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A TREATISE

ON THE

LAW OF RAILROADS

CONTAINING A CONSIDERATION OF THE ORGANIZATION, STATUS AND POWERS OF RAILROAD CORPORATIONS, AND OF THE RIGHTS AND LIABILITIES INCIDENT TO THE

LOCATION, CONSTRUCTION AND OPERATION OF RAILROADS

AND ALSO THE

DUTIES, RIGHTS AND LIABILITIES OF RAILROAD COMPANIES

AS CARRIERS

UNDER THE RULES OF THE COMMON LAW AND THE INTERSTATE COMMERCE ACT

BY

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In Four Volumes

VOLUME III

INDIANAPOLIS AND KANSAS CITY
THE BOWEN-MERRILL COMPANY
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TABLE OF CONTENTS.

VOLUME III.

LOCATION, CONSTRUCTION AND OPERATION.

CHAPTER XXXVI.

LOCATION OF THE ROAD.

PAGE.

§ 919. Choice of location—How determined....1263
920. Discretion of company in determining location—How exercised..1264
921. Conflicting grants—Priority of location....1266
922. Location of road upon property already devoted to public use....1267
923. Branch and lateral roads....1270
924. Exempt property....1271
925. Preliminary survey....1273
926. Perfecting location—Map of proposed route....1273
927. Effect of location—When location is complete....1276
928. Contracts to influence location....1279
929. Change of location—When authorized....1281
930. Change of location after first location is finally completed....1282
931. Abandonment of location....1286

CHAPTER XXXVII.

ACQUISITION OF RIGHT OF WAY.

932. How right of way may be acquired....1291
933. Authority to purchase....1291
934. Who may convey....1293
935. Enforcement of agreement to sell—Specific performance....1296
936. When specific performance will not be enforced....1299
937. Effect of conveyance or release of damages....1300

PAGE.

§ 938. What estate is taken....1302
939. Conditional conveyances....1304
940. Difference between conditions precedent and conditions subsequent—Effect of failure to perform conditions precedent....1306
941. Conditions subsequent—What is sufficient performance—Effect of failure to perform....1307
942. Remedies of grantor for failure of company to perform conditions subsequent....1309
943. Construction of conditions subsequent—Compliance with conditions....1311
944. When equity will interfere in case of a breach of conditions subsequent....1312
945. Covenants running with the land....1313
946. Other covenants....1315
947. Dedication of land to the use of railroad....1316
948. Title by adverse possession....1320
949. Rights of railroad company acquired by entry under license....1323

CHAPTER XXXVIII.

APPROPRIATION UNDER THE EMINENT DOMAIN.

950. Definition and nature of the eminent domain....1330
951. Constitutional provisions and questions....1335
952. Public use and necessity—Who determines....1337
953. Delegation of the power of eminent domain....1341
954. Delegation of the power to railroad companies—Extent of authority....1342
955. Construction of statute granting right to condemn....1346
956. Right of foreign and consolidated companies to condemn....1347
957. Exercise of the right by *de facto* corporations....1348
958. Right to condemn where road is leased or in hands of a receiver.1350
959. Right to condemn can not be delegated to contractor or construction company....1352
960. Purposes for which a railroad company may condemn....1353
961. Condemnation for roads to mines or manufacturing establishments....1360
962. Condemnation of land for future use—Second appropriation....1368
963. What may be appropriated—Generally....1369
964. Property of other corporations....1371
965. Property of state or United States....1374
966. Property devoted to another public use....1376
967. Franchises....1379
968. Exclusive grants and franchises....1381
969. Exempt property....1382
970. Extent of taking....1383
971. Taking additional property....1385
972. Title or interest acquired....1386

PAGE.
§ 973. Width taken for right of way....1389
974. Taking right of way of another road....1392
975. Crossing another road....1396
976. What constitutes a taking—Generally....1397
977. What constitutes a taking—Illustrative cases....1402
978. Property damaged or injured—Constitutional provisions....1409

CHAPTER XXXIX.

COMPENSATION AND DAMAGES.

979. Compensation—Constitutional right....1412
980. Provisions of the federal constitution—Federal powers....1413
981. Constitutional right to compensation does not extend to general damages....1416
982. Compensation must be made in money—Principle not violated by deducting special benefits....1417
983. The measure of compensation is a judicial question....1418
984. Right to compensation not lost by conditional grant....1419
985. Time at which compensation is computed....1420
986. Time of payment of compensation....1422
987. Benefits—General survey of the subject....1423
988. Benefits—The different lines of decision....1425
989. Benefits—General and special....1427
990. Benefits confined to parcel or tract actually taken....1428
991. Remote or conjectural damages can not be allowed....1428
992. Damages confined to a particular tract....1429
993. Injuries to part of tract or parcel of land not actually taken....1431
994. Elements of value....1432
995. Measure of damages—Illustrative cases....1435
996. Matters to be considered in estimating damages—Illustrative instances....1439
997. Improvements made by company under unauthorized entry—Views of the authors....1444
998. Improvements made by company under unauthorized entry—Illustrative cases....1445
999. Deviation from proposed line—Change of route....1448
1000. Owner at time of possession is entitled to damages—Vendor and vendee....1449
1001. Who is entitled to the compensation where the land is conveyed after appropriation proceedings are commenced—Vendor and vendee....1449
1002. Notice to purchaser by existence of railroad....1451
1003. To whom compensation should be paid....1451
1004. Effect of assessment of damages....1453
1005. Award of compensation does not cover negligent acts....1455
1006. Interest—Allowance of....1456
1007. Presumption of payment of compensation....1458
1008. Waiver—Estoppel....1459

CHAPTER XL.

PROCEDURE IN APPROPRIATION CASES.

PAGE.

§ 1009. Procedure—Introductory 1462
1010. Nature of the proceedings 1462
1011. Tribunals—Generally 1464
1012. Nature of the tribunal for assessment of benefits and damages 1464
1013. Creation of the tribunal—Legislative power 1467
1014. Tribunals—Jurisdiction—Decision of majority 1467
1015. Appointment of appraisers or commissioners to assess benefits and damages 1469
1016. Duty to appoint appraisers or commissioners—Mandamus 1470
1017. Qualification of jurors, appraisers or commissioners 1471
1018. Oath must be taken by jurors or commissioners 1474
1019. Notice—General doctrine 1476
1020. Notice—Requisites of 1478
1021. Notice—Political questions—Expediency 1480
1022. Notice—Description 1481
1023. Service of notice 1482
1024. Summoning the jury or commissioners 1484
1025. Parties 1485
1026. Parties—Amendments 1492
1027. Effort to agree 1493
1028. Petition or articles of appropriation 1496
1029. Contents of the petition 1499
1030. Title 1502
1031. Effect of pendency of proceedings to condemn 1503
1032. Dismissal of proceedings—Effect of 1504
1033. Abandonment of proceedings 1506
1034. Meetings of commissioners or jurors 1010
1035. Open and close 1511
1036. Evidence of value—Illustrative instances 1512
1037. Competency of witnesses 1516
1038. Opinions of witnesses 1520
1039. Power of commissioners to act upon their own knowledge 1522
1040. View 1524
1041. Report of commissioners 1525
1042. Report of commissioners—Requisites of—Illustrative cases 1529
1043. Time within which report must be made 1531
1044. Objections to report 1532
1045. Confirmation or rejection of report—Modification 1533
1046. Misconduct of jurors or commissioners 1534
1047. Waiver of objections 1535
1048. Remedies to enforce payment of compensation 1536
1049. Remedies of land-owner 1540
1050. Possession pending appeal 1547

PAGE.
§ 1051. Tender....1549
1052. Acceptance of damages—Estoppel....1551
1053. Appeal....1552
1054. Certiorari....1557
1055. Company a trespasser when proceedings are void....1559

XLI.

CONSTRUCTION.

1056. Duty to construct—Authority and care required in construction.1562
1057. Liability for injuries caused by construction — Consequential damages....1563
1058. Construction contracts....1568
1059. Engineers' estimates and certificates....1572
1060. Extra work....1578
1061. Subcontractors....1580
1062. Breach of contract—Remedies....1583
1063. Liability of the company for injuries resulting from negligence of contractor or his servants....1586
1064. Liability of contractor—Joint liability....1592
1065. Rights of laborers....1593
1066. Mechanics' liens—General laws do not include railroads....1595
1067. Statutes authorizing liens....1596
1068. For what lien may be obtained....1597
1069. Upon what lien may be acquired....1598
1070. Who may acquire lien....1599
1071. Mode of acquiring lien....1601
1072. Priority of liens....1603
1073. Assignability of lien....1605
1074. Enforcement of lien....1605
1075. Waiver of lien....1606

CHAPTER XLII.

RAILROADS IN STREETS.

1076. Authority to use streets....1610
1077. Implied authority of municipality to grant right to use streets...1613
1078. How and by whom grant should be made or consent given....1616
1079. Nature and effect of grant by municipality....1617
1080. Construction of grant—Illustrative cases....1618
1081. Right of municipality to impose conditions....1621
1082. Municipal regulation and control....1622
1083. Rights of rival companies in streets....1625
1084. Right of one company to use another's track....1626
1085. Rights of abutters—Generally....1628

PAGE.
§ 1086. Rights of land-owners other than abutters....1629
1087. Commercial railroad is an additional burden....1632
1088. Street railways—When an additional burden....1635
1089. Railroads in narrow streets....1636
1090. Obstruction of highways—Nuisance....1638
1091. Bridges, viaducts and approaches....1639
1092. Duty of company to restore and repair street....1640
1093. Respective rights of the company and of the public....1643
1094. Duty to travelers upon the street....1644
1095. Liability for negligence—Contributory negligence....1646
1096. Remedies for unlawful use of street....1649

CHAPTER XLIII.

HIGHWAY CROSSINGS.

1097. What is included in highway crossing....1652
1098. Right to lay out highway across railway....1653
1099. Right to construct railway across highway....1655
1100. Proceedings by municipality....1656
1101. Proceedings by railway company....1658
1102. Construction of crossing....1659
1103. Damages when highway is opened across a railroad....1661
1104. Impairing rights of railway company....1663
1105. Restoring condition of highway....1664
1106. Mandamus to compel restoration....1667
1107. Approaches, embankments and other structures....1668
1108. Grade crossings....1670
1109. Crossings above grade....1670
1110. Crossings below grade....1672
1111. Mandamus to compel construction of viaduct....1672
1112. Keeping crossing in repair....1674
1113. Rights of abutters....1675
1114. Gates, watchmen and signals at crossings....1677
1115. Accidents and injuries at crossings....1679

CHAPTER XLIV.

CROSSING OF RAILROADS BY RAILROADS.

1116. Right of one railroad to cross another....1680
1117. Crossings secured by agreement of companies....1683
1118. Enforcing agreement as to crossing....1684
1119. Crossings secured under statutory authority....1686
1120. Location of crossing....1690
1121. Franchise must not be impaired....1691
1122. Crossings at grade....1693

PAGE.
§ 1123. Crossings above or below grade....1695
1124. Number of crossings....1697
1125. Enjoining construction of crossings....1697
1126. Compensation—Taking property....1699
1127. Damages—Elements of....1701
1128. Expense of constructing crossings....1704
1129. Watchmen and flagmen at crossing....1705
1130. Stopping at crossings—Duty imposed by contract....1706
1131. Stopping at crossings—Duty imposed by statute....1707
1132. Collisions at crossings....1708
1133. Priority of passage....1710
1134. Maintenance and repair of crossings....1711
1135. Street railway crossings of steam railroads....1713

CHAPTER XLV.

PRIVATE CROSSINGS.

1136. Definition....1716
1137. Who entitled to....1716
1138. Effect of conveyance of right of way by land-owner....1717
1139. Right to crossing where right of way has been condemned....1719
1140. Private crossings by prescription....1720
1141. Private crossings by agreement....1721
1142. Private crossings under statutory authority....1722
1143. Location and number of crossings....1725
1144. Construction of crossing—Sufficiency....1727
1145. Enforcing construction....1727
1146. Repair and maintenance....1728
1147. Passways and subways under the track....1729
1148. Damages for destruction or impairment of crossing by railway company....1730
1149. When right to private crossing runs with the land....1731
1150. Care required on part of railway company at private crossings....1732
1151. Accidents and injuries at private crossings....1734

CHAPTER XLVI.

INJURIES AT CROSSINGS.

1152. Introductory....1735
1153. Mutual rights and duties of company and traveler at crossings—Generally....1736
1154. Duty of company at private crossings and at crossings by custom or license....1740
1155. Statutory duties of company at crossings—Violation as negligence....1743
1156. Common law duties of company at crossings—Degree of care....1747

PAGE.
§ 1157. Sign boards, gates and flagmen at crossings....1750
1158. Signals on approach to crossings....1755
1159. Duty of company to keep a lookout—Lights....1759
1160. Rate of speed—When negligence....1760
1161. Duty of company where view is obstructed....1762
1162. Backing and "kicking" cars....1763
1163. Contributory negligence generally....1765
1164. Contributory negligence—Illustrative cases....1768
1165. Duty of traveler—Generally....1770
1166. Duty of traveler to look and listen....1773
1167. Duty of traveler to stop, look and listen....1776
1168. Attempting to cross in front of an approaching engine or train..1778
1169. Passing under, over, or between cars....1779
1170. Smoke and like obstructions to view....1781
1171. Misleading traveler—Invitation to cross....1782
1172. Children and infirm persons....1785
1173. Sudden peril as affecting the duty of the traveler....1788
1174. Negligence of driver of vehicle not imputed to passenger therein..1790
1175. Injury after discovery of traveler's danger—Willfulness....1792
1176. Injuries at defective crossings....1794
1177. Evidence of subsequent repairs and other accidents at the same place....1796
1178. Collisions with street cars....1798
1179. Directing a verdict in crossing cases....1800

CHAPTER XLVII.

DUTY TO FENCE.

1180. Common law rule....1802
1181. Statutory duty to fence....1807
1182. Statutes rest upon police power....1809
1183. Constitutionality of statutes imposing duty to fence....1811
1184. Kind of fence required....1814
1185. Repair of fences—Casualties and trespassers....1816
1186. Transfer of duty to fence....1820
1187. Fences erected by land-owner....1820
1188. Agreement to fence....1821
1189. Waiver of duty to fence....1824
1190. To whom duty to fence is owing....1825
1191. Injuries to passengers resulting from neglect of duty to fence...1828
1192. Injuries to employes resulting from neglect of duty to fence....1830
1193. Places allowed to remain unfenced—Highways and crossings...1831
1194. Fences at depot and station grounds....1834
1195. Fences in cities, towns and villages....1837
1196. Fences at embankments....1838
1197. Fences at oblique approaches to highways....1839

PAGE.
§ 1198. Cattle guards....1840
1199. Wing fences....1843
1200. Gates and bars....1844
1201. Place of entry of animals on railway track....1846
1202. Determining places where fences required—Questions of law and fact....1848
1203. Injuries to animals on highway....1849
1204. Rate of speed—Stopping train....1850
1205. Duty to look out for animals....1854
1206. Signals....1856
1207. Actual collision with animal—Injuries caused by fright....1858
1208. Liability of lessees, mortgagees and receivers....1860
1209. Contributory negligence....1862
1210. Animals abandoned by their owner....1867
1211. Animals attracted to railroad tracks....1868
1212. Ownership of animals....1869
1213. Presumption of negligence....1869
1214. Burden of proof—Evidence....1872
1215. Pleading and practice....1875
1216. Notice and demand for damages....1877
1217. Appraisement of damages....1878
1218. Measure of damages....1879
1219. Double damages....1882
1220. Attorney's fees....1885

CHAPTER XLVIII.

FIRES SET BY RAILWAY COMPANIES.

1221. Common law liability....1887
1222. Statutory liability....1890
1223. Constitutionality of statutes imposing liability....1891
1224. Equipment—Spark arresters—Ash-pans—Fuel....1894
1225. Management of engines....1899
1226. Duty as to right of way—Combustible material....1900
1227. Fires set to burn off right of way....1903
1228. Extra precautions—Dry seasons—Wind—Exposed property....1905
1229. Fires started on right of way....1906
1230. Fires started off the right of way....1907
1231. Remote fires....1908
1232. Duty to extinguish fires....1911
1233. Ownership of property burned....1912
1234. Effect of insurance on property burned....1914
1235. Property on right of way....1916
1236. Contracts limiting liability....1918
1237. Liability where road is operated under lease....1920
1238. Contributory negligence of owner....1922

PAGE.
§ 1239. Measure of damages for property destroyed by fire....1928
1240. Pleading—Parties....1932
1241. Pleading—Sufficiency of complaint....1933
1242. Burden of proof—Presumption of negligence....1935
1243. Proof that company set out fire....1938
1244. Proof that company negligently set out fire....1941
1245. Evidence to rebut presumption of negligence....1943
1246. Attorney's fees....1945
1247. Personal and other injuries caused by fires....1946

CHAPTER XLIX.

INJURIES TO TRESPASSERS, LICENSEES AND STRANGERS.

1248. Who are licensees....1947
1249. Difference between invitation and license....1950
1250. Duty to licensees....1951
1251. Liability for injuries to licensees....1954
1252. Who are trespassers....1957
1253. Duty to trespassers....1959
1254. Liability for injuries to trespassers....1960
1255. Trespassers on cars....1961
1256. Strangers at stations....1964
1257. Injuries to trespassers upon track....1966
1258. Injuries to persons in company's yards....1970
1259. Liability for injury to trespassing children....1972
1260. Injury to trespassing children—Illustrative and conflicting cases.1975
1261. Contributory negligence of children....1977
1262. Imputable negligence....1981
1263. Liability for injury to persons on adjacent highway....1983
1264. Liability for frightening horses....1985
1265. Liability to strangers for willful acts of employes....1988

CHAPTER L.

INJURIES TO EMPLOYES.

1266. Introductory....1995
1267. Contract the basis of the employer's duty....1996
1268. Employer's duty to furnish a reasonably safe working place....1997
1269. Structures near the track....1998
1270. Failure to fence....2001
1271. Bridges....2003
1272. Negligence of employer in failing to keep premises safe—Switch yards....2005
1273. Machinery and appliances—Master's duty respecting....2007
1274. Appliances generally used sufficient....2008

PAGE.
§ 1275. Latent defects....2009
1276. Delegation of master's duty....2009
1277. Employer not bound to abandon appliances because newer ones are in use....2011
1278. Inspection—Duty of....2011
1279. Foreign cars—Duty of inspection....2014
1280. Employer's duty to promulgate rules....2016
1281. Time-tables or schedules....2018
1282. Violation of rules by employes....2019
1283. Duty to warn employe of danger....2021
1284. Duty to employ competent servants....2025
1285. Presumption of competency of employe....2026
1286. Burden of proof where incompetency of fellow-servant is alleged....2026
1287. Trains to be provided with a sufficient crew....2027
1288. Assumption of risks of service—General doctrine....2028
1289. Assumption of risks—Employer's method of conducting business....2030
1290. Risks of service—Illustrative cases....2031
1291. Duty of employe to acquaint himself with employer's business methods....2034
1292. Duty of employe in regard to competency of co-employes....2034
1293. Employe bound to use ordinary care to remedy defects....2036
1294. Duty of employe to acquaint himself with rules of employer....2037
1295. Promise to repair....2038
1296. Brakeman—Assumption of risks....2039
1297. Engineers and firemen—Assumption of risks....2045
1298. Dangers from running of trains....2048
1299. Injuries from explosions....2049
1300. Injuries from collisions....2051
1301. Cars negligently loaded....2052
1302. Dangerous service....2054
1303. Performing work outside of scope of the contract of employment—Permissive privilege....2056
1304. Work outside of the ordinary line of duty—Special orders....2058
1305. Volunteers....2060
1306. Concurrent negligence....2062
1307. The rule as to the master's knowledge of defects....2062
1308. Test of the employer's liability....2063
1309. Evidence of employer's negligence....2064
1310. Employer not liable to employe unless the negligence was the proximate cause of the injury....2065
1311. Knowledge of defects on part of employe—Averment and proof....2067
1312. Knowledge of defects on part of employe—Evidence of....2067
1313. Contributory negligence of employes....2068
1314. Contributory negligence of employes—Illustrative instances....2070
1315. Contributory negligence—Violation of statutory duty....2073

CHAPTER LI.

FELLOW-SERVANTS.

PAGE.
§ 1316. Survey of the fellow-servant rule—General doctrine 2075
1317. Vice-principal—Superior agent—Views of the authors 2078
1318. Vice-principal—Superior agent—Illustrative cases 2080
1319. Vice-principal as to particular subjects 2081
1320. What constitutes a common employment 2082
1321. General managers—Superintendents 2083
1322. Train dispatcher 2084
1323. Master mechanic 2085
1324. Road masters 2086
1325. Train masters 2087
1326. Station masters 2087
1327. Inspectors 2088
1328. Telegraph operators 2089
1329. Foremen 2091
1330. Trainmen engaged in operating the same train 2093
1331. Trainmen operating different trains 2094
1332. Trainmen and switchmen and laborers and sectionmen 2095
1333. Recent federal cases 2097

CHAPTER LII.

EMPLOYERS' LIABILITY ACTS.

1334. Changes in the law of master and servant by legislation—Generally 2099
1335. Validity of statutes 2101
1336. Invalid legislation 2102
1337. Construction of employers' liability statutes—Generally 2103
1338. Construction of employers' liability acts—Definitions 2104
1339. The effect of the statute upon the contractual element in the relation of employer and employe 2106
1340. Railroad companies owning lines partly within the state and partly within other states 2108
1341. Railroad operated by receivers 2108
1342. The relation of master and servant must exist 2109
1343. Care required by statute of employer respecting machinery and appliances 2110
1344. Who are within the statute 2110
1345. Assumption of risks—Effect of the statute 2112
1346. Who are fellow-servants under employers' liability acts 2114
1347. Defects in appliances or machinery 2115
1348. Latent defects—Rule under the statute 2116

PAGE.
§ 1349. Rule where the defect is not attributable to the negligence of the employer....2116
1350. Presumption of negligence....2117
1351. Selection of co-employes....2113
1352. Superintendents within the meaning of the employers' liability acts....2119
1353. What constitutes negligence in superintendence....2120
1354. Cars—Trains—Meaning of term "cars" as used in statutes enlarging liabilities of railroad companies....2120
1355. Use and operation of railway—Meaning of term....2121
1356. "Charge and control"....2122
1357. Contributory negligence—Doctrine of as affected by the statute.2123
1358. Contracts waiving right of action invalid....2124

CHAPTER LIII.

INJURIES RESULTING IN DEATH.

1359. Introductory....2125
1360. Constitutional questions....2127
1361. Construction of statutes....2128
1362. Limiting the right to sue—Designating the forum....2130
1363. Instantaneous death....2131
1364. Statutes have no extra-territorial effect....2132
1365. The right and the remedy....2132
1366. Conflict of law....2133
1367. Who may recover—Generally....2135
1368. Who may recover—Illustrative cases....2136
1369. What must be shown to constitute a cause of action....2138
1370. Year and a day....2139
1371. Actions for injuries causing death are transitory....2140
1372. Actions by administrators and executors....2141
1373. Limitations—Time within which actions must be brought....2143
1374. Statutes do not deny the right to rely upon defense of contributory negligence....2144
1375. One recovery merges cause of action....2145
1376. Release—Compromise....2147
1377. Avoiding releases and compromises....2149
1378. Measure of damages....2151

CHAPTER LIV.

RELIEF DEPARTMENTS AND HOSPITALS.

1379. Power of railroad company to establish relief department....2154
1380. Relief association not an insurance company....2155
1381. Effect of rule that company can not contract against negligence..2156

PAGE.

§ 1382. Contract that employe may elect to accept benefits and thereby release company not void as against public policy....2156
1383. Consideration and mutuality of contract....2158
1384. Acceptance of benefits under such contract after injury releases company....2158
1385. Release of railroad company may be a pre-requisite to action against a relief association....2159
1386. Suit against company or compromise with it releases the relief association—Beneficiary barred....2160
1387. Acceptance of benefits by widow or child—When a bar to action against the company....2161
1388. Hospitals and medical attendance....2161
1389. When company is liable for negligence of surgeon in its hosptial.2162
1390. When release of claim against company will not include claim for negligent treatment in hospital....2163

LOCATION, CONSTRUCTION AND OPERATION.

CHAPTER XXXVI.

LOCATION OF THE ROAD.

§ 919. Choice of location—How determined.
920. Discretion of company in determining location—How exercised.
921. Conflicting grants—Priority of location.
922. Location of road upon property already devoted to public use.
923. Branch and lateral roads.
924. Exempt property.
§ 925. Preliminary survey.
926. Perfecting location — Map of proposed route.
927. Effect of location—When location is complete.
928. Contracts to influence location.
929. Change of location—When authorized.
930. Change of location after first location is finally completed.
931. Abandonment of location.

§ 919. **Choice of location—How determined.** — The legislature may fix the exact location of the road of a company incorporated by special charter,[1] or it may merely define the general route and termini and leave the company to exercise its discretion as to the location of the road between the points named. Indeed, it may even authorize the company to select both the general and particular location and termini of the road. If the charter does not designate the exact route, but gives the company a general authority to build its road between certain

[1] *In re* Coney Island, etc., R. Co., 12 Hun (N. Y.) 451; Mississippi, etc., R. Co. *v.* Cross, 20 Ark. 443. In Macon, etc., R. Co. *v.* Gibson, 85 Ga. 1, 43 Am. & Eng. R. Cas. 318, it was held that, under a reserved power to amend the charter of a railroad company, the legislature could require it to build its road upon a designated route, by an act passed after the company had exercised the discretion conferred upon it by its original charter, to locate its road, but before it had begun its construction.

points, the company is invested with full discretion as to the location of its road within those limits, and maps or plans that were exhibited to the legislature by which the charter was granted but which are not referred to in the charter, are not admissible to prove the legislative intent in granting it.[1] Where the route and termini are stated in general terms by the charter its language must be given a reasonable construction with reference to the subject-matter of the grant, and the purposes to be attained.[2] If the road is required to run through several towns, it is not essential that it should pass through them in the order named.[3] And it is held that the requirement that one terminus of the road shall be at or near a certain point leaves a large discretion to be exercised by the railroad company in locating its road, the exercise of which will not be revised unless it has clearly exceeded its just limits or acted in bad faith.[4]

§ 920. **Discretion of company in determining location—How exercised.**—The general laws for the incorporation of railroads, that have been passed in most of the states[5] and in England, give a company incorporated thereunder discretionary power to select its route between charter points, and to appropriate land and establish grades subject to restrictions therein con-

[1] Boston, etc., R. Co. *v.* Midland R. Co., 1 Gray (Mass.) 340; Commonwealth *v.* Fitchburg R. Co., 8 Cush (Mass.) 240; Reg. *v.* Caledonian R. Co., 16 Q. B. 19; North British R. Co. *v.* Tod, 5 Bell's App. Cas. (Scotland) 184. The fact that plans and maps are referred to in the charter for one purpose does not make them admissible for another. Reg. *v.* Caledonian R. Co., *supra*.

[2] Cleveland, etc., R. Co. *v.* Speer, 56 Pa. St. 325, 94 Am. Dec. 84. All railroad charters that do not directly express the contrary must be taken to allow the exercise of such a discretion in the location of the route as is incident to an ordinary practical survey, but not deviating substantially from the course and direction indicated by the charter. Southern Minnesota R. Co. *v.* Stoddard, 6 Minn. 150. The selection made by the officers in the exercise of the discretion given them by the charter should not be disturbed unless they have clearly erred. Hentz *v.* Long Island R. Co., 13 Barb. (N. Y.) 646.

[3] Commonwealth *v.* Fitchburg, etc., R. Co., 8 Cush. (Mass.) 240.

[4] Fall River, etc., Co. *v.* Old Colony, etc., R. Co., 5 Allen (Mass.) 221.

[5] See Stimson's Am. Stat. (1892), §§ 8741, 8742, 8743.

tained.[1] This discretion must be exercised by the company, and can not be controlled by previous acts or contracts of its agents.[2] Where the duty of locating the road is imposed by statute upon the president and directors of the company, an exercise of discretion on their part is called for which can not be delegated. And a location made by an executive committee provided for in the by-laws of the company is inoperative, and can not be ratified by the company so as to make it valid as against the rights of another company which have attached to the property in question prior to such ratification.[3] The exercise of this discretion by the company will not be disturbed except where there is a plain case of an abuse of it.[4] Where a statute gives the railroad company power to carry its tracks over or under a public highway, "as may be found most expedient," the railroad company is clothed with authority to determine the expediency of the different modes of crossing; and an indictment against the company for maintaining a nuisance can not be sustained by proof that it erected a bridge to carry the highway over its tracks when it would have been more expedient to carry the railroad tracks over the highway.

[1] Chicago, etc., R. Co. *v.* Dunbar, 100 Ill. 110.

[2] The act of the engineer in making a preliminary survey and staking off the line of the proposed road does not constitute a binding location. Williamsport, etc., R. Co. *v.* Philadelphia, etc., R. Co., 141 Pa. St. 407. And an agreement between the land-owner and the attorney of the company that the road shall be of a less width than is afterward fixed upon by the directors in making the location does not control the width of the land which the company is authorized to condemn. Central Mills Co. *v.* New York, etc., R. Co., 127 Mass. 537.

[3] Weidenfeld *v.* Sugar Run R. Co., 48 Fed. Rep. 615. See, also, Washington, etc., R. Co. *v.* Cœur D'Alene, etc., Co., 16 Sup. Ct. R. 239.

[4] Walker *v.* Mad River, etc., R. Co., 8 Ohio 38; Hentz *v.* Long Island R. Co., 13 Barb. (N. Y.) 646; Fall River Iron Works *v.* Old Colony R. Co., 5 Allen (Mass.) 221; Parke's Appeal, 64 Pa. St. 137; Cleveland, etc., R. Co. *v.* Speer, 56 Pa. St. 325, 94 Am. Dec. 84; Struthers *v.* Dunkirk, etc., R. Co., 87 Pa. St. 282; People *v.* New York Central R. Co., 74 N. Y. 302; Southern Minn. R. Co. *v.* Stoddard, 6 Minn. 150; Ford *v.* Chicago, etc., R. Co., 14 Wis. 609; Colorado, etc., R. Co. *v.* Union Pac. R. Co., 41 Fed. Rep. 293; *post*, § 970; Woods Ry. Law 744. Where the contract for a right of way releases a strip of land of a certain width through a certain tract of land, and no more definitely, it vests in the railroad company the right to select the particular location. Burrow *v.* Terre Haute, etc., R. Co., 107 Ind. 432.

When the railroad company has, in good faith, determined the question as to the relative expediency of the different modes of crossing, its determination is final, and, even though erroneous, can not be reversed by a jury.[1] And where the line is located upon a direct and convenient route between the termini, the fact that another route is available for which land could be purchased does not prove that land sought to be taken by condemnation proceedings is not necessary for the use of the petitioner.[2] A railroad company can not, however, under a mere general authority to locate its road, acquire any right in lands already acquired by another company, and devoted to public uses, further than is necessary in crossing other roads lying between its termini.[3]

§ 921. **Conflicting grants—Priority of location.**—Where both companies were organized under the same general law, the prior appropriation of a right of way constitutes a prior grant from the state,[4] and it is the settled rule that of two con-

[1] People *v.* New York, etc., R. Co., 74 N. Y. 302; New York, etc., Co. *v.* People, 12 Hun 195.

[2] Colorado Eastern R. Co. *v.* Union Pac. R. Co., 41 Fed. Rep. 293, 44 Am. & Eng. R. Cas. 10. In this case the C. E. Co. sought to appropriate for storehouses, switches, turnouts, and the like, land held by the U. P. Co. for its own use at such time as it should be required in caring for its increasing business. It was the only land available for switching purposes along the line of the C. E. Co.'s road as located, but it appeared that by making a detour to the north other suitable lands could be reached. The court held that the location of its road upon these lands was within the discretion given to the C. E. Co. by its charter.

[3] Lake Shore, etc., R. Co. *v.* New York, etc., R. Co., 8 Fed. Rep. 858; Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 112 Ill. 589. A railroad company, organized under the New York general railroad act of 1850, having filed a map and survey of its proposed line of road, and having notified all persons to be affected by it, thereby acquires the right to construct its road upon such line, as against all other railroad corporations. Rochester, etc., R. Co. *v.* New York, etc., R. Co., 13 Cent. 232, 110 N. Y. 128, 17 N. E. R. 680.

[4] Boston, etc., R. Co. *v.* Lowell, etc., R. Co., 124 Mass. 368; Atchison, etc., R. Co. *v.* Mecklim, 23 Kan. 167; New Brighton, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 105 Pa. St. 13; Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 112 Ill. 589. In Morris, etc., R. Co. *v.* Blair, 9 N. J. Eq. 635, it appeared that two companies had each been authorized in general terms to construct a railroad to the Delaware river, both acts providing in substantially the same language that "when

flicting grants of a particular location, the earlier grant must prevail.[1] This rule has been held to apply to the case of a line extending through a mountain pass so narrow that the right of way of the first company occupies the entire pass.[2] But where explicit authority is given to locate a railroad through a pass already occupied by another road, the grant includes authority to use the right of way of the first road if the second can not be built without it.[3]

§ 922. **Location of road upon property already devoted to public use.**—The legislature has power to authorize the condemnation of railroad property and franchises,[4] and may au-

the route of such road shall have been determined upon, and a survey of such route deposited in the office of the secretary of state, then it shall be lawful for said companies to enter upon," etc. Surveys by the two companies were filed on the same day, showing a conflict between the routes selected through certain passes. One of the companies, which was chartered seven days after the act incorporating the other company was passed, was shown to have been the first to make an actual survey of the route in question, but its rival was the first to make a definite adoption of the route, and also filed its survey with the secretary of state at an earlier hour of the same day that the other survey was filed. It was held that the company which first adopted the line was entitled to priority.

[1] Chesapeake, etc., Canal Co. *v.* Baltimore, etc., R. Co., 4 Gill & J. (Md.) 1; Boston, etc., R. Co. *v.* Lowell, etc., R. Co., 124 Mass. 368; Morris, etc., R. Co. *v.* Blair, 9 N. J. Eq. 635, 644.

[2] Contra Costa, etc., R. Co. *v.* Moss, 23 Cal. 323.

[3] Denver, etc., R. Co. *v.* Denver, etc., R. Co., 17 Fed. R. 867; Anniston, etc., R. Co. *v.* Jacksonville, etc., R. Co., 82 Ala. 297; Montana Cent. R. Co. *v.* Helena, etc., R. Co., 6 Mon. 416; Matter of City of Buffalo, 68 N. Y. 167, 173. See, also, Railway Co. *v.* Alling, 99 U. S. 463.

[4] Alexandria, etc., R. Co. *v.* Alexandria, etc., R. Co., 75 Va. 780; Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 30 Ohio St. 604; White River Turnp. Co. *v.* Vermont Cent. R. Co., 21 Vt. 590; Metropolitan City R. Co. *v.* Chicago, etc., R. Co., 87 Ill. 317; Commonwealth *v.* Pittsburg, etc., R. Co., 58 Pa. St. 26; N. Y. Cent., etc., R. Co. *v.* Metropolitan Gas Light Co., 63 N. Y. 326; Inhabitants of Springfield *v.* Connecticut River R. Co., 4 Cush. (Mass.) 63; Fitchburg, etc., R. Co. *v.* Boston, etc., R. Co., 3 Cush. (Mass.) 58; Eastern, etc., R. Co. *v.* Boston, etc., R. Co., 111 Mass. 125; Tuckahoe Canal Co. *v.* Tuckahoe, etc., Railroad Co., 11 Leigh (Va.) 42; Baltimore, etc., Co. *v.* Union R. Co., 35 Md. 224; Newcastle, etc., R. Co. *v.* Peru, etc., R. Co., 3 Ind. 464; Richmon R. Co. *v.* Louisa R. Co., 13 How. (U. S.) 71; New York R. Co. *v.* Boston R. Co., 36 Conn. 196; Union Pac. R. Co. *v.* Burlington, etc., R. Co., 1 McCrary (U. S.) 452; Elliott on Roads and Streets 164, *et seq.*

thorize one railroad company to use, not only the right of way, but the tracks of another company, upon making due compensation.[1] But no implication in favor of such authority arises from the grant of power to build a second railroad, unless there is a necessity so absolute that without it the grant itself will be defeated. And where the appropriation of the franchise of a street railroad company by a railroad company was made merely as a matter of economy, and to avoid the purchase of valuable property which the railroad company must have acquired to reach its terminus without interfering with the street railroad, it was held that no such necessity existed.[2] A right to cross an existing railroad or highway may often be implied where a right to take it longitudinally could not be implied.[3] Thus, where authority is granted to locate and construct the road from one specified point to another, the right to cross other railroads and highways lying between the two points is necessarily implied;[4] but the right to take an existing road or highway longitudinally is essentially different, and would not, ordinarily, be implied in such a case. It must be granted expressly or by necessary implication.[5] By act of con-

[1] Providence, etc., R. Co. *v.* Norwich, etc., R. Co., 138 Mass. 277, 22 Am. & Eng. R. Cas. 493; Baltimore, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 17 W. Va. 812; Kinsman St. R. Co. *v.* Broadway, etc., R. Co., 36 Ohio St. 239; Toledo, etc., R. Co. *v.* Toledo, etc., R. Co., (Ohio) 1 Am. & Eng. R. Cas. (N. S.) 230, and note; St. Louis, etc., R. Co. *v.* Southern R. Co., 105 Mo. 577, s. c. 15 S. W. R. 1013, 16 S. W. R. 960; Sixth Ave. R. Co. *v.* Kerr, 45 Barb. (N. Y.) 138; North Baltimore, etc., R. Co. *v.* North Ave. R. Co., 75 Md. 233. Compare Pacific R. Co. *v.* Wade, 91 Cal. 449, s. c. 50 Am. & Eng. R. Cas. 362; New Orleans, etc., R. Co. *v.* City of New Orleans, 44 La. Ann. 728, s. c. 50 Am. & Eng. R. Cas. 391.

[2] Pennsylvania R. Co.'s Appeal, 93 Pa. St. 150, 3 Am. & Eng. R. Cas. 507. See, also, Elliott on Roads and Streets, 169.

[3] Elliott on Roads and Streets, 169.

[4] Morris, etc., R. Co. *v.* Central R. Co., 31 N. J. L. 205; City of Ft. Wayne *v.* Lake Shore, etc., R. Co., 132 Ind. 558, s. c. 32 Am. St. R. 277, 283; Lake Erie, etc., R. Co. *v.* Kokomo, 130 Ind. 224, s. c. 29 N. E. R. 780; Providence, etc., R. Co. *v.* Norwich, etc., R. Co., 138 Mass. 277; City of Bridgeport *v.* New York, etc., R. Co., 36 Conn. 255.

[5] Alexandria, etc., R. Co. *v.* Alexandria, etc., R. Co., 75 Va. 780; Housatonic R. Co. *v.* Lee, etc., R. Co., 118 Mass. 391; Lewis *v.* Germantown, etc., Co., 16 Phila. (Pa.) 608; City of Ft. Wayne *v.* Lake Shore, etc., R. Co., 132 Ind. 558, s. c. 32 Am. St. R. 277; Illinois Cent. R. Co. *v.* Chicago, etc.,

gress[1] it is provided that no company building its road upon or across government lands, which shall locate its lines through any canyon, pass or defile in the mountains, shall prevent any other company from the use or occupancy of the same canyon, pass or defile for the purpose of its road in common with the road first located. And several of the states have statutes to the same effect.[2] Under this law it is held that where a canyon is broad enough to enable both roads to proceed without interfering with each other in the construction of their respective roads, the second company should be permitted to put down a track parallel with that of the first company,[3] encroaching upon its right of way only where the character of the surface will not permit it to use adjoining ground.[4] And if, in any portion of the canyon, it is impracticable or impossible to lay down more than one road-bed and track, a court of equity will, upon proper application, make such orders as will secure to the second company the right to use, upon just and equitable terms, the road-bed and track constructed by the first company.[5] A railroad may, under a general grant of power to exercise the right of eminent domain, without special authority, condemn property of another railroad not held or used for the purposes of the road.[6] And where land has been held for five years by a railroad company without being used in any way, the fact that the company

R. Co., 122 Ill. 473; Chattanooga, etc., R. Co. *v.* Felton, 69 Fed. R. 273, and authorities on p. 280, s. c. 41 Cent. L. J. 444; Barre R. Co. *v.* Montpelier, etc., R. Co., 61 Vt. 1, s. c. 15 Am. St. R. 877, and note.

[1] Act of March 3, 1875, 1 Sup. Rev. St. U. S. 91.

[2] Stimson's Am. St. (1892), § 8744.

[3] Railway Co. *v.* Alling, 99 U. S. 463.

[4] Denver, etc., R. Co. *v.* Denver, etc., R. Co., 17 Fed. R. 867, 14 Am. & Eng. R. Cas. 83.

[5] Railway Co. *v.* Alling, 99 U. S. 463; Denver, etc., R. Co. *v.* Denver, etc., R. Co., 17 Fed. R. 867.

[6] Sioux City, etc., R. Co. *v.* Chicago, etc., R. Co., 27 Fed. R. 770, 25 Am. & Eng. R. Cas. 150. The unnecessary use of land by one railroad company is no defense to condemnation proceedings instituted by another company to take the same land. Baltimore, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 17 W. Va. 812. And the fact that land owned by one railroad company is held for public convenience and for purposes of *quasi* public character, does not protect it from condemnation. *In re* New York, etc., R. Co., 99 N. Y. 12.

anticipates using it at some future time does not exempt it from condemnation by another company which desires to build a railroad across it. The prospective use should yield to the more immediate necessities.[1]

§ 923. **Branch and lateral roads.**—It has been held that authority to locate and construct a railroad carries by implication the right to construct branches and sidings to carry out the purposes of the company's charter;[2] but, while the right to construct ordinary sidetracks and switches may be included,[3] we think authority to locate the road on a certain line does not, ordinarily, carry with it the right to construct branch or lateral roads running in a different direction.[4] These may, however, be authorized for a public purpose,[5] and provision is usually made for locating and constructing them under statutory authority. It has also been held by some of the courts that the legislature may constitutionally authorize them to be constructed so as to connect the main line with manufacturing establishments and mines, and that the power of eminent domain may be exercised for that purpose.[6] But this is denied

[1] Colorado Eastern R. Co. *v.* Union Pacific R. Co., 41 Fed. R. 293, 44 Am. & Eng. R. Cas. 10.

[2] Schofield *v.* Pennsylvania R. Co., 2 Pa. Dist. Ct. R. 57. But see Edgewood R. Co.'s Appeal, 79 Pa. St. 257; Philadelphia, etc., R. Co. *v.* Philadelphia, etc., R. Co., 1 Pa. Dist. Ct. R. 73.

[3] Arrington *v.* Savannah, etc., R. Co., 95 Ala. 434; Matter of New York Cent., etc., R. Co., 77 N. Y. 248; People *v.* Brooklyn, etc., R. Co., 89 N. Y. 75; Philadelphia, etc., R. Co. *v.* Williams, 54 Pa. St. 103; Matter of Boston, etc., R. Co., 53 N. Y. 574; Central Branch, etc., R. Co. *v.* Atchison, etc., R. Co., 26 Kan. 669; Toledo, etc., R. Co. *v.* Daniels, 16 Ohio St. 390; Protzman *v.* Indianapolis, etc., R. Co., 9 Ind. 467.

[4] Chicago, etc., R. Co. *v.* Wiltse, 116 Ill. 449, s. c. 6 N. E. R. 49; Illinois Cent. R. Co. *v.* Chicago, 138 Ill. 453, s. c. 28 N. E. R. 740. See, also, Baltimore, etc., R. Co. *v.* Union R. Co., 35 Md. 224; Morris, etc., R. Co. *v.* Central R. Co., 31 N. J. Law 205; Knight *v.* Carrollton R. Co., 9 La. Ann. 284.

[5] Toledo, etc., R. Co. *v.* East Saginaw, 72 Mich. 206; Newhall *v.* Galena, etc., R. Co., 14 Ill. 273; Secombe *v.* Railroad Co., 23 Wall. (U. S.) 108; Howard County *v.* Booneville Cent. Nat. Bank, 108 U. S. 314, s. c. 2 Sup. Ct. R. 689; Cherokee Nation *v.* Southern Kansas R. Co., 135 U. S. 641, s. c. 10 Sup. Ct. R. 965; Beekman *v.* Saratoga, etc., R. Co., 3 Paige (N. Y.) 45; Matter of Union El. Ry. Co., 113 N. Y. 275; Tyler *v.* Elizabethtown, etc., R. Co., 9 Bush (Ky.) 510.

[6] Getz's Appeal, 10 W. N. C. (Pa.) 453, s. c. 3 Am. & Eng. R. Cas. 186; Slocum's Appeal, 12 W. N. C. (Pa.) 84; Hays *v.* Risher, 32 Pa. St. 169;

by other courts.[1] Where the charter authorizes the company to locate and construct branches or lateral roads, it may build a branch line running in the same general direction as the main line, and connecting such main line with another railroad.[2] In other words, the branch may be practically an extension of the main line as well as a line running off at an intermediate point. So, there may be a branch from a branch, all having a common stem in the main line.[3] But it has been held that authority to construct "branch roads from the main line to other points or places in the several counties through which said road may pass," does not give the company the right to construct a branch through more than one county, that is, any one branch must begin and end in the same county.[4]

§ 924. **Exempt property.**—In some of the states, the general railroad laws forbid a railroad to locate its line so as to take, without the consent of the owners, cemeteries,[5] churches,[6] dwell-

Harvey *v.* Thomas, 10 Watts (Pa.) 63. See, also, New York, etc., R. Co. *v.* Metropolitan, etc., Co., 63 N. Y. 326; Clarke *v.* Blackmar, 47 N. Y. 150; South Chicago R. Co. *v.* Dix, 109 Ill. 237; Fisher *v.* Chicago, etc., R. Co., 104 Ill. 323; Kettle River R. Co. *v.* Eastern R. Co., 41 Minn. 461; Phillips *v.* Watson, 63 Iowa 28; Hibernia R. Co. *v.* DeCamp, 47 N. J. L. 518; New Cent., etc., Co. *v.* George's, etc., Coal Co., 37 Md. 537; Dietrich *v.* Murdock, 42 Mo. 279; Rudolph *v.* Pennsylvania, etc., Co., 166 Pa. St. 430, s. c. 31 Atl. R. 131.

[1] See Matter of Split Rock Cable R. Co., 128 N.Y.408; Weidenfeld *v.* Sugar Run R. Co., 48 Fed. R. 615; People *v.* Dist. Ct., 11 Colo. 147; *In re* Rochester, etc., R. Co., 12 N. Y. Supp. 566; Railroad Co. *v.* Iron Works, 31 W.Va. 710; Chicago, etc., R. Co. *v.* Wiltse, 116 Ill. 449; Mikesell *v.* Durkee, 34 Kan. 509; State *v.* Railway Co., 40 Ohio St. 504.

[2] Blanton *v.* Richmond, etc., R. Co., 86 Va. 618, s. c. 10 S. E. R. 925, 43 Am. & Eng. R. Cas. 617; Atlantic, etc., R. Co. *v.* St. Louis, 66 Mo. 228; McAboy's Appeal, 107 Pa. St. 548. It may cross another railroad. Hays *v.* Briggs, 74 Pa. St. 373.

[3] Wheeling, etc., R. Co. *v.* Camden, etc., Co., 35 W. Va. 205, s. c. 13 S. E. R. 369.

[4] Works *v.* Junction R. Co., 5 McLean (U. S. C. C.) 425. See, also, Currier *v.* Marrietta, etc., R. Co., 11 Ohio St. 228; Baltimore, etc., R. Co. *v.* Union R. Co., 35 Md. 224. It has also been held that power to locate, construct and operate a branch road does not authorize the purchase of a road already constructed. Gulf, etc., R. Co. *v.* Morris, 67 Tex. 692, s. c. 35 Am. & Eng. R. Cas. 94; Campbell *v.* Marrietta, etc., R. Co., 23 Ohio St. 168.

[5] Stimson's Am. Stat., (1892) § 8743, citing laws of Maine, North Carolina, Vermont, Florida, Louisiana. Except by the unanimous approval of the railroad commissioners. Pub. Stat., 1887, Conn., § 3463.

[6] Rev. Stat., 1883, Me. Ch. 51, § 17.

ing-houses,[1] or the yard, kitchen or garden thereunto attached.[2] A dwelling-house has been held to include so much of the yard and curtilage as is necessary for its reasonable enjoyment,[3] though this has been denied where the statute was silent on the subject.[4] Under a charter which provided that the president and directors of the railroad company should have power to determine and locate the route of the railroad, as they might deem expedient, not, however, passing through any burying ground or place of public worship, or any dwelling-house in the occupancy of the owner without his consent, it was held that a house, to be exempt, must be *bona fide* the residence of the owner, and that where the line of a railroad has been surveyed so as to cut through a dwelling-house occupied by a tenant, the owner can not, by moving into the house for the mere purpose of defeating the proposed improvement, or of extorting excessive compensation, render it "a dwelling-house in the occupancy of the owner," within the meaning of the law, so as to prevent its condemnation.[5] Where the statute prohibited the taking of a dwelling-house or any space within

[1] Stimson's Am. Stat., (1892) § 8743; State *v.* Troth, 34 N. J. Law 377; McConiha *v.* Guthrie, 21 W. Va. 134, 17 Am. & Eng. R. Cas. 1. The word "house" has been construed by the English courts to include court yard, office, garden, unfinished houses, and all that is necessary to the enjoyment of the house, if within the same ambit or circuit, whether attached to the main building or not, and though purchased after the main building was erected. Governors, etc., *v.* Charing Cross, etc., R. Co., 30 L. J. R. (Ch.) 395; Mason *v.* London, etc., R. Co., 37 L. J. R. (Ch.) 483; Dakin *v.* London, etc., R. Co., 26 L. J. R. (Ch.) 734, note, s. c. 3 De Gex & S. 414; King *v.* Wycombe R. Co., 29 L. J. R. (Ch.) 462; Cole *v.* West London, etc., R. Co., 27 Beav. 242; Alexander *v.* West End, etc., R. Co., 31 L. J. R. (Ch.) 500; Grosvenor *v.* Hempstead, etc., R. Co., 26 L. J. R. (Ch.) 731, cited in 23 Am. & Eng. R. Cas. 2, note.

[2] Voorhis Rev. Laws, 1884, La., § 705; Code 1883, N. Car., § 1701. See Richmond, etc., R. Co. *v.* Wicker, 13 Gratt. (Va.) 375.

[3] Swift's Appeal, 111 Pa. St. 516; Damon's Appeal, 119 Pa. St. 287. But it does not include a part of a lot one hundred and twenty-five feet away from the house and not reasonably essential to the use and enjoyment of the house. Rudolph *v.* Pennsylvania, etc., R. Co., 166 Pa. St. 430, s. c. 31 Atl. R. 131. See, also, Lyle *v.* McKeesport, etc., R. Co., 131 Pa. St. 437.

[4] Wells *v.* Somerset, etc., R. Co., 47 Me. 345.

[5] Hagner *v.* Pennsylvania, etc., R. Co., 154 Pa. St. 475, 57 Am. & Eng. R. Cas. 648. See Stahl *v.* Pennsylvania R. Co., 155 Pa. St. 309. The exemption must be asked in good faith. It will not apply

sixty feet thereof, it was held that the limitation applied only to land belonging to the owner of the dwelling, and that it did not prohibit the location of a road within sixty feet of the land of another.[1] And a billiard saloon attached to a tavern and used for the entertainment of the guests was held to be part of a dwelling.[2]

§ 925. **Preliminary survey.**—Railroad companies are given power by the statutes of almost all of the states to enter by their officers or agents upon the land of any person, and cause an examination and survey of their proposed route to be made,[3] subject, however, in some of the states, to liability for actual damages.[4] A preliminary survey for this purpose does not constitute a taking in the sense in which that term is used in the law of eminent domain and in the various state constitutions;[5] but where the survey is conducted in an unreasonable manner it may be actionable and may even constitute a taking where the soil is disturbed and trees are cut down, or the like.[6] The right to make a preliminary survey does not include the right to make experiments upon the land, without compensation, for the purpose of ascertaining whether it is a suitable route.[7]

§ 926. **Perfecting location—Maps of proposed route.**—A defective location may be perfected by legislative confirmation,

to a shanty built on the line of a railway, and occupied by some negroes who were induced to live there for the purpose of enabling the owner to evade the condemnation law. Morris *v.* Schallsville, etc., R. Co., 4 Bush (Ky.) 448; Carris *v.* Commissioners of Waterloo, 2 Hill (N. Y.) 443.

[1] Richmond, etc., R. Co. *v.* Wicker, 13 Gratt. (Va.) 375.

[2] State *v.* Troth, 36 N. J. L. 422.

[3] Stimson's Am. Stat. (1892), § 8741.

[4] Stimson's Am. Stat. (1892), § 8741. They are not trespassers where they enter and make the survey under statutory authority. Burrow *v.* Terre Haute, etc., R. Co., 107 Ind. 432.

[5] Elliott's Roads and Streets, 162; Randolph on Em. Domain, § 195; Bonaparte *v.* Camden, etc., R. Co., Bald. (U. S. C. C.) 209; Polly *v.* Saratoga, etc., R. Co., 9 Barb. (N. Y.) 449; Oregonian R. Co. *v.* Hill, 9 Ore. 377.

[6] Orr *v.* Quimby, 54 N. H. 590; Morris & E. R. Co. *v.* Hudson, etc., Co., 25 N. J. Eq. 384.

[7] People *v.* Loew, 102 N. Y. 471; Ash *v.* Cummings, 50 N. H. 591. See, also, Davis *v.* San Lorenzo, etc., Co., 47 Cal. 517; California, etc., Co. *v.* Central, etc., Co., 47 Cal. 528; Toledo, etc., R. Co. *v.* Loop, 139 Ind. 542, s. c. 39 N. E. R. 306.

since the legislature has the same right to confirm an existing location that it has to authorize a location to be made in the future. But such an act does not relieve the railroad company from the consequences of illegal acts done before its passage.[1] In some states the company is required to submit a map of its proposed route to the railroad commissioners for their approval, while in most of the others, such a map must be filed or recorded in each of the counties through which the line extends.[2] In some of the states, the statute merely requires the map to be filed before the construction of the road is begun, and permits the right of way to be condemned before such filing.[3] In others the map is filed with the secretary of state after the location of the road.[4] Some states require that the road shall be located and a "survey" thereof shall be filed,[5] in which case the survey may be aided by plans and maps filed with it.[6] Similar provisions are frequently found in special charters granted to railroad companies. Such statutes should receive a reasonable construction, such as will substantially protect private rights without needless embarrassment to public improvements.[7] Where a survey, map, or location is required to be filed as a precedent condition to the institution of condemnation proceedings, the particular property to be taken must be clearly pointed out.[8] In New Jersey it is held that the survey of the route of a railroad, filed in the office of the secretary of state, limits the right of condemnation to the lands included in its description. This affords the only evidence of the grant by the

[1] City of Salem *v.* Eastern R. Co., 98 Mass. 431; Commonwealth *v.* Old Colony R. Co., 80 Mass. (14 Gray) 93.

[2] Stimson's Am. Stat. (1892), § 8748.

[3] Missouri River, etc., R. Co. *v.* Shepard, 9 Kan. 647; Chicago, etc., R. Co. *v.* Grovier, 41 Kan. 685. See Wheeling Bridge, etc., R. Co. *v.* Camden, etc., Co., 35 W. Va. 205, 47 Am. & Eng. R. Cas. 27.

[4] Stimson's Am. Stat., § 8748.

[5] United New Jersey R., etc., Co. *v.* National, etc., R. Co., 52 N. J. Law 90.

[6] Grand Junction R. Co. *v.* County Comrs., 14 Gray (Mass.) 553; Drury *v.* Midland R. Co., 127 Mass. 571; Portland, etc., R. Co. *v.* County Comrs., 65 Me. 292; Quincy, etc., R. Co. *v.* Kellogg, 54 Mo. 334.

[7] Lansing *v.* Caswell, 4 Paige 519; Lewis' Eminent Domain, § 281.

[8] United New Jersey, etc., R. Co. *v.* National Docks, etc., R. Co., 52 N. J. Law 90.

state to the corporation, and land not specified in such survey can not be condemned by the railroad as a right of way.[1] In New York it is held that the filing of the map vests the railroad company with a right to the land therein specified as its proposed right of way, subject only to the right of the landowner to have his damages assessed and paid. A map showing but a single line, without anything to indicate whether it is the center or one of the boundary lines of the right of way, and containing no statement of the width of the land taken, has been held not to be a sufficient compliance with the law as to location to authorize condemnation proceedings where the statute requires a map of the proposed location to be filed before such proceedings are begun.[2] The owner is entitled to information as to the exact property which it is proposed to take.[3] Since the map required to be filed is intended mainly for the purpose of acquiring property necessary to be taken, it is sufficient if it shows the alignment and profile of the proposed road and designates the width of the right of way. It need not show the connections, turnouts, and switches.[4] The fact that the map of the route as filed stops short of one of the chartered termini does not work a change in the termini nor amount to an abandonment by the company of a portion of the authorized

[1] Rochester, etc., R. Co. *v.* New York, etc., R. Co., 110 N. Y. 128, 35 Am. & Eng. R. Cas. 267.

[2] N.Y., etc., R. Co. *v.* New York, etc., R. Co., 11 Abb. (N. Y.) N. C. 386. Where the line of the road was indicated in the vote of the directors adopting a location only by reference to the course followed by the center line of the road, without any specification as to the width to be taken, it was held that the location was fatally defective. New York, etc., R. Co. *v.* New York, etc., R. Co., 52 Conn. 274, 25 Am. & Eng. R. Cas. 215.

[3] Housatonic R. Co. *v.* Lee, etc., R. Co., 118 Mass. 391; Heise *v.* Pennsylvania R. Co., 62 Pa. St. 67; Vail *v.* Morris, etc., R. Co., 21 N. J. Law 189; Strang *v.* Beloit, etc., R. Co., 16 Wis. 635. But he may, by his actions after having received actual knowledge of the proposed route, waive his right to object to condemnation proceedings upon the grounds of indefiniteness in the location of the road as approved by the railroad commissioners. New York, etc., R. Co. *v.* New York, etc., R. Co., 52 Conn. 274; Duck River, etc., R. Co. *v.* Cochrane, 3 Lea (Tenn.) 478; Atchison, etc., R. Co. *v.* Mecklim, 23 Kan. 167; Drury *v.* Midland R. Co., 127 Mass. 571; Denver, etc., R. Co. *v.* Canon City, etc., R. Co., 99 U. S. 463.

[4] State *v.* Brooklyn, etc., R. Co., 89 N. Y. 75.

road, and its right to operate the road throughout its entire length as laid down in the charter can not, on that account, be questioned by the state.[1]

§ 927. Effect of location—When location is complete.—When a proposed line has been regularly located and staked off, and the expense thereof has been paid, the corporation by which it is done has a prior claim to the right of way for a reasonable time, which can not be defeated by another company that procures voluntary conveyances from the owners before the proceedings in condemnation instituted by the first company have terminated.[2] The first company, in such a case, can condemn the right of way in the hands of the purchasing company in the same manner that it might have condemned it in the hands of the original owners.[3] The location of the road

[1] People *v.* Brooklyn, etc., R. Co., 89 N. Y. 75, 9 Am. & Eng. R. Cas. 454; Mason *v.* Brooklyn, etc., R. Co., 35 Barb. (N. Y.) 373.

[2] Sioux City, etc., R. Co. *v.* Chicago, etc., R. Co., 27 Fed. Rep. 770, 25 Am. & Eng. R. Cas. 150; Barre R. Co. *v.* Montpelier, etc., R. Co., 61 Vt. 1, s. c. 15 Am. St. R. 877; Morris, etc., R. Co. *v.* Blair, 9 N. J. Eq. 635; Titusville, etc., R. Co. *v.* Warren, etc., R. Co., 12 Phila. (Pa.) 642; Williamsport, etc., R. Co. *v.* Philadelphia, etc., R. Co., 141 Pa. St. 407. See Boston, etc., R. Co. *v.* Lowell, etc., R. Co., 124 Mass. 368; Denver, etc., R. Co. *v.* Canon City, etc., R. Co., 99 U. S. 463; Sulphur Springs, etc., R. Co. *v.* St. Louis, etc., R. Co., 2 Tex. Civ. App. 650; Pittsburgh, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 159 Pa. St. 331. But it is otherwise where the conveyance is obtained and recorded before the location is made by the company seeking to condemn. Elting, etc., Co. *v.* Williams, 36 Conn. 310.

[3] Sioux City, etc., R. Co. *v.* Chicago, etc., R. Co., 27 Fed. Rep. 770. In this case Judge Shiras said: "The injustice and injury to private and public rights alike, which would arise were it held that after a company has duly surveyed and located its line of railway, and is in good faith preparing to carry forward the construction of its road, some other company may, by private purchase, procure the right of way over parts of the located line, and either prevent the construction of the road or extort a heavy and exorbitant payment from the company first locating its line as a condition to the right to build the same as originally located, are strong reasons for holding that the first location, if made in good faith and followed up within a reasonable time, may confer the prior right, even though a rival company may have secured the conveyance of the right of way by purchase from the property-owners after the location, but before the application to the sheriff for the appointment of commissioners." Abandonment of a surveyed branch railroad can be asserted only by the state, not by an-

results only from some definite action on the part of the corporation itself. An engineer alone can not locate a railroad so as to give title to the company that employs him; and a preliminary survey made by an engineer which has never been reported to or adopted by the company, does not constitute a legal location of the line of the railroad which will give such company priority over another company that has adopted a line covering a portion of the same territory.[1] Where two or more experimental surveys were made in succession and various resolutions were passed by the directors adopting the different routes surveyed, it was held that the location of the road involved the abandonment of the route previously adopted; and that where the route first surveyed was abandoned and then re-adopted, the rights of the corporation dated from the passage of the resolution by which it was finally designated as the line of the road, although the preliminary survey had been made several months before.[2] In some of the states, as we have already seen, a map of the proposed route must be filed with a designated public officer of each county through which the proposed road runs, and notice given to the land-owners before the "location" is complete.[3] And this requirement is usually made where grants of public land are made to railroads.[4] But

other company attempting to use the right of way. Pittsburgh, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 159 Pa. St. 331.

[1] Williamsport, etc., R. Co. *v.* Philadelphia, etc., R. Co., 141 Pa. St. 407, 47 Am. & Eng. R. Cas. 224. An engineer may make explorations in advance of a location, or he may remark the line or adjust the grades after the adoption of a location, but an engineer alone can not locate a railroad so as to give title to the company that employs him. He is not the company. The right of eminent domain does not reside in him. Williamsport, etc., R. Co. *v.* Philadelphia, etc., R. Co., *supra*.

[2] Hagner *v.* Pennsylvania, etc., R. Co., 154 Pa. St. 475.

[3] Stimson's Am. Stat. (1892), § 8748, citing laws of Massachusetts, Vermont, New York, Connecticut, Indiana, Michigan, Wisconsin, West Virginia, Kansas, North Carolina, Missouri, Arkansas, Texas, Nevada, California, North Dakota, Idaho, Utah, New Mexico. The filing of a map was not essential to the location of a road in North Carolina prior to 1872. Purifoy *v.* Richmond, etc., R. Co., 108 N. Car. 100, 46 Am. & Eng. R. Cas. 232.

[4] See Hannibal, etc., R. Co. *v.* Smith, 41 Mo. 310; Western Pac. R. Co. *v.* Tevis, 41 Cal. 489; Baker *v.* Gee, 1 Wall. (U. S.) 333. The filing of the

when the required map is filed and notice given, the company acquires a prior right to construct a railroad upon such line, exclusive of all other railroad corporations and free from the interference of any party, and this right ripens into title as soon as the land is purchased or taken and compensation is paid under proper condemnation proceedings.[1] If the statute does not provide for a survey or location, nor require a map, survey or description to be recorded, the company which first institutes proceedings to condemn a particular tract of land will have priority of right to appropriate it,[2] provided such proceedings have been lawfully begun.[3] Where the statute does not require a railroad company, after making a location, to keep stakes in position along the proposed line, or to file or record a map of its proposed route, a failure to keep its lines staked out will not imply an abandonment of the location so as to estop the company from denying the right of another company to construct its road thereon.[4] As against the land-owner himself, under the laws of most of the states, the corporation acquires no rights by the act of location, except a paramount right of purchase or condemnation for railroad purposes as soon as the value of the land has been legally ascertained, and compensation paid.[5] It can not enter upon the

map definitely fixes the location, although no survey has been made. Southern Pac. R. Co. *v.* United States, 69 Fed. R. 47; Kansas P. R. Co. *v.* Dunmeyer, 113 U. S. 629, s. c. 5 Sup. Ct. R. 566.

[1] Rochester, etc., R. Co. *v.* New York, etc., R. Co., 110 N. Y. 128, 35 Am. & Eng. R. Cas. 267. The map and profile filed in the clerk's office, with proof of the construction of the road on the line indicated, is sufficient to show such a permanent location as to entitle it to have a tax voted to it put upon the tax-duplicate, under the Indiana statute. Caffyn *v.* State, 91 Ind. 324.

[2] Lake Merced Water Co. *v.* Cowles, 31 Cal. 215.

[3] San Francisco, etc., Co. *v.* Alameda Water Co., 36 Cal. 639.

[4] Pittsburgh, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 159 Pa. St. 331, 57 Am. & Eng. R. Cas. 46. In this case it was held that the lapse of five years and two months' time after the location of a branch road, without anything being done toward its construction, is not sufficient evidence of the abandonment of the location. See New Brighton, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 105 Pa. St. 13; Washington, etc., R. Co. *v.* Cœur D'Alene, etc., Co., 160 U. S. 77 s. c. 16 Sup. Ct. R. 231.

[5] In Sioux City, etc., R. Co. *v.* Chicago, etc., R. Co., 27 Fed. R. 770, Judge Shiras said: "The company does not

land for the purpose of constructing its road until the damages have been assessed and paid or secured.[1]

§ 928. **Contracts to influence location.**—Contracts made with the officers of a railroad company, and for their own personal benefit, by which it is sought to influence them to procure the road to be built on a particular location[2] or to procure the location of a depot at a particular point,[3] are absolutely void. Thus a contract by which the officers of the company are to be given a share in certain lands on condition that the railroad shall be so located as to pass through them is illegal and void.[4] Such an agreement, it is said, must either be in the nature of a bribe to procure the location of the road where it

perfect its right to the use of the land, as against the owner thereof, until it has paid the damages, but as against the railroad company, it may have a prior right and better equity. The right to the use of the way is a public, not a private right. It is, in fact, a grant from the state, and although the payment of the damages to the owner is a necessary prerequisite, the state may define who shall have the prior right to pay the damages to the owner, and thereby acquire a perfected right to the easement. The owner can not by conveying the right of way to A., thereby prevent the state from granting the right to B. All that the owner can demand is that his damages shall be paid."

[1] Stimson's Am. Stat. (1892), § 8753; Elliott's Roads and Streets, 180. When the company locates its line over land it secures a vested right to enter and occupy the lands covered as soon as the damages have been paid or secured. Lafferty *v.* Schuylkill, etc., R. Co., 124 Pa. St. 297, 36 Am. & Eng R. Cas. 575.

[2] Berryman *v.* Cincinnati, etc., R. Co., 14 Bush (Ky.) 755; Bestor *v.* Wathen, 60 Ill. 138; Fuller *v.* Dame, 18 Pick. (Mass.) 472.

[3] Pacific R. Co. *v.* Seely, 45 Mo. 212; Holladay *v.* Patterson, 5 Ore. 177.

[4] Cook *v.* Sherman, 20 Fed. Rep. 167, 16 Am. & Eng. R. Cas. 561; Woodstock Iron Co. *v.* Richmond Extension Co., 129 U. S. 643, 38 Am. & Eng. R. Cas. 683. In Union Pacific R. Co. *v.* Durant, 3 Dill. (U. S. C. C.) 343, s. c. 1 Cent. L. J. 581, it was held by Judge Dillon that where the president uses his power oppressively and by threats to compel citizens to convey lands to him for the company, the court will decree a reconveyance to the grantors. In Fuller *v.* Dame, 18 Pick. (Mass.) 472, the owner of a large tract of land in the south part of Boston agreed with one of the stockholders of a railroad company to pay him $9,600 for his services in inducing the company to run its road through that land, and to fix its termination and principal depot at a certain point. Suit having been brought upon the note, it was held that the contract was contrary to public policy, and that the note given in consideration of it was void.

would not be of the greatest benefit to the stockholders, or it is a contract to pay the directors for doing what they were already bound to do but were fraudulently claiming they would not do, and is therefore without consideration; and in either case it can not be enforced.[1] Such a contract will not be enforced even when the officers profess to act for the company in making it. Thus a contract to lay off 160 acres of land into town lots, and to make a deed to one-fourth of the lots to such persons as the directors might designate, in consideration that a depot should be located on the lands, is contrary to sound public policy, and can not be enforced even at the suit of the railroad company.[2] Contracts by which some benefit is secured to the corporation itself by the choice of a particular location are upheld so long as they do not infringe the rights of the public, and for this reason contracts of subscription and grants of land, conditioned upon the location of the road or a depot at a particular place, if fairly made, are upheld in most of the states.[3] But contracts by which it is sought to prevent the establishment of a rival depot at some other point, where the interests of the corporation and of the public demand it,[4] and contracts by which it is sought to bind the corporation to select a particular route can not be enforced against the company to the injury of the public.[5]

[1] Bestor *v.* Wathen, 60 Ill. 138.

[2] Pacific R. Co. *v.* Seely, 45 Mo. 212.

[3] Cook on Stock and Stockholders (3d ed.), § 83; *ante*, §§ 121, 362, 385, 386. In Louisville, etc., R. Co. *v.* Sumner, 106 Ind. 55, the court said: "Public policy, as declared by the legislature and enforced by this court, permits counties, cities and townships to make subscriptions or donations to railway corporations, subject to conditions in respect to the location of depots. We can see no good reason why the courts should declare a different policy as between individuals and railway companies." But in Dix *v.* Shaver, 14 Hun (N. Y.) 392, it was held that an agreement by a land-owner that, if the railroad company will construct its road on a specified line, he will pay a certain sum of money, is against public policy and can not be enforced. And see Fort Edward, etc., Co. *v.* Payne, 15 N. Y. 583; Butternuts, etc., Turnp. Co. *v.* North, 1 Hill (N.Y.) 518.

[4] Louisville, etc., R. Co. *v.* Sumner, 106 Ind. 55, 24 Am. & Eng. R. Cas. 641; Williamson *v.* Chicago, etc., R. Co., 53 Iowa 126; Marsh *v.* Fairbury, etc., R. Co., 64 Ill. 414; St. Louis, etc., R. Co. *v.* Mathers, 71 Ill. 592; St. Louis, etc., R. Co. *v.* Mathers, 104 Ill. 257, 9 Am. & Eng. R. Cas. 600; St. Joseph, etc., R. Co. *v.* Ryan, 11 Kan. 602. But see Mahaska Co. R. Co. *v.* Des Moines, etc., R. Co., 28 Iowa 437.

[5] But damages may be awarded against a railroad company for the

§ 929. **Change of location—When authorized.**—The general railroad laws of many of the states provide for slight changes in the route of a railroad whenever it is necessary to improve the location[1] and the change can be made without departing from the general route or avoiding any points named in the company's charter. Indeed, it is held that a railroad company may, under the general power to locate its road, change its location whenever it is shown to be necessary, so long as no steps have been taken toward securing possession of the first location.[2] Gross injustice might arise from holding a company

breach of an agreement made in consideration of a right of way across the plaintiff's lands, by which the company undertook to maintain its track at certain places and to provide the plaintiff with private side tracks connecting with his warehouse. Chapman & Harkness *v.* Mad River, etc., R. Co., 6 Ohio St. 119. See, also, Louisville, etc., R. Co. *v.* Sumner, 106 Ind. 55.

[1] Stimson's Am. Stat. (1892), § 8757.

[2] Mahaska Co. R. Co. *v.* Des Moines Valley R. Co., 28 Iowa 437; Hagner *v.* Pennsylvania, etc., R. Co., 154 Pa. St. 475, 57 Am. & Eng. R. Cas. 648. In this last case the court said: "It may be said that the company, having made its location, should be held to it. This would impose unnecessary hardship upon the company. The location may have been made in good faith, but subsequent investigation or action may show that a construction according to the location is not feasible. Suppose, in this case, the company had been restrained from crossing the Philadelphia and Reading road under grade, because of unnecessary injury to the road so crossed. To hold that in such a case the company had exhausted its powers, and could not change the location, might deprive the public of necessary railroad facilities. * * * We are aware that it has been decided that a railroad company may not change its location after damages for land taken are assessed (Neal *v.* Pitts., etc., Railroad Co., 31 Pa. St. 19; Beale *v.* Penn., etc., Railroad Co., 86 Pa. St. 509); but these decisions are based upon the ground that a railroad company has no right to experiment upon the question of damages. It can not change its location to escape the payment of unsatisfactory damages. But in the case before us no work was done on the original line at the time the change was made, and no steps were taken to assess damages; therefore the grounds upon which the foregoing decisions are based do not exist in our case. If changes in location can not be made when proper railroad construction demands them, the public must suffer as well as the corporation. Mistakes will happen in engineering, as well as in other work, and such mistakes may not be discovered until after the location of the road. While the location continues, the owner, by reason of the appropriation of his land, may sustain some damages. These should be paid, and when they are paid no one is injured by a change of location made in good faith." See, also, Washington, etc., R. Co. *v.* Cœur D'Alene, etc., Co., 60 Fed. R. 881, affirmed in 16 Sup. Ct. R. 231.

bound by all the details of an experimental survey,[1] and the company has, in general, full power and discretion to correct any errors in its first survey. And it will not be disturbed in the exercise of this discretion unless it has clearly erred.[2]

§ 930. Change of location after first location is finally completed.—When the company has exercised its discretion by making a final location of its road and filing a map of its proposed route, thereby fastening upon the right of way its claim for an easement,[3] and especially after the damages have been assessed,[4] the company can not change its route and invoke the power of eminent domain to procure another right of way

[1] In 19 Am. & Eng. Enc. of Law 830, it is said: "The correct rule, therefore, seems to be that while a railroad company may not change its location from motives of caprice, or for the sake of private individual convenience, it may do so whenever the interest or convenience of the public is to be subserved thereby and where it is essential to the accomplishment of the ends for which the road is being built." See Mississippi, etc., R. Co. *v.* Devaney, 42 Miss. 555, 2 Am. R. 608; *Ex parte* South Carolina R. Co., 2 Rich. L. (S. Car.) 434; South Carolina R. Co. *v.* Blake, 9 Rich. L. (S. Car.) 228; New Orleans, etc., R. Co. *v.* Second Municipality, 1 La. Ann. 128; Atlantic R. Co. *v.* St. Louis, 66 Mo. 228; Works *v.* Junction R. Co., 5 McLean (U. S.) 425; Eel River, etc., R. Co. *v.* Field, 67 Cal. 429, 22 Am. & Eng. R. Cas. 91; McCartney *v.* Chicago, etc., R. Co., 112 Ill. 611; Minneapolis, etc., R. Co. *v.* St. Paul, etc., R. Co., 35 Minn. 265, 26 Am. & Eng. R. Cas. 638; Hewitt *v.* St. Paul, etc., R. Co., 35 Minn. 226, 27 Am. & Eng. R. Cas. 342; *In re* New York, etc., R. Co., 88 N. Y. 279, 10 Am. & Eng. R. Cas. 113; Mahaska Co. R. Co. *v.* Des Moines Valley R. Co., 28 Iowa 437; Hoard *v.* Chesapeake, etc., R. Co., 123 U. S. 222; North Missouri R. Co. *v.* Lackland, 25 Mo. 515.

[2] Hentz *v.* Long Island R. Co., 13 Barb. (N. Y.) 646. Equity will not restrain the directors of a railroad company unless it is shown that they wantonly or capriciously disregard the rights of others. Anspach *v.* Mahanoy, etc., R. Co., 5 Phil. (Pa.) 491.

[3] Neal *v.* Pittsburgh, etc., R. Co., 2 Grant's Cas. (Pa.) 137, 31 Pa. St. 19; Old Colony R. Co. *v.* Miller, 125 Mass. 1; Davidson *v.* Boston, etc., R. Co., 3 Cush. (Mass.) 91; San Francisco, etc., R. Co. *v.* Mahoney, 29 Cal. 112.

[4] Railway companies, it is said, may make experimental surveys at pleasure, before finally locating their route. But they can not have experimental suits at law, as a means of chaffering with the land-owners for the cheapest route. The power of taking any man's land by such company is exhausted by a location. It can not be indulged with another choice. Neal *v.* Pittsburg, etc., R. Co., 2 Grant's Cases (Pa.) 137, s. c. 31 Pa. St. 19; Beale *v.* Penn., etc., Railroad Co., 86 Pa. St. 509.

except for reasons amounting to a legal necessity for the second taking.[1] If a change of location is made under statutory authority after condemnation proceedings have begun, and because the award of damages is unsatisfactory, and the proceedings are abandoned, the railroad company must pay all damages and costs occasioned by their institution.[2] After the road has been constructed, the company will not be permitted to change its route and exercise the power of eminent domain to procure a new right of way excepting where it has statutory authority to make the change.[3] Some courts, however, hold that a railroad company may condemn land for the purpose of varying, altering, and repairing the road upon a proper showing of its necessity. But in such a case the petition for condemnation must allege in detail the facts showing the taking to be necessary, and such allegations are traversable by the land-owner.[4] Where the power to change the location of a railroad whenever that location could be improved was expressly given by statute, it was held that the power could be exercised after a partial construction of the road.[5] And it is

[1] Moorhead *v.* Little Miami R. Co., 17 Ohio 340; Little Miami R. Co. *v.* Naylor, 2 Ohio St. 235, 59 Am. Dec. 667; Griffin *v.* House, 18 Johns. (N. Y.) 397. A railroad company may condemn land for its relocation, if there be a manifest necessity for the change of location, and no detriment accrues to the public. Mississippi, etc., R. Co. *v.* Devaney, 42 Miss. 555, 2 Am. Rep. 608.

[2] North Missouri R. Co. *v.* Reynal, 25 Mo. 534; Leisse *v.* St. Louis, etc., R. Co., 2 Mo. App. 105, 72 Mo. 561, 6 Am. & Eng. R. Cas. 611, note; Hudson River R. Co. *v.* Outwater, 3 Sandf. (N. Y.) 689; Drath *v.* Burlington, etc., R. Co., 15 Neb. 367, 20 Am. & Eng. R. Cas. 385. In Hagner *v.* Pennsylvania, etc., R. Co., 154 Pa. St. 475, the opinion is expressed that the mere location of a railroad across land may give a claim for damages, though the land is never condemned. The court says: "While the location continues, the owner, by reason of the appropriation of his land, may sustain some damages. These should be paid, and when they are paid, no one is injured by a change of location made in good faith."

[3] Cleveland, etc., R. Co. *v.* Speer, 56 Pa. St. 325, 94 Am. Dec. 84; Works *v.* Junction R. Co., 5 McLean (U. S.) 425. See, also, State *v.* Norwalk, etc., Turnp. Co., 10 Conn. 157; Louisville, etc., Turnp. Co. *v.* Nashville, etc., Turnp. Co., 2 Swan (Tenn.) 282.

[4] South Carolina R. Co. *v.* Blake, 9 Rich. L. (S. Car.) 228; Knight *v.* Carrollton R. Co., 9 La. Ann. 284; Mississippi, etc., R. Co. *v.* Devaney, 42 Miss. 555.

[5] Lewis on Eminent Domain (1888), § 258, citing Eel River, etc., R. Co. *v.* Field, 67 Cal. 429; Cape Girardeau,

firmly settled by the weight of authority that making one appropriation does not exhaust the power, but new appropriations of land for the construction of additional tracks, turnouts, engine houses and other railroad facilities, may be made from time to time as the necessities of the road may require.[1] The right to change the location does not, as a rule, authorize a change in the termini, but only alterations in the route between the same termini.[2] It has been held, however, that a railroad company, having authority to construct branches, may effect a virtual change not only of a portion of its route but of its terminus, by the construction of a branch road, beginning at a point near the end of the line and running in the same general direction as the main line of the road.[3] It has been held that a grant contained in a special charter, of authority to vary the route and change the location of a railroad whenever

etc., R. Co. *v.* Dennis, 67 Mo. 438. In the case of Eel River, etc., R. Co. *v.* Field, the statute provided as follows: "If at any time after the location of the railroad and the filing of the maps and profiles thereof, as provided in the preceding section, it appears that the location can be improved, the directors may * * * alter or change the same and cause new maps and profiles to be filed showing such changes, in the same offices where the originals are on file, and may proceed in the same manner as the original location was acquired to acquire and take possession of such new line, and must sell or relinquish the lands owned by them for the original location within five years after such change. No new location shall, as herein provided, be so run as to avoid any points named in their articles of incorporation." Cal. Civ. Code, § 467.

[1] Central Branch Union Pac. R. Co. *v.* Atchison, etc., R. Co., 26 Kan. 669; St. Louis, etc., R. Co. *v.* Petty, 57 Ark. 359; Ligat *v.* Commonwealth, 19 Pa. St. 456; Black *v.* Philadelphia, etc., R. Co., 58 Pa. St. 249; Philadelphia, etc., R. Co. *v.* Williams, 54 Pa. St. 103; Water Comrs. *v.* Lawrence, 3 Edw. Ch. (N. Y.) 552; South Carolina R. Co. *v.* Blake, 9 Rich. L. (S. Car.) 228. "It would be, indeed, a disastrous rule to hold that a railroad company must, in the first instance, acquire all the ground it will ever need for its own convenience or the public accommodation. * * * The greatest degree of sagacity could hardly determine precisely what conveniences the future might demonstrate to be necessary to do its business with facility." Chicago, etc., R. Co. *v.* Wilson, 17 Ill. 123. See, also, Toledo, etc., R. Co. *v.* Daniels, 16 Ohio St. 390; Prather *v.* Jeffersonville, etc., R. Co., 52 Ind. 16, 42. But see Lodge *v.* Philadelphia, etc., R. Co., 8 Phila. (Pa.) 345.

[2] Attorney-General *v.* West Wisconsin R. Co., 36 Wis. 466. But, see, Protzman *v.* Indianapolis Co., 9 Ind. 467.

[3] Atlantic, etc., R. Co. *v.* St. Louis, 66 Mo. 228.

a better and cheaper route could be had, or whenever any obstacle occurred, either by way of difficulty of construction or inability to procure a right of way at reasonable cost, does not include authority to relocate the line after the road has been constructed, and to condemn land on which to build the road as relocated.[1] Indeed, most of the special charters granted to railroads have been construed to authorize but one exercise of the power of locating the road, and after this power has been exercised and a final location made, the power is held to be exhausted and no change can thereafter be made, except by express consent of the legislature.[2] Where the charter enumerates the causes for which a change or relocation may be made, the route can only be changed for some cause that is fairly within the terms of the statute.[3] In New York, North Carolina and New Hampshire, provision is made for the relocation of a proposed railroad upon the petition of any land-owner aggrieved by the location as made by the company whenever a better route is shown to exist.[4] Where the company has built

[1] Atkinson *v.* Marietta, etc., R. Co., 15 Ohio St. 21; Little Miami R. Co. *v.* Naylor, 2 Ohio St. 235; Moorhead *v.* Little Miami R. Co., 17 Ohio 340.

[2] Moorhead *v.* Little Miami R. Co., 17 Ohio 340; Morris, etc., R. Co. *v.* Central R. Co., 31 N. J. Law 205; Doughty *v.* Somerville, etc., R. Co., 21 N. J. Law 442; People *v.* New York, etc., R. Co., 45 Barb. (N. Y.) 73; Hudson, etc., Canal Co. *v.* New York, etc., R. Co., 9 Paige Ch. (N. Y.) 323; State *v.* Norwalk, etc., R. Co., 10 Conn. 157; Hastings *v.* Amherst, etc., R. Co., 9 Cush. (Mass.) 596; Brigham *v.* Agricultural, etc., R. Co., 1 Allen (Mass.) 316; Works *v.* Junction R. Co., 5 McLean (U. S.) 425; Brooklyn Cent. R. Co. *v.* Brooklyn City R. Co., 32 Barb. (N. Y.) 358.

[3] Works *v.* Junction R. Co., 5 McLean (U. S.) 425; *In re* New York, etc., R. Co., 88 N. Y. 279. In Works *v.* Junction R. Co., *supra*, it was held that the fact that a town situated upon the line of the road refused to contribute toward its construction was not sufficient reason for the relocation of the route under a charter authority to vary the location "either for the difficulty of construction, or of procuring a right of way at a reasonable cost, or whenever a better and cheaper route can be had."

[4] Laws 1890, N. Y. Ch. 565, § 2; Code of 1883, N. C., § 1952; Pub. Stat. (1892) N. H. Ch. 158, § 7. Where, in a proceeding under the New York statute, it appears that notice of the application for commissioners has not been given to an individual whose lands will be affected thereby such proceeding is wholly void. Norton *v.* Wallkill Valley R. Co., 63 Barb. (N. Y.) 77. The commissioners appointed by the court at the petition of a land-owner, as provided by the New York statute, have jurisdiction of the entire

its road without resorting to the power of eminent domain, and is able to acquire a new right of way by purchase, or otherwise without condemnation, it has authority to make any changes in its route that do not interfere with the rights of the public.[1]

§ 931. **Abandonment of location.**—It is provided by statute in many of the states that a failure on the part of a railroad company to begin the construction of its road within a time limited shall amount to an abandonment of its location,[2] and many of the states which authorize a company to change its proposed route provide that such a change shall work an abandonment of so much of the old line as is affected by the change.[3] By abandoning its location, the company loses all right thereto, and the land reverts to the owner.[4] In the absence of an express legislative enactment on the subject, perhaps no court would be justified in fixing a limit at which a failure to construct its road should be held to be an abandon-

subject of the location of the route through the county in which the land of the person applying for their appointment is situated, and are not confined to the consideration of necessary changes in that part of the route which passes through the land of the petitioner. *In re* Long Island R. Co., 45 N. Y. 364. But they have no power to so change a portion of the proposed route as to leave it disconnected at either end with the other portions. People, *ex rel.* Erie, etc., R. Co. *v.* Tubbs, 49 N. Y. 356.

[1] Mine Hill, etc., R. Co. *v.* Lippincott, 86 Pa. St. 468.

[2] Stimson's Am. Stat. (1892), §§ 8759, 8908. See Fernow *v.* Chicago, etc., R. Co., 75 Iowa 526. Where the statute provided that in case any railroad company should not, within twelve months after the acceptance of the route by the commissioners, pay for a right of way over all the land covered by its location, such acceptance should be void, it was held that such failure to pay for the right of way was not in the nature of a forfeiture, to be taken advantage of only by the state in a direct proceeding against the company, but that the whole proceeding became of no effect upon the expiration of twelve months. New York, etc., R. Co. *v.* Boston, etc., R. Co., 36 Conn. 196.

[3] Stimson's Am. Stat. (1892), § 8757.

[4] Roanoke Investment Co. *v.* Kansas City, etc., R. Co., 108 Mo. 50, 51 Am. & Eng. R. Cas. 426; Hastings *v.* Burlington, etc., R. Co., 38 Iowa 316; Fernow *v.* Chicago, etc., R. Co., 75 Iowa 526; New York, etc., R. Co. *v.* Boston, etc., R. Co., 36 Conn. 196; Troy, etc., R. Co. *v.* Boston, etc., R. Co., 86 N. Y. 107; Girard College, etc., R. Co. *v.* Thirteenth, etc., R. Co., 7 Phila. (Pa.) 620; Harrison *v.* Lexington, etc. R. Co., 9 B. Mon. (Ky.) 470.

ment of its location on the part of the company, but the case should generally be controlled by the rule as to the loss of rights by prescription.[1] Accordingly it is held that a failure on the part of the company to construct its road for a number of years is not of itself sufficient to show an abandonment of its right of way.[2] Neither does the use of a part of the right of way for the erection of restaurants and places of amusement constitute an abandonment of the part so used if such structures conduce to the comfort of its passengers and augment its business.[3] Nor does the erection of a public elevator or warehouse by the company, or its licensee, to be used to facilitate the business of the company,[4] even if such use of its land could be considered as unauthorized.[5] A sale or transfer of its right of way to another company by whom the road is completed and operated is not an abandonment.[6] And it has

[1] Pittsburgh, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 159 Pa. St. 331, 57 Am. & Eng. R. Cas. 46; Western Pennsylvania R. Co.'s Appeal, 104 Pa. St. 399. It has been held that an adjoining owner may obtain title to a part of the right of way of a railroad company by adverse possession, where its conduct shows a purpose to abandon the part of its location of which he has taken possession. Norton *v.* London, etc., R. Co., L. R. 9 Ch. Div. 623, L. R. 13 Ch. Div. 268.

[2] Barlow *v.* Chicago, etc., R. Co., 29 Iowa 276 (thirteen years); Durfee *v.* Peoria, etc., R. Co., 140 Ill. 435, 30 N. E. R. 686 (ten years); Pittsburgh, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 159 Pa. St. 331, 57 Am. & Eng. R. Cas. 46 (five years); Roanoke Investment Co. *v.* Kansas City, etc., R. Co., 108 Mo. 50, 51 Am. & Eng. R. Cas. 426 (thirteen years); Western Pennsylvania R. Co.'s Appeal, 104 Pa. St. 399; Kansas City, etc., R. Co. *v.* Kansas City, etc., R. Co., 129 Mo. 62, s. c. 31 S. W. R. 451. Under the Iowa statute a right of way of a railroad, "not used nor operated for a period of eight years," reverts to the owner of the land from which it was taken. Fernow *v.* Chicago, etc., Co., 75 Iowa 526, 36 Am. & Eng. R. Cas. 420.

[3] Prospect Park, etc., R. Co. *v.* Williamson, 91 N. Y. 552. Where it was shown that the depot was not constructed upon ground condemned for depot purposes, but the land adjoined the depot and was improved and used for beautifying the depot grounds, it was held that the question whether the land was abandoned should be left to the jury. Muhle *v.* New York, etc., R. Co., 86 Tex. 459, 25 S. W. Rep. 607, reversing S. C. (Tex. Civ. App.) 23 S. W. Rep. 809.

[4] Gurney *v.* Minneapolis, etc., Co. (Minn.), 65 N. W. R. 136.

[5] Gurney *v.* Minneapolis, etc., Co. (Minn.), 65 N. W. R. 136, citing Roby *v.* N. Y. Railroad Co., 142 N. Y. 176, s. c. 36 N. E. R. 1053; Peirce *v.* Boston, etc., R. Co., 141 Mass. 481, s. c. 6 N. E. R. 96.

[6] Crolley *v.* Minneapolis, etc., R. Co., 30 Minn. 541; Henry *v.* Dubuque,

been held that the fact that a railroad company has entered into a contract to run its trains over the road of another company and has taken up part of its own track, and permitted the owner of the adjoining lands to take possession thereof for cultivation, does not show an abandonment of another part of the right of way which is retained for use as a switch.[1] No general rule of law, applicable to all cases, can be laid down as to what constitutes abandonment of the whole or a part of its

etc., R. Co., 2 Iowa 288; Noll *v.* Dubuque, etc., R. Co., 32 Iowa 66; Junction R. Co. *v.* Ruggles, 7 Ohio St. 1; Hatch *v.* Cincinnati, etc., R. Co., 18 Ohio St. 92; U. S. *v.* Little Miami, etc., R. Co. (U. S. C. C. S. D. Ohio) 9 Reporter 676; Commonwealth *v.* Central Pass. R. Co., 52 Pa. St. 506; State *v.* Rives, 5 Ired. L. (N. C.) 297; Commonwealth *v.* Tenth Mass. Turnpike Co., 5 Cush. (Mass.) 509. But in State *v.* Atchison, etc., R. Co., 24 Neb. 143, 32 Am. & Eng. R. Cas. 388, it was held that a lease of its road without statutory authority was such an abandonment as to incur a forfeiture of the franchises of the company under a statute making the abandonment of its road or a material part thereof by a railroad company a cause of forfeiture. See, also, Blakely *v.* Chicago, etc., R. Co., 46 Neb. 272, s. c. 64 N. W. R. 972 (sale an abandonment). In Roanoke Investment Co. *v.* Kansas City, etc., R. Co., 108 Mo. 50, s. c. 51 Am. & Eng. R. Cas. 426, 435, the court said: "It is not the policy of the law to permit a railroad to acquire a right of way to build a railroad, do some work on it, and then, after changing its route, and abandoning the easement, still claim and exercise the right to sell the right of way to another. The statute permitting it to acquire land limits it to its own corporate purposes. It is not allowed to enter the market and speculate in real estate in this manner. When it ceases to use the land for the legitimate purposes indicated in its charter, the lands revert to the owner." A lease of land to a coal company for a coal yard into which the railroad company extended a switch by which they delivered coal to the lessee was held not to constitute an abandonment. Roby *v.* New York Cent., etc., R. Co., 142 N. Y. 176, 36 N. E. 1053. Where a railroad company, not prohibited by statute from acquiring by purchase or condemnation the fee-simple of land, on abandoning for railroad purposes land whose fee it had bought conveys such fee to a purchaser for purposes unconnected with its road,—since there could be no reversion to the company's grantor, who had been paid full value for the fee, nor to his heirs —the title conveyed is at least good as against any private person. Chamberlain *v.* Northeastern R. Co., 41 S. Car. 399, 19 S. E. Rep. 743.

[1] City of Columbus *v.* Columbus, etc., R. Co., 37 Ind. 294. Where a street railroad having a double track took up one of its tracks and operated its line as a single track road for a period of ten years, it was held that its right to operate a double track was not thereby lost, but that the company could relay the track which it had taken up. Hestonville R. Co. *v.* Philadelphia, 89 Pa. St. 210. But see Hickox *v.* Chicago, etc., R. Co., 94 Mich. 237.

right of way by a railroad company, but the question whether abandonment exists in a given case must be determined by the particular circumstances of that case.[1] The relocation of part of a railroad in order to avoid real or seeming difficulties in the way of its construction upon the line as originally laid out amounts to an implied abandonment of a portion of the old line,[2] and permitting another company to occupy and use the land included within its location may estop a railroad company from denying that such location had been abandoned[3] as will also, in general, any acts by which a clear intention to abandon is shown.[4] The doctrine of abandonment will be applied with

[1] See Attorney-General *v.* Eastern R. Co., 137 Mass. 45; Henderson *v.* Central Pass. R. Co., 21 Fed. Rep. 358; City of Columbus *v.* Columbus, etc., R. Co., 37 Ind. 294; Central Iowa R. Co. *v.* M. & A. R. Co., 57 Iowa 249. In Muhle *v.* New York, etc., R. Co., 86 Tex. 459, the question of what constitutes abandonment is held to be one for the jury.

[2] Stacey *v.* Vermont Central R. Co., 27 Vt. 39; Hagner *v.* Pennsylvania, etc., R. Co., 154 Pa. St. 475, 57 Am. & Eng. R. Cas. 648; Louisville, etc., R. Co. *v.* Louisville, etc., R. Co., 2 Duv. (Ky.) 175. In Colorado, upon the relocation of a railroad, the old location reverts to the land-owners on payment by them to the railroad company of the damages paid by the company to secure such previous right of way. Gen. Stat. 1883, Col. Sec. 2795. A provision evidently enacted at the instigation of the railroads themselves. But see Hickox *v.* Chicago, etc., R. Co., 94 Mich. 237.

[3] Coe *v.* New Jersey Midland R. Co., 31 N. J. Eq. 105; Chesapeake, etc., Canal Co. *v.* Baltimore, etc., R. Co., 4 G. & J. (Md.) 1.

[4] Where a route was wholly disused for a period of ten years, during which the company operated a competing line, and no disposition to relay the road was manifested until ten years had elapsed, and until after there was a move made by another railway company to obtain the route and operate a street railway over it, the court held that the evidence established an intention to abandon. Henderson *v.* Central Pass. R. Co., (U. S. C. C. D. Ky.) 21 Fed. Rep. 358. In Central Iowa R. Co. *v.* M. & A. R. Co., 57 Iowa 249, the court held that making a survey of the unfinished portion of its line, and building station-houses and sidetracks along the part which had been built was not satisfactory evidence that a company, which had done nothing toward building the part of road that remained incomplete, suspended operations with a *bona fide* intention of resuming them at some time in the future. A failure to run passenger trains is not evidence of abandonment where the road is regularly used for hauling freight, and, because of competition, no passengers are offered to the company for transportation at a price that would be a reasonable compensation for the service. Commonwealth *v.* Fitchburg R. Co., 12 Gray (Mass.) 180. Leasing a parallel road for a period of ten years, and taking up its

greater strictness in a suit by the state against the company for non-user of its franchises than in a suit by another corporation or a private individual, claiming title to the abandoned right of way.[1]

track, and allowing its right of way to be fenced in by the owner of the adjoining land during all of said ten years, is not an abandonment, where the intention to resume the use of the right of way at the expiration of the lease is clearly proved. Durfee *v.* Peoria, etc., R. Co., 140 Ill. 435, 30 N. E. Rep. 686. Where a company had shown a disposition to abandon its proposed route, and, upon being remonstrated with by a committee of citizens from a town upon that route, replied through its chief engineer that the grade was so heavy that the road could not be built, where it then built its road over another route, did nothing toward building upon the land in dispute for a period of thirteen years, permitted the original owner and his assignee to make costly improvements, and even to fill up the cut which it had made without offering any protest, and finally conveyed its rights in the proposed route to another company, it was held that the evidence of abandonment was conclusive. The court said: "We think the intention to abandon and the absolute abandonment were consummated, the easement was lost, and the lands in question became discharged of this burden. Acts so decisive and conclusive in character as these have but one meaning. They indicate and prove a clear intention to abandon the right of way. Moore *v.* Rawson, 3 Barn. & Cr. 332; Liggins *v.* Inge, 7 Bing. 682; Louisville & N. R. Co. *v.* Covington, 2 Bush (Ky.) 526."

[1] State *v.* Atchison, etc., R. Co., 24 Neb. 143; Crolley *v.* Minneapolis, etc., R. Co., 30 Minn. 541. See, also, Chicago, etc., R. Co. *v.* Wright, 153 Ill. 307, s. c. 38 N. E. R. 1062. In the last case above cited, it was held that failure to complete the road within the time limited by its charter is not such an abandonment that it can be taken advantage of by third persons, in the absence of any action by the state.

CHAPTER XXXVII.

ACQUISITION OF RIGHT OF WAY.

§ 932. How right of way may be acquired.
933. Authority to purchase.
934. Who may convey.
935. Enforcement of agreement to sell—Specific performance.
936. When specific performance will not be enforced.
937. Effect of conveyance or release of damages.
938. What estate is taken.
939. Conditional conveyances.
940. Difference between conditions precedent and conditions subsequent—Effect of failure to perform conditions precedent.
941. Conditions subsequent—What is sufficient performance—Effect of failure to perform.
§ 942. Remedies of grantor for failure of company to perform conditions subsequent.
943. Construction of conditions subsequent—Compliance with conditions.
944. When equity will interfere in case of a breach of conditions subsequent.
945. Covenants running with the land.
946. Other covenants.
947. Dedication of land to the use of railroad.
948. Title by adverse possession.
949. Rights of railroad company acquired by entry under license.

§ 932. **How right of way may be acquired.**—A right of way may be acquired by a railroad company by purchase, by grant, by dedication, by adverse possession, by license or by condemnation under the power of eminent domain. We have already treated of the acquisition of a right of way by public grant, and we shall consider the subject of eminent domain in a subsequent chapter. In this chapter we shall consider the other modes of acquiring a right of way. The first is by purchase.

§ 933. **Authority to purchase.**—Railroads are generally authorized to purchase the necessary lands for a right of way and for the erection of station-houses, repair shops and other

accommodations for the transaction of their business,[1] or to take such land by gift[2] or as a consideration for any agreement which the company is empowered to make. Indeed, an attempt to purchase or agree upon the compensation is usually made a condition precedent to the exercise of the power of eminent domain.[3] But even without special statutory authority a railroad company could, if not expressly forbidden to do so, purchase such lands under its implied power as a corporation to acquire and hold whatever property is reasonably useful and convenient in attaining its legitimate ends.[4] A grantee in existence and capable of taking is ordinarily essential to every conveyance. Accordingly it has been held that, in the absence of special statutory authority, a railroad company can take nothing by a conveyance executed before its organization.[5]

[1] Stimson's Am. Stat. (1892), § 8702. In Indiana the guardian of an infant or of a person *non compos* may agree with the railroad company for the sale of a right of way across his ward's land, if the court will approve of such agreement. 2 R. S. 1894, § 5160.

[2] Stimson's Am. Stat. (1892), § 8702.

[3] See Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 116 Ind. 578, s. c. 19 N. E. R. 440; Terre Haute, etc., R. Co. *v.* Scott, 74 Ind. 29; Ells *v.* Pacific R. Co., 51 Mo. 200; Powers *v.* Hazelton, etc., R. Co., 33 Ohio St. 429; Brown *v.* Rome, etc., R. Co., 86 Ala. 206, s. c. 36 Am. & Eng. R. Cas. 571; Omaha R. R. *v.* Gerrard, 17 Neb. 587; O'Hara *v.* Pennsylvania R. Co., 25 Pa. St. 445; Pennsylvania R.Co. *v.* National Docks, etc., Co., (N. J.) 30 Atl. R. 183; *In re* Prospect Park, etc., R. Co., 67 N. Y. 371; Oregon, etc., R. Co. *v.* Oregon, etc., Co., 10 Ore. 444; Toledo, etc., R. Co. *v.* Detroit, etc., R. Co., 62 Mich. 564, s. c. 28 Am. & Eng. R. Cas. 272, 4 Am. St. R. 875; Cooley Const. Lim., § 528.

[4] Blanchard's Gun Stock, etc., Factory *v.* Warner, 1 Blatchf. (U. S.) 258; Old Colony R. Co. *v.* Evans, 6 Gray (Mass.) 25; Moss *v.* Averell, 10 N. Y. 449; Spear *v.* Crawford, 14 Wend. (N. Y.) 20; Ryan *v.* Leavenworth, etc., R. Co., 21 Kan. 365, 400; Page *v.* Heineberg, 40 Vt. 81; Thompson *v.* Waters, 25 Mich. 214, 227; Royal Bank of India's Case, L. R. 4 Ch. App. 252, L. R. 7 Eq. Cas. 91; 1 Bl. Com. 475, 478; 2 Kent's Com. 227; Morawetz on Priv. Corp. (2d ed.) 327. In some states, foreign railroad companies are forbidden to acquire a right of way within the state until duly incorporated therein. Constitution of Nebraska, (1875), Art. II, § 8; Constitution of Mississippi (1890), § 197. But it has been held that a non-resident corporation may acquire a right of way and land for depot grounds, yards and machine shops by contract, although prohibited from doing so by condemnation. St. Louis, etc., R. Co. *v.* Foltz, 52 Fed. R. 627. See American etc., Co. *v.* Minnesota, etc., Co. (Ill.) 42 N. E. R. 153.

[5] Gage *v.* New Market, etc., R. Co., 18 Q. B. (Eng.) 457. See Boston, etc., R. Co. *v.* Babcock, 3 Cush. (Mass.) 228, and compare Chattanooga, etc., Co. *v.* Evans, 66 Fed. R. 809. See *Ante*, § 409.

But it is competent for the legislature to authorize conveyances to be made to a corporation by name in advance of its organization as an inducement to the formation of the company, and such conveyances, upon ratification by the company after its organization, by entering upon the land and locating its line upon the same, become binding upon the grantor and the company.[1] So, of course, a conveyance may be taken by individuals in trust for the company when formed.[2] So, it has been held that a non-resident company which has no authority to condemn land may nevertheless acquire it by contract with the owner and that the latter by taking part in the condemnation proceedings and accepting the award is estopped to deny that there was an implied contract for the right of way.[3]

§ 934. **Who may convey.**—A conveyance to a railroad company is subject to the same restrictions and conditions as if made to a person not possessing the right of eminent domain. The grantor can ordinarily convey only his own interest. A deed from the husband does not convey the wife's land,[4] and

[1] Bravard *v.* Cincinnati, etc., R. Co., 115 Ind. 1. *Ante*, § 409.

[2] Burrow *v.* Terre Haute, etc., R. Co., 107 Ind. 432.

[3] St. Louis, etc., R. Co. *v.* Foltz, 52 Fed. R. 627.

[4] Galveston, etc., R. Co. *v.* Donahoo, 59 Tex. 128; Texas, etc., R. Co. *v.* Durrett, 57 Tex. 48; Pilcher *v.* Atchison, etc., R. Co., 38 Kan. 516. In Chicago, etc., R. Co. *v.* Anderson, 42 Kan. 297, it is held that the husband or wife had such an interest in the lands of the other as to be a necessary party to condemnation proceedings. But it has been held that where the husband is, in law, the absolute owner of all lands held in his name, and possessed of an absolute power of sale or alienation, that a statutory inhibition against the conveyance of any part of the "homestead" without the consent of the wife does not deprive the husband of the right to release to the railroad a right of way over which it has located its line. The railroad company could take the property by process of condemnation, if it were not released, in which case the damages assessed would be payable to the husband, and a release from him is merely a release of his claim for damages. Randall *v.* Texas Central R. Co., 63 Tex. 586, 22 Am. & Eng. R. Cas. 102. In Iowa, decisions to the same effect are put upon the ground that a release of a mere easement through a homestead for the construction of a railroad may be made by the husband without the consent of the wife if the occupancy of the right of way will not materially interfere with the use of the homestead premises as such. Chicago, etc., R. Co. *v.* Swinney, 38 Iowa 182. In Ottumwa, etc., R. Co. *v.* McWilliams, 71 Iowa 164, 29 Am. & Eng. R. Cas.

the same is true of a conveyance by the wife in which her husband does not join, where the husband is required by statute to join in all conveyances of land by the wife.[1] Nor does the deed of the mortgagor affect the mortgagee's interest.[2] A guardian can not bind the trust estate by his deed for a right of way unless it is made with the approval of the court.[3] Nor can an executor or administrator, unless he has a power to sell.[4] If, however, the owner of an equitable interest in lands conveys to a railroad a right of way across them and

544, the same court held that a railroad running through a forty-acre homestead tract, through a cut, the edge of which was ninety-five feet, and the deepest part, in which the track was laid, 144 feet from the dwelling-house, did not destroy the homestead or defeat its occupancy as such. This was an action on a contract by which the husband bound himself to convey a fee-simple title to a strip of ground for a right of way for the railroad. The court below directed the conveyance of an easement, and its decree was approved on appeal. In Canty *v.* Latterner, 31 Minn. 239, it was held that the husband has the sole right to damages awarded on condemnation of property for a railroad right of way through a homestead, from which the doctrine of Randall *v.* Texas Central R. Co. would logically follow. But this position is denied in Iowa, and the court holds that the damages awarded are a part of the homestead. Kaiser *v.* Seaton, 62 Iowa 463.

[1] Colorado Central R. Co. *v.* Allen, 13 Colo. 229, 44 Am. & Eng. R. Cas. 193. In this case it was held that the wife could convey her land to a railroad company without joining her husband under the act removing the disabilities of married women, even though the law required her husband to be joined with her in a suit by the railroad company to take the land under the power of eminent domain. In Texas, etc., R. Co. *v.* Durrett, 57 Tex. 48, it was held that the husband could not, without the concurrence and consent of the wife as prescribed by statute, grant to a railroad company a right of way across the separate property of the wife. In Pickert *v.* Ridgefield Park R. Co., 25 N. J. Eq. 316, it is held that the wife can not, after the company has entered into possession and begun the construction of its road under an agreement with her husband who held the record title to the property and who made the agreement with her knowledge, enjoin the further prosecution of the work on the ground that she holds an unrecorded deed to the property, of which the railroad company had no opportunity to acquire knowledge.

[2] Wade *v.* Hennessy, 55 Vt. 207.

[3] Indiana, etc., R. Co. *v.* Brittingham, 98 Ind. 294; Indiana, etc., R. Co. *v.* Allen, 100 Ind. 409; State *v.* Commissioners, 39 Ohio St. 58. See, also, Myers *v.* McGavock, 39 Neb. 843, s. c. 42 Am. St. R. 627.

[4] Rush *v.* McDermott, 50 Cal. 471; Tompkins *v.* Augusta, etc., R. Co., 21 S. Car. 420; Hankins *v.* Kimball, 57 Ind. 42.

afterward perfects his title, the new rights which he acquires will inure to the benefit of the railroad company.[1] A life tenant may convey the land during his tenancy for any use which does not injure the inheritance,[2] but he can not bind the reversioner.[3] As in the case of private individuals, the railroad company takes only the estate which its grantors had in the land. Thus the holder of a leasehold interest can not be divested of his estate by a conveyance by his landlord.[4] Neither can the title of the landlord be prejudiced by a deed from the tenant.[5] Where the company enters under a deed from one tenant in common, it has been held a trespasser as to the other tenants in common who do not join in the deed.[6]

[1] Indianapolis, etc., R. Co. *v.* Rayl, 69 Ind. 424.

[2] Chicago, etc., R. Co., *v.* Goodwin, 111 Ill. 273; Tutt *v.* Port Royal, etc., R. Co., 16 S. Car. 365; Hope *v.* Norfolk, etc., R. Co., 79 Va. 283. See, also, Bentonville R. *v.* Baker, 45 Ark. 252.

[3] Bradley *v.* Missouri Pac. R. Co., 91 Mo. 493; Hope *v.* Norfolk, etc., R. Co., 79 Va. 283; Bentonville R. *v.* Baker, 45 Ark. 252; Chicago, etc., R. Co. *v.* Goodwin, 111 Ill. 273; Austin *v.* Rutland, etc., R. Co., 45 Vt. 215. Where the reversioner, and her trustee know of the grant of a right of way across the estate, and acquiesce in the construction and operation of the railroad thereon for many years, the trustee can not recover the land in the lifetime of the life tenant upon allegations of forfeiture for waste. Tutt *v.* Port Royal, etc., R. Co., 20 S. Car. 110. Under the Canadian statute a tenant for life is authorized to convey to a railroad company, and the latter remains liable to the reversioner or remainder-man for the proportion of the price due to his interest. Midland Railroad *v.* Young, 22 Can. S. C. R. 190.

[4] Chattanooga, etc., R. Co. *v.* Brown, 84 Ga. 256, 43 Am. & Eng. R. Cas. 611; Burbridge *v.* New Albany, etc., R. Co., 9 Ind. 546; Crowell *v.* New Orleans, etc., R. Co., 61 Miss. 631.

[5] Toledo, etc., R. Co. *v.* Dunlap, 47 Mich. 456.

[6] Rush *v.* Burlington, etc., R. Co., 57 Iowa 201. But in Charleston, etc., R. Co. *v.* Leech, 33 S. Car. 175, 43 Am. & Eng. R. Cas. 588, it was held that a railroad company, which had built its road across a farm belonging to its grantor and her three children as tenants in common, was entitled to an order compelling a partition of the land as upon the application of the grantor, and directing that, if possible, the allotment to the grantor should include the strip over which the company had constructed its road; and that proceedings instituted by the minor children to recover damages to their interests should be enjoined pending the partition proceedings. The court says: "Suppose the proceedings instituted by the minors for compensation and damages are allowed to proceed to final judgment before any partition is made. Of course the plaintiff would be compelled to pay

Where the joint deed of husband and wife is necessary to convey her real estate, a release of damages by a married woman in which her husband does not join has been held inoperative for any purpose.[1] Contracts of this kind, like all other contracts, are not binding upon the company unless those assuming to act for the corporation had the requisite authority, or their acts are afterwards ratified.[2]

§ 935. **Enforcement of agreement to sell—Specific performance.**—The railroad company may make a binding agreement for the purchase of lands to be conveyed to it at some future time,[3] and may, in a proper case, enforce specific performance of the agreement on the part of the land-owner, under the

them the amount so adjudged. And suppose that after this, when partition is made, it shall turn out that the railroad does not go through or over any portion of the land allotted to the minors, but goes only over the land allotted to Mrs. Leech, would not this be the greatest injustice to the plaintiff? For, in such case, the plaintiff will have been required to pay for a right of way over land for which it holds a grant, and to persons who, as it turns out, are not entitled to a foot of the land over which such right of way has been paid for." But the doctrine of this case is manifestly unsound, since the construction of a railroad across the property may have damaged it to a greater or less extent, and such damage could not be taken into account by the commissioners and charged against the interest of the grantor in effecting a partition. Indeed, it is conceivable that a tract of land of which but a small part was taken, should be damaged by the construction of a railroad across it to an amount greater than the entire interest of the tenant in common by whom alone its construction was authorized. Upon the general proposition that one tenant in common can not convey to a stranger a specific portion of the common estate so as to prejudice the rights of his co-tenants in the part conveyed, see Shepardson *v.* Rowland, 28 Wis. 108; Mattox *v.* Hightshue, 39 Ind. 95; Marsh *v.* Holley, 42 Conn. 453; Jewett *v.* Stockton, 3 Yerg. (Tenn.) 492; Gates *v.* Salmon, 35 Cal. 576; Markoe *v.* Wakeman, 107 Ill. 251; Ballou *v.* Hale, 47 N. H. 347; Dennison *v.* Foster, 9 Ohio 126; Good *v.* Coombs, 28 Tex. 34.

[1] Delaware, etc., R. Co. *v.* Burson, 61 Pa. St. 369. But see Mills Em. Dom., § 111. Where the statute authorizes the railroad company to acquire title by a release from the "owner," the fact that the wife does not release her inchoate right of dower is immaterial. Chouteau *v.* Missouri Pacific R. Co., 122 Mo. 375, 22 S. W. R. 458.

[2] Reynolds *v.* Dunkirk, etc., R. Co., 17 Barb. (N. Y,) 613; Central Mills Co. *v.* New York, etc., R. Co., 127 Mass. 537.

[3] Dayton, etc., R. Co. *v.* Lawton, 20 Ohio St. 401; Ross *v.* Chicago, etc., R. Co., 77 Ill. 127.

rules governing decrees for specific performance of contracts in general.[1] These rules are briefly, but comprehensively, stated by Justice Story,[2] as follows: "An agreement, to be entitled to be carried into specific performance, ought to be certain, fair and just in all its parts. Courts of equity will not decree a specific performance in cases of fraud or mistake; or of hard and unconscionable bargains; or where the decree would produce injustice; or where it would compel the party to an illegal or immoral act; or where it would be against public policy; or where it would involve a breach of trust; or where a performance has become impossible; and generally, not in any cases where such a decree would be inequitable under all the circumstances."[3] If, for any reason, it would be inequitable to compel performance, the party will be left to his remedy at law.[4] But a decree for specific performance of a contract may be granted in a proper case, even though the plaintiff has a remedy at law.[5] A defective description of land in an agreement to convey may be cured by putting the vendee into possession of a tract to which the description may be made to apply.[6] In such a case, conveyance of the tract so delivered

[1] See, in general, Purinton *v.* Northern Illinois, etc., R. Co., 46 Ill. 297; Clarke *v.* Rochester, etc., R. Co., 18 Barb. (N. Y.) 350; Coe *v.* N. J. Midland R. Co., 31 N. J. Eq. 105; Boston, etc., R. Co. *v.* Babcock, 3 Cush. (Mass.) 228; Blanchard *v.* Detroit, etc., R. Co., 31 Mich. 43; South Wales R. Co. *v.* Wythes, 5 DeG., M. & G. 880; Holmes *v.* Eastern Counties R. Co., 3 K. & J. 675; Flanagan *v.* Gt. Western R. Co., L. R. 7 Eq. 116; Hood *v.* Northeastern R. Co., L. R. 5 Ch. 525.

[2] Story's Equity Juris., § 769.

[3] See note, 43 Am. & Eng. R. Cas. 645.

[4] Coe *v.* New Jersey Midland R. Co., 31 N. J. Eq. 105; Whitney *v.* New Haven, 23 Conn. 624. The land-owner, as well as the railroad company, may have his action for damages for breach of the contract by the other party. Morss *v.* Boston, etc., R. Co., 2 Cush. (Mass.) 536; Houston R. Co. *v.* McKinney, 55 Tex. 176; Hubbard *v.* Kansas City R. Co., 63 Mo. 68; Sherwood *v.* St. Paul, etc., R. Co., 21 Minn. 122; Mills Em. Dom., § 113.

[5] Eastern Counties Ry. Co. *v.* Hawkes, 5 H. L. Cas. 331; Blanchard *v.* Detroit, etc., R. Co., 31 Mich. 43.

[6] Purinton *v.* Northern Ill. R. Co., 46 Ill. 297; Ottumwa, etc., R. Co. *v.* McWilliams, 71 Iowa 164. See Burrow *v.* Terre Haute, etc., R. Co., 107 Ind. 432; Indianapolis, etc., R. Co. *v.* Rayl, 69 Ind. 424. In Hall *v.* Peoria, etc., R. Co., 143 Ill. 163, it was held that a court of equity would decree a specific performance of the contract, though it was not in writing, where

to the vendee may be enforced in a court of equity.[1] And the mere fact that the value of the land exceeds the price agreed upon will not prevent a decree for specific performance, where the construction of the road is a part of the consideration.[2] The right to compel a specific performance of an agreement is reciprocal, and the land-owner may, in a proper case, compel the company to perform a contract to purchase.[3] A contract signed by only one of the contracting parties can not be enforced by the signer,[4] but it may be enforced against him by the other party upon proof that he has acted upon it.[5]

one agreed to convey land to a railroad company for depot purposes, the consideration being paid and accepted, and the land staked out by the grantor and occupied by the railroad company for twenty years, with valuable improvements.

[1] Ottumwa, etc., R. Co. *v.* McWilliams, 71 Iowa 164. In this case suit was brought to enforce a contract to convey "a right of way" of a designated width "by deed in fee-simple," and the court decreed the conveyance of an easement for a right of way, and the supreme court affirmed the decree, saying: "The purposes for which the land was to be used, and the object of the plaintiff in securing the contract, was to secure a right of way, and not a fee-simple title to the land."

[2] Ottumwa, etc., R. Co. *v.* McWilliams, 71 Iowa 164. See Western R. Co. *v.* Babcock, 6 Met. (Mass.) 346.

[3] Viele *v.* Troy, etc., R. Co., 20 N.Y. 184; Inge *v.* Birmingham, etc., R. Co., 3 DeG., M. & G. 658; Williams *v.* St. George's Harbor Co., 2 DeG. & J. 547. The fact that an application to parliament was necessary to make a good title, was held not to be a valid objection to a decree for the specific performance by a railroad company of its contract for the purchase of lands. Eastern Counties R. Co., *v.* Hawkes, 5 H. L. Cas. 331, s. c. Hawkes *v.* Eastern Counties Ry. Co., 1 DeG., M. & G. 737. But where the location of the railway for which the land was taken has been abandoned, and it would be inequitable to require the company to pay a price for the land based upon damages which were never inflicted, the court will not decree a specific performance. Webb *v.* Direct London, etc., R. Co., 9 Hare 129, 1 DeG., M. & G. 521; Whitney *v.* New Haven, 23 Conn. 624.

[4] Boston, etc., R. Co. *v.* Bartlett, 10 Gray (Mass.) 384; Jacobs *v.* Peterborough, etc., R. Co., 8 Cush. (Mass.) 223.

[5] Old Colony R. Co. *v.* Evans, 6 Gray (Mass.) 25. But in Hall *v.* Peoria, etc., R. Co. 143 Ill. 163, it was held that a court of equity would decree a specific performance of the contract, though it was not in writing, where one agreed to convey land to a railroad company for depot purposes, the consideration being paid and accepted, and the land staked out by the grantor and occupied by the railroad company for twenty years with valuable improvements. East Tennessee, etc., R. Co. *v.* Davis, 91 Ala. 615, 8 So. R. 349.

§ 936. **When specific performance will not be enforced.**—Equity will not decree the specific performance of a contract to do a succession of acts extending through a long period of time, and requiring the exercise of skill and discretion in their performance.[1] Accordingly, the land-owner can not enforce specific performance of a contract made in consideration of the grant of a right of way, by which the railroad undertakes to build a branch road,[2] to operate a line of railroad,[3] to stop daily trains at a certain point,[4] or to erect fences and cattleguards

[1] Marble Co. *v.* Ripley, 10 Wall. (U. S.) 339; Ross *v.* Union Pac. R. Co., Woolw. (U. S.) 26; Blanchard *v.* Detroit, etc., R. Co., 31 Mich. 43; South Wales R. Co. *v.* Wythes, 1 K. & J. (Eng.) 186; Ranger *v.* Great Western R. Co., 1 Eng. R. & Canal Cas. 1.

[2] Peto *v.* Brighton, etc., R. Co., 1 H. & Miller 468; South Wales R. Co. *v.* Wythes, 1 K. & J. 186; Munro *v.* Wivenhoe, etc., R. Co., 4 De G., J. & S. 723; Heathcote *v.* North Staffordshire R. Co., 20 L. J. N. S. Ch. 82; Waring *v.* Manchester, etc., R. Co., 7 Hare 482; Ross *v.* Union Pacific R. Co., Woolw. (U. S.) 26. In Hoard *v.* Chesapeake, etc., R. Co., 123 U. S. 222, the court declined to enforce the specific performance of an agreement to build the railroad across certain lots through which it was granted a right of way.

[3] Port Clinton R. Co. *v.* Cleveland R. Co., 13 Ohio St. 544. In this case the P. C. Co. conveyed its line to the Cleveland Co. by lease in partial consideration of a covenant on the part of the Cleveland Co. to keep the road in operation. A railroad corporation, in consideration of a grant of the right of way through the premises of S., contracted to place beside their road, on said premises, a platform convenient for lading and unlading cars, and to take from that platform all produce to be shipped by S., and to bring and place on it all freight shipped by or for him to that place from any other point on their road, provided the railroad had three days' notice of any such freight to be transported. *Held*, that a bill in equity would not lie to compel a specific performance of the contract. Atlanta, etc., R. Co. *v.* Speer, 32 Ga. 550.

[4] Blanchard *v.* Detroit, etc., R. Co., 31 Mich. 43. In this case the court said: "If the writing embodies any promissory agreement at all, it is that when and so long as trains run on the road, one train each way shall *every day* stop at that place, and also that passengers and freight shall there be regularly received and discharged. * * * Waiving all considerations of possible future action by the government under the postal, war, police or other powers, inconsistent with any particular decree which might now be made, can the court see that in all coming time these requirements are carried out? Can it know or keep informed whether trains are running, and what accommodations are suitable to the public interest? Can it see whether the proper stoppages are made each day? Can it take notice, or legitimately and truly ascertain from day to day, what amounts to regularity in the receipt and discharge of passengers and freight? Can it have the means of deciding at all

and keep them in repair.[1] But it has been held that the breach of such a contract may be prevented by injunction.[2] Where the railroad company makes a contract with persons who are known to have no interest in the lands through which it desires to run by which such persons bind themselves to procure the owners to grant a right of way across such lands to the railroad, it can not have a decree for specific performance, but must be left to its action at law for damages. The court will not command the defendants to control the actions of other persons not before the court.[3]

§ 937. **Effect of conveyance or release of damages.**—The conveyance of land to a railroad for a right of way[4] or the execution of a release of damages for its construction[5] usually

times whether the due regularity is observed? Can it superintend and supervise the business, and cause the requirements in question to be carried out? If it can, and if it may do this in regard to one station on the road, it may with equal propriety upon a like showing do the same in regard to all stations on the road, and not only so, but in regard to all stations on all the present and future roads in the state."

[1] Cincinnati, etc., R. Co. *v.* Washburn, 25 Ind. 259; Columbus, etc., R. Co. *v.* Watson, 26 Ind. 50. But see opinion in Dayton *v.* Lewton, 20 Ohio St. 401; Aikin *v.* Albany, etc., R. Co., 26 Barb. (N. Y.) 289; Midland R. Co., *v.* Fisher, 125 Ind. 19. A covenant by a railroad company in consideration of the grant of a right of way to fence it and put in cattle-guards and crossings runs with the land, and is binding upon immediate and subsequent grantees, and passes to immediate and remote grantees of both the easement and the fee-simple. Toledo, etc., R. Co. *v.* Cosand, 6 Ind. App. Ct. R. 222. See, also, Lake Erie, etc., R. Co. *v.* Priest, 131 Ind. 413, s. c. 31 N. E. R. 77.

[2] It is now firmly established that the court will often interfere by injunction to restrain acts in violation of a lawful contract, although the nature of the contract is such that specific performance would not be enforced. Singer Sewing Machine Co. *v.* Union, etc., Co. 1 Holmes (U. S.) 253; W. U. Tel. Co. *v.* Union Pac. R. Co., 3 Fed. Rep. 423, 429; Coe *v.* Louisville, etc., R. Co., 3 Fed. Rep. 775; Wells, Fargo & Co. *v.* Oregon, etc., R. Co., 18 Fed. Rep. 517; Wells, Fargo & Co. *v.* Northern Pac. R. Co. 23 Fed. Rep. 469; Chicago, etc., R. Co. *v.* New York, etc., R. Co., 24 Fed. Rep. 516, 22 Am. & Eng. R. Cas. 265, and note on page 271. For instances where affirmative acts have been required similar to those prayed for in the cases cited in preceding notes, see *ante*, § 635, *et seq.*

[3] Chicago, etc., R. Co. *v.* Durant, 44 Minn. 361, 46 Am. & Eng. R. Cas. 488.

[4] St. Louis, etc., R. Co. *v.* Hurst, 14 Ill. App. 419; St. Louis, etc., R. Co. *v.* Walbring, 47 Ark. 330.

[5] Eaton *v.* Boston, etc., R. Co., 51 N. H. 504. See Trickey *v.* Schlader, 52 Ill. 78; Freeman *v.* Weeks, 45 Mich. 335.

has the same effect as the assessment and payment of damages under proceedings for condemnation, and the land-owner can claim no further damages for the legal and proper construction of the railroad.[1] The same effect has been given to a receipt by the owner for the amount of damages agreed upon.[2] It has been held that a release, to be binding, must have been executed by the owner while free from legal disabilities,[3] and must be free from fraud.[4] If it was made upon a condition, the performance of the condition must be shown.[5] It will be presumed, however, that a deed to the right of way, or a release of damages was executed in contemplation of the lawful and proper construction of the road, and the land-owner will be permitted to recover for damages occasioned by negligence and lack of skill,[6] such as a failure to provide necessary cul-

[1] Norris *v.* Vermont Central R. Co., 28 Vt. 99; Gilbert *v.* Savannah, etc., R. Co., 69 Ga. 396; Stodghill *v.* Chicago, etc., R. Co., 43 Iowa 26; Houston, etc., R. Co. *v.* Adams, 58 Tex. 476; International, etc., R. Co. *v.* Bost, 2 Tex. Ct. of App. (Civ. Cas.) 334; McCarty *v.* St. Paul, etc., R. Co., 31 Minn. 278; Chicago, etc., R. Co. *v.* Smith, 111 Ill. 363; Benson *v.* Chicago, etc., R. Co., 78 Mo. 504; McDonald *v.* Southern Cal. Ry. Co., 101 Cal. 206, s. c. 35 Pac. R. 643; North, etc., R. Co. *v.* Swank, 105 Pa. St. 555; Watts *v.* Norfolk, etc., R. Co., 39 W. Va. 196, s. c. 19 S. E. R. 521; Croft *v.* London & N. W. R. Co., 3 B. & S. 436, 113 Eng. C. L. R. 435. But it has been held that he is not barred from an action for damages caused by the construction of the road across the land of an adjoining proprietor. Eaton *v.* Boston, etc., R. Co., 51 N. H. 504; St. Louis, etc., R. Co. *v.* Harris, 47 Ark. 340. See, also, Egbert *v.* Lake Shore, etc., R. Co., 6 Ind. App. R. 350, s. c. 33 N. E. R. 659; Hartley *v.* Keokuk, etc., R. Co., 85 Iowa 455, s. c. 52 N. W. R. 352; Longworth *v.* Meriden, etc., R. Co., 61 Conn. 451, s. c. 23 Atl. R. 827.

[2] Rockland Water Co. *v.* Tillson, 69 Me. 255.

[3] Delaware, etc., R. Co. *v.* Burson, 61 Pa. St. 369.

[4] Rockford, etc., R. Co. *v.* Shunick, 65 Ill. 223.

[5] Rockford, etc., R. Co. *v.* Shunick, 65 Ill. 223. See, also, Humphreys *v.* Richmond, etc., R. Co., 88 Va. 431, s. c. 13 S. E. R. 985; Bredin *v.* Pittsburg, etc., R. Co., 165 Pa. St. 262, s. c. 31 Atl. R. 39. But compare Matson *v.* Port Townsend, etc., R. Co., 9 Wash. 449, s. c. 37 Pac. R. 705. In a recent case before the Missouri Supreme Court, it was held that the railway company's charter, by providing for relinquishment of the right of way by the "owner," impliedly made it unnecessary for the wife to join in the conveyance by reason of her inchoate right of dower, and it made no difference that the husband did not convey directly to the railroad, but by mesne conveyances. Chouteau *v.* Missouri Pac. Ry. Co., 122 Mo. 375, 22 S. W. R. 458, 30 S. W. R. 299.

[6] Hortsman *v.* Lexington, etc., R. Co., 18 B. Mon. (Ky.) 218; Ludlow *v.* Hudson River R. Co., 6 Lans. (N. Y.)

verts,[1] the diversion of a stream of water,[2] the negligent removal of earth by which the adjoining soil is deprived of support,[3] or the construction of its embankment in such a way as to unnecessarily flood the grantor's land,[4] or leave dirt and rock upon a part not granted.[5] It has also been held that where the statute requires a railroad company to fence its right of way, a conveyance of a right of way in consideration of a promise to fence is without consideration and does not prevent the grantor from afterwards having his damages assessed.[6] So, it was held, in another case, that a deed conveying a right of way, and releasing all damages by reason of the location and construction of the railroad did not release the grantor's right to a way of necessity across the land conveyed.[7]

§ 938. **What estate is taken.**—An estate in fee may be acquired by purchase, even though the corporation is created for a limited period, and the fee so acquired may be transferred to the successor or assignee of the company.[8] The question as to what estate is acquired by the railroad company under a grant must usually be settled by reference to the deed of conveyance.[9] And the mere fact that the railroad company's

128; Spencer *v.* Hartford, etc., R. Co., 10 R. I. 14; Hatch *v.* Vermont Central R. Co., 25 Vt. 49, 70; Jacksonville, etc., R. Co. *v.* Cox, 91 Ill. 500.

[1] Heath *v.* Texas, etc., R. Co., 37 La. Ann. 728.

[2] Stodghill *v.* Chicago, etc., R. Co., 43 Iowa 26.

[3] Ludlow *v.* Hudson River R. Co., 6 Lans. (N. Y.) 128. It has been held that a general release of damages covered all damages from the making of cuts necessary to the proper enjoyment of the right of way, and that the company is not bound to build walls to prevent the banks from falling. Hortsman *v.* Covington, etc., R. Co., 18 B. Mon. (Ky.) 218. See *ante*, § 977.

[4] St. Louis, etc., R. Co. *v.* Morris, 35 Ark. 622.

[5] Watts *v.* Norfolk, etc., R. Co., 39 W. Va. 196, s. c. 19 S. E. R. 521.

[6] Shortle *v.* Terre Haute, etc., R. Co., 131 Ind. 338, s. c. 30 N. E. R. 1084.

[7] New York, etc., R. Co. *v.* Railroad Comr's, 162 Mass. 81, s. c. 38 N. E. R. 27.

[8] Nicoll *v.* New York, etc., R. Co., 12 N. Y. 121; Holt *v.* City, etc., of Somerville, 127 Mass. 408; Hill *v.* Western Vermont R. Co., 32 Vt. 68. See, also, Coburn *v.* Coxeter, 51 N. H. 158; Page *v.* Heineberg, 40 Vt. 81.

[9] Cincinnati, etc., R. Co. *v.* Geisel, 119 Ind. 77. See, also, as to the width, Olive *v.* Sabine, etc., R. Co. (Tex.), 33 S. W. R. 139.

charter empowered it to acquire a greater estate than that which it contracted for does not affect its rights in the land purchased.[1] Under the Missouri statute, however, it has been held that a railroad company takes only an easement under a deed purporting to convey the fee.[2] Where the intention to convey a fee does not appear,[3] as in case of the conveyance of a "right of way" for the railroad through certain lands,[4] the company takes an easement only.[5] When the width of the

[1] Cincinnati, etc., R. Co. *v.* Geisel, 119 Ind. 77.

[2] Chouteau *v.* Missouri Pac. R. Co., 122 Mo. 375, s. c. 22 S. W. R. 458, 30 S. W. R. 299.

[3] Junction R. Co. *v.* Ruggles, 7 Ohio St. 1.

[4] Cincinnati, etc., R. Co. *v.* Geisel, 119 Ind. 77; Blakely *v.* Chicago, etc., R. Co., 46 Neb. 272, s. c. 64 N. W. R. 972. Where the deed conveys the land absolutely "for railroad purposes," it has been said that the railroad company takes a base or qualified fee, liable to be divested whenever the land is devoted to other uses. State *v.* Brown, 27 N. J. L. 13. A deed to a railroad company entitled "Deed of Right of Way," but in the form of a regular warranty deed, will convey the fee and not merely an easement. Ballard *v.* Louisville, etc., N. R. Co. (Ky.), 5 S. W. R. 484. A contract releasing to a railroad company a right of way of indefinite size and location, through certain land, and agreeing to convey a strip of ground by metes and bounds, by deed in fee-simple, when desired, has, however, been held to be a contract for the conveyance of an easement merely and not the fee. Ottumwa, C. F. & St. P. R. Co. *v.* McWilliams, 71 Iowa 164, 32 N. W. R. 315.

[5] In Williams *v.* Western Union R. Co., 50 Wis. 71, 5 Am. & Eng. R. Cas. 290, Judge Orton, speaking for the court, said: "'Right of way,' in its strict meaning, is 'the right of passage over another man's ground;' and in its legal and generally accepted meaning, in reference to a railway, it is a mere easement in the lands of others, obtained by lawful condemnation to public use or by purchase. (Mills on Em. Dom., § 110.) It would be using the term in an unusual sense, by applying it to an absolute purchase of the fee-simple of lands to be used for a railway or any other kind of way." See Stuyvesant *v.* Woodruff, 21 N. J. L. 133; Bodfish *v.* Bodfish, 105 Mass. 317; Blakely *v.* Chicago, etc., R. Co., (Neb.) 64 N. W. R. 972; Wild *v.* Deig, 43 Ind. 455; Lake Erie, etc., Railroad Co. *v.* Ziebarth, 6 Ind. App. 228, s. c. 33 N. E. R. 256; Pfaff *v.* Terre Haute, etc., R. Co., 108 Ind. 144; Jones *v.* Van Bochove, (Mich.) 61 N. W. R. 342. Where a land-owner conveys to a railroad company a right of way, and the property and franchises of the company to which the conveyance is made are subsequently mortgaged and sold on a decree of foreclosure, the railroad company which becomes the owner of such property and franchises, and constructs a railroad on the right of way, will be entitled to the easement granted to the company by which the mortgage was executed. Columbus, H. & G. Ry. Co. *v.* Braden, 110 Ind. 558, 11 N. E. R. 357.

right of way is not specified in the grant the company will, in general, acquire only so much as is actually taken and used,[1] or is reasonably necessary,[2] and the acts and declarations of the parties are admissible to determine the width.[3] There is much reason, however, for holding that where the width is not specified and there is nothing either in the contract or in the acts of the parties to indicate that less than the statutory width was granted, it will be presumed that a right of way of the full statutory width was intended.[4] Where land is conveyed to a railroad company in fee simple, the company may devote it to any use to which a private owner might put his land without incurring a liability to the adjoining land-owner. Thus it is held that it may lease a portion of the land over which its track runs, for use as a lumber yard, and may permit the erection of necessary buildings for handling and storing lumber, where such a use of its land will not interfere with the transaction of its business as a common carrier.[5]

§ 939. **Conditional conveyances.**—A railroad company may, in general, accept a conveyance of land upon any conditions

[1] Fort Wayne, etc., Co. *v.* Sherry, 126 Ind. 334; Lake Erie, etc., R. Co. *v.* Michener, 117 Ind. 465. See, also, Morgan *v.* Railroad Co., 96 U. S. 716; Nashville, etc., R. Co. *v.* Hammond, 104 Ala. 191, s. c. 15 So. R. 935.

[2] See Grafton *v.* Moir, 130 N. Y. 465, s. c. 29 N. E. R. 974; Jones *v.* Erie, etc., R. Co., 169 Pa. St. 333, 32 Atl. R. 535.

[3] Indianapolis, etc., R. Co. *v.* Lewis, 119 Ind. 218; Indianapolis, etc., R. Co. *v.* Reynolds, 116 Ind. 356. See, also, Jennison *v.* Walker, 11 Gray (Mass.) 423; Onthank *v.* Lake Shore, etc., R. Co., 71 N. Y. 194.

[4] See Hargis *v.* Kansas City, etc., R. Co., 100 Mo. 210; Indianapolis, etc., Railway Co. *v.* Rayl, 69 Ind. 424; Campbell *v.* Indianapolis, etc., Railroad, 110 Ind. 490; Prather *v.* Western Un. Tel. Co., 89 Ind. 501; Duck River, etc., R. Co. *v.* Cochrane, 3 Lea (Tenn.) 478; Philadelphia, etc., R. Co. *v.* Obert, 109 Pa. 193; Morris, etc., R. Co. *v.* Bonnell, 34 N. J. L. 474.

[5] Calcasieu Lumber Co. *v.* Harris, 77 Tex. 18, 43 Am. & Eng. R. Cas. 570. The company is not liable for the expense of removing a building on the right of way purchased by it. Delsol *v.* Spokane, etc., R. Co. (Idaho), 40 Pac. R. 59. But a grant of a right of way 100 feet wide, with the right to use such additional land as may be necessary for the construction and maintenance of the road-bed, does not give the right to permanently appropriate and cut timber on the land outside of the right of way. Gulf, etc., R. Co. *v.* Richards, (Tex.) 32 S. W. R. 96.

that may lawfully be annexed to an ordinary grant.[1] Where title is not expressly made to depend upon the performance of certain conditions, stipulations contained in a deed will usually be construed to amount to covenants only, since conditions by which title is prevented from vesting, or by which forfeitures are incurred, are not favored in law.[2] But provisos[3] and recitals of the considerations for which the deed was made[4] have been construed to amount to implied conditions, upon a breach of which the land would revert to the grantors.[5] And

[1] Hammond *v.* Port Royal, etc., R. Co., 15 S. Car. 10.

[2] Midland R. Co. *v.* Fisher, 125 Ind. 19; Jeffersonville, etc., R. Co. *v.* Barbour, 89 Ind. 375; Georgia Southern R. Co. *v.* Reeves, 64 Ga. 492. If it be doubtful whether a clause in a deed is a condition or a covenant the courts will incline against the condition, for a covenant is far preferable. Roanoke Invest. Co. *v.* Kansas City, etc., R. Co., 108 Mo. 50, 51 Am. & Eng. R. Cas. 426, 433, quoting 4 Kent's Com. 132.

[3] Taylor *v.* Cedar Rapids, etc., R. Co., 25 Iowa 371; Southard *v.* Central R. Co., 26 N. J. L. 13. In this latter case, the owner of land conveyed a part thereof for the purposes of a depot and passenger refreshment room by a deed containing a proviso that if the railroad company should erect and use any other buildings within a mile for the same purposes, the deed should be avoided. In Rathbone *v.* Tioga Navigation Co., 2 W. & S. (Pa.) 74, land was conveyed to a railroad company upon which to build its road, "provided the same does not interfere with buildings on the grantor's land," and it was held that the company took the land subject to an obligation to construct its road so far away from said buildings as not to endanger them or prevent their usefulness.

[4] Indianapolis, etc., R. Co. *v.* Hood, 66 Ind. 580. In this case the deed recited that it was made "for and in consideration of the permanent location and construction of the depot of said railroad" thereon, and the court held that upon the removal of the depot by the railroad, the land reverted to the grantor. But see *contra*, East Line R. Co. *v.* Garrett, 52 Tex. 133; Blanchard *v.* Detroit, etc., R. Co., 31 Mich. 43.

[5] In Aikin *v.* Albany, etc., R. Co., 26 Barb. (N. Y.) 289, the owner of a farm granted to a railway company a right of way through it by a deed which contained, *inter alia*, the following clause: "The said Albany Northern Railroad is to construct and maintain two good farm crossings." The court intimated the opinion that this was properly a condition, but, in order to aid the grantor, it was construed in that case to amount to a covenant only. In Donisthorpe *v.* Fremont, etc., R. Co., 30 Neb. 142, 43 Am. & Eng. R. Cas. 583, it was held that parol evidence was admissible to annex the condition that the property should be used only for the main line and not for side tracks, to a deed which expressly stipulated that the grantor thereby released the grantee, its successors and assigns, from all costs, expenses and damages sustained by the construction, building and use of the railroad. And the grantor was held entitled to damages for the construc-

if it clearly appears by the form and terms of a clause in a deed that it is, in legal effect, a condition, the fact that the parties make use of the word "covenant" will not alter its legal character.[1]

§ 940. **Difference between conditions precedent and conditions subsequent—Effect of failure to perform conditions precedent.**—Where an act is required to be done before the title vests, it is a condition precedent,[2] and the company can assert no rights under the deed without showing the performance of the condition.[3] But, "if the act or condition required do not necessarily precede the vesting of the estate, but may accompany or follow it, and if the act may as well be done after as before the vesting of the estate; or, if from the nature of the act to be performed, and the time required for its performance, it is evidently the intention of the parties that the estate shall vest, and the grantee perform the act after taking possession, then the condition is subsequent."[4] The same words have been construed differently, and the question whether a condition, precedent or subsequent, is created, is always one of intention.[5] The distinction between conditions precedent and conditions subsequent, while difficult to define, is very important, since a condition precedent must be fulfilled before the title vests, and in case it be impossible or unlawful, or the grantee neglect to perform, the title remains with the grantor.[6] But in case of a grant upon condition subsequent, the title vests at once, and in case an illegal condition is imposed, the condition is treated as a nullity and the estate is held to be ab-

tion of side tracks upon the right of way.

[1] Blanchard *v.* Detroit, etc., R. Co., 31 Mich. 43.

[2] Nicoll *v.* New York, etc., R. Co., 12 N. Y. 121.

[3] Crosbie *v.* Chicago, etc., R. Co., 62 Iowa 189, 14 Am. & Eng. R. Cas. 463.

[4] Underhill *v.* Saratoga R. Co., 20 Barb. 456; Parmelee *v.* Oswego, etc., R. Co., 6 N. Y. 74.

[5] Finlay *v.* King, 3 Pet. (U. S.) 346, 374, per Marshall, Ch. J.; Hotham *v.* East India Co., 1 T. R. 638; Parmelee *v.* Oswego, etc., R. Co., 6 N. Y. 74.

[6] 2 Washburn on Real Property 8, citing Co. Litt. 206; Co. Litt. 218*a*; Vanhorne's Lessee *v.* Dorrance, 2 Dall. 304; Taylor *v.* Mason, 9 Wheat. 325; Mizell *v.* Burnett, 4 Jones L. 249; Martin *v.* Ballou, 13 Barb. (N. Y.) 119; Bertie *v.* Falkland, 2 Freem. 222.

solute.[1] Thus where land is deeded to a railroad company upon condition that it shall locate its road upon a certain route, it has been held that the company acquires no rights under the deed until the route is located in substantial compliance with the condition.[2] After performance on the part of the grantee, it is entitled to the property in the same manner that it would be after payment in case of an ordinary contract of purchase.[3]

§ 941. Conditions subsequent—What is sufficient performance—Effect of failure to perform.—Conveyances of land to railroad companies are very frequently made upon conditions subsequent, as that the property shall be used for railroad purposes,[4] that a depot shall be permanently located thereon,[5] that

[1] Story's Eq. Juris. 288; Co. Litt. 206, *a* and *b*; Co. Litt. 217 *a*; Bertie *v.* Falkland, 2 Freem. 220; 2 Washburn on Real Property 8; 2 Bl. Com. 156, 157. But the breach of a condition subsequent may work a forfeiture. Pierce on Railroads, 136; Indianapolis, etc., R. Co. *v.* Hood, 66 Ind. 580.

[2] Crosbie *v.* Chicago, etc., R. Co., 62 Iowa 189; Detroit, etc., R. Co. *v.* Forbes, 30 Mich. 165.

[3] Chicago, etc., R. Co. *v.* Boyd, 4 W. Rep. 137; Borders *v.* Murphy, 78 Ill. 81.

[4] Boone v. Clark, 129 Ill. 466, s. c. 21 N. E. R. 850. A conveyance to a railroad company of the right of way for its road, the consideration for which is shown to be the construction and permanent maintenance of the road upon the line so granted, and the erection and maintenance of its depot upon adjoining lands, is a condition subsequent, and if such depot and tracks be afterward abandoned, it is a breach of the condition, which defeats the grant. Cleveland, etc., R. Co. *v.* Coburn, 91 Ind. 557, 17 Am. & Eng. R. Cas. 37. Where a grant was of land to be used for the raceway of a mill, it was held to be no breach of the condition that it was also used for a towpath, or that a building encroached upon it, so long as it continued to be used as a raceway. McKelway *v.* Seymour, 29 N. J. L. 321. See cases in next note. The limitation that the estate is to exist only so long as the property is used for a specified purpose is distinguished from the ordinary condition subsequent, inasmuch as it marks the limit or boundary beyond which the estate conveyed can not continue to exist. Mayor, etc., City of Macon *v.* East Tennessee, etc., R. Co., 82 Ga. 501, 40 Am. & Eng. R. Cas. 462.

[5] Taylor *v.* Cedar Rapids, etc., R. Co., 25 Iowa 371; New York, etc., R. Co. *v.* Stanley, 34 N. J. Eq. 55; Vicksburg, etc., R. Co. *v.* Ragsdale, 54 Miss. 200; Indianapolis, etc., R. Co. *v.* Hood, 66 Ind. 580; Jeffersonville, etc., R. Co. *v.* Barbour, 89 Ind. 375; Horner *v.* Chicago, etc., R. Co., 38 Wis. 165; Close *v.* Burlington, etc., R. Co., 64 Iowa 149, 17 Am. & Eng. R. Cas. 33. See note 38 Am. & Eng. R. Cas. 711; Jessup *v.* Grand Trunk R. Co., 28 Grant's

the railroad shall be constructed across the grantor's land upon a particular route,[1] or that the company maintain crossings and cattle-guards,[2] or build a dam or embankment,[3] or keep open certain portions of the land conveyed as a public street,[4] or keep up a certain system of drainage,[5] or furnish the grantor and his family annual passes during their lives.[6] The perform-

Ch. (Up. Can.) 583. Contracts for the location of a depot at a certain point are generally sustained where the contract does not prohibit the location of depots at other points, and the agreement is fairly made for a valuable consideration. Louisville, etc., R. Co. *v.* Sumner, 106 Ind. 55; Vicksburg, etc., R. Co. *v.* Ragsdale, 54 Miss. 200; Kansas Pac. R. Co. *v.* Hopkins, 18 Kan. 494; McClure *v.* Missouri River, etc., R. Co., 9 Kan. 373; Kinealy *v.* St. Louis, etc., R. Co., 69 Mo. 658; Missouri Pac. R. Co. *v.* Tygard, 84 Mo. 263; Cedar Rapids, etc., R. Co. *v.* Spafford, 41 Iowa 292; Courier *v.* Concord R. Co., 48 N. H. 321; Texas, etc., R. Co. *v.* Robards, 60 Tex. 545; Cumberland Valley R. Co. *v.* Baab, 9 Watts (Pa.) 458. But some courts have held that an agreement by which a railroad company undertakes to locate and maintain a station at a particular point is void, as being contrary to the public policy which demands that stations shall be located with a view to the best interests of the public and of the stockholders, and can not be hampered by private contracts. Mobile, etc., R. Co. *v.* People, 132 Ill. 559; Pacific R. Co. *v.* Seely, 45 Mo. 212.

[1] Douglass *v.* New York, etc., R. Co., Clarke's Ch. (N. Y.) 174; Cleveland, etc., R. Co. v. Coburn, 91 Ind. 557. A condition in a deed to a railroad company providing that the same shall be void unless the railroad shall be built upon a particular route, and one of its stations located at a particular point, is not void as being opposed to public policy. McClure *v.* Missouri, etc., R. Co., 9 Kan. 373. See Chicago, etc., R. Co. *v.* Estes, 71 Iowa 603, 30 Am. & Eng. R. Cas. 276, as to what constitutes a contract upon such a condition.

[2] Dayton *v.* Lewton, 20 Ohio St. 401. Where the maintenance of fences between the railroad right of way and the adjoining property is expressly made a condition of holding title to the land, a failure to maintain the fences will defeat the title. Emerson *v.* Simpson, 43 N. H. 475; Hartung *v.* Witte, 59 Wis. 285.

[3] Underhill *v.* Saratoga, etc., R. Co., 20 Barb. (N. Y.) 455.

[4] Such a condition is not void as imposing upon the company a duty or trust inconsistent with its business and foreign to the objects for which it was formed. Tinkham *v.* Erie R. Co., 53 Barb. (N. Y.) 393.

[5] Hammond *v.* Port Royal, etc., R. Co., 15 S. Car. 10, 11 Am. & Eng. R. Cas. 352.

[6] Ruddick *v.* St. Louis, etc., R. Co., 116 Mo. 25, 57 Am. & Eng. R. Cas. 290. In this case it was held that the railroad company's successor took subject to the condition annexed to its deed, and that, upon its failure to furnish the passes, the land-owner could maintain an action to recover the land. But see Dickey *v.* Kansas City, etc., R. Co., 122 Mo. 223, s. c. 26 S. W. R. 685, and *post*, § 946.

ance of a condition subsequent may be excused when its performance becomes impossible by the act of God,[1] or the company is prevented by the grantor from performing it.[2] Performance is also unnecessary where the condition is opposed to positive law or public policy,[3] as in case the conveyance is made upon condition that no stations shall be established within a certain distance of one to be located upon the land conveyed.[4]

§ 942. **Remedies of grantor for failure of company to perform conditions subsequent.**—In case of a failure on the part of the grantee to comply with a condition subsequent in the deed the grantor may re-enter and maintain ejectment to recover the property,[5] or he may waive the forfeiture, and sue for damages,[6] or, in some cases, he may bring a bill for specific

[1] Stuyvesant *v.* Mayor of New York, 11 Paige Ch. (N. Y.) 414.

[2] Jones *v.* Chesapeake, etc., R. Co., 14 W. Va. 514.

[3] 2 Washburn on Real Property, 15.

[4] Williamson *v.* Chicago, etc., R. Co., 53 Iowa 126; St. Louis, etc., R. Co. *v.* Mathers, 71 Ill. 592, 104 Ill. 257; St. Joseph, etc., R. Co. *v.* Ryan, 11 Kan. 602; Holladay *v.* Patterson, 5 Ore. 177. In McClain *v.* Chicago, etc., R. Co., 90 Iowa 646, 57 N. W. Rep. 594, it was held that the provisions of the code declaring that eight years' non-user of a railroad right of way shall work a reversion does not forbid forfeiture for abandonment by non-user in accordance with the conditions of a deed.

[5] 2 Washburn on Real Property, 11; Indianapolis, etc., R. Co. *v.* Hood, 66 Ind. 580. In Close *v.* Burlington, etc., R. Co., 64 Iowa 149, it was held that a railroad company did not, by accepting a conveyance of land in consideration of one dollar "and the permanent location of a depot on the grounds conveyed" render itself liable in damages for a failure to maintain the depot; but that this provision was a condition subsequent, for a breach of which the estate could be forfeited. But see Hubbard *v.* Kansas City, etc., R. Co., 63 Mo. 68. The grantor can only enter for breach of an entire condition, and such an entry affects the entire tract conveyed. And where a grantor parts with his right of re-entry as to part of a tract, the condition is destroyed, Tinkham *v.* Erie R. Co., 53 Barb. (N. Y.) 393.

[6] Rush *v.* Burlington, etc., R. Co., 57 Iowa 201; Gray *v.* Burlington, etc., R. Co., 37 Iowa 119; Joliet, etc., R. Co. *v.* Jones, 20 Ill. 221; Kankakee, etc., R. Co. *v.* Fitzgerald, 17 Ill. App. 525; Baker *v.* Chicago, etc., R. Co., 57 Mo. 265. See Hubbard *v.* Kansas City, etc., R. Co., 63 Mo. 68; Thornton *v.* Sheffield, etc., R. Co., 84 Ala. 109, s. c. 4 So. R. 197. In Jones *v.* St. Louis, etc., R. Co., 79 Mo. 92, the court held that the proper remedy of a grantor of land upon condition that it be used for depot purposes alone, was to re-enter for condition broken in the event

performance by the railroad company of its implied agreement to perform the conditions.[1] A waiver by the grantor of a breach of the conditions in a deed relieves the estate from the forfeiture, even though it does not affect the grantor's right to have the condition performed.[2] Thus where a grant to a railroad company of land was upon condition that the road should be completed by a certain time, and the company failed to complete it before the time expired; and after that, the grantor, knowing the fact, suffered the company to go on and incur expenses in constructing their road, and made no objection, it was held to be a waiver of the condition and forfeiture.[3] A breach of a condition subsequent can only be taken advantage of by the grantor or his heirs,[4] and a person to whom he has conveyed his interests either before or after the breach acquires no rights as against the company.[5] The general rule is that a forfeiture for this cause can only be enforced by an actual entry[6] with intent to defeat the estate.[7] But in an Iowa case, where a right of way was deeded to a railroad company upon condition that the company's depot should be located near a certain point, and the condition was not com-

of its being devoted to other purposes, and not by suit to set aside the deed.

[1] Aikin *v.* Albany, etc., R. Co., 26 Barb. (N. Y.) 289; Gray *v.* Burlington, etc., R. Co., 37 Iowa 119; Hubbard *v.* Kansas City, etc., R. Co., 63 Mo. 68. But see Hoard *v.* Chesapeake, etc., R. Co., 123 U. S. 222.

[2] 2 Washburn on Real Property, 15.

[3] Ludlow *v.* New York, etc., R. Co., 12 Barb. (N. Y.) 440; Baker *v.* Chicago, etc., R. Co., 57 Mo. 265.

[4] 2 Washburn on Real Property, 11, 14. This rule has been changed by statute in some of the states in favor of devisees and some others. Southard *v.* Central R. Co., 26 N. J. L. 13; McKissick *v.* Pickle, 16 Pa. St. 140; Hayden *v.* Stoughton, 5 Pick. (Mass.) 528; Austin *v.* Cambridgeport Parish, 21 Pick. (Mass.) 215. In Rice *v.* Boston, etc., R. Co., 12 Allen (Mass.) 141, it is held that a son of the grantor, to whom he conveyed the adjoining property by deed, could not take advantage of the breach of a condition, since he claimed by grant and not by descent. Hooper *v.* Cummings, 45 Me. 359.

[5] Nicoll *v.* New York, etc., R. Co., 12 N. Y. 121; Paul *v.* Connersville, etc., R. Co., 51 Ind. 527; Rice *v.* Boston, etc., R. Co., 12 Allen (Mass.) 141; Hooper *v.* Cummings, 45 Me. 359; Underhill *v.* Saratoga, etc., R. Co., 20 Barb. (N. Y.) 455, 4 Kent's Com. 129.

[6] Fonda *v.* Sage, 46 Barb. (N. Y.) 109; Hall *v.* Pickering, 40 Me. 548.

[7] Rollins *v.* Riley, 44 N. H. 9; Ruddick *v.* St. Louis, etc., R. Co., 116 Mo. 25, 57 Am. & Eng. R. Cas. 290.

plied with, it was held that the breach of this condition forfeited the title, and that, the estate being less than a freehold, no formal act of entry was necessary to enable the land-owner to proceed under the statute for an assessment of his damages.[1]

§ 943. **Construction of conditions subsequent—Compliance with conditions.**—Conditions subsequent are not favored in law,[2] but are strictly construed, and a substantial compliance with the conditions is generally held sufficient.[3] Thus, a railroad company will hold a right of way conveyed to it for the location, construction and maintenance of its road, and conditioned upon the continued maintenance and operation thereof, provided it builds and operates the road across the land conveyed; and the fact that it does not build a road the full extent of its charter route will not work a forfeiture.[4] A conveyance recited that the ground was deeded "expressly for the use and purpose of depot grounds" for a railroad company, and provided that in case the grantee "shall fail to erect buildings and occupy said ground for the use and purpose above mentioned," it should revert to the donor. The buildings were erected and the ground used for depot purposes for thirty-three years, after which the depot was removed to another location, and the tract in question ceased to be used for such purposes. The court held that the condition had been fully performed

[1] Taylor *v.* Cedar Rapids, etc., R. Co., 25 Iowa 371.

[2] Hammond *v.* Port Royal, etc., R. Co., 15 S. Car. 10, 11 Am. & Eng. R. Cas. 352, 369; Jeffersonville, etc., R. Co. *v.* Barbour, 89 Ind. 375; Ellis *v.* Elkhart Car Works Co., 97 Ind. 247; Sumner *v.* Darnell, 128 Ind. 38.

[3] Hoyt *v.* Kimball, 49 N. H. 322; Voris *v.* Renshaw, 49 Ill. 425. Locating the depot upon a five-acre tract of land which touched the corner of a designated field was held to be a substantial compliance with a condition requiring the depot to be located on a five-acre tract adjoining that field. Fitzgerald *v.* Britt, 43 Iowa 498. Building a depot a quarter of a mile from the edge of the town plat, and stopping trains there, was held a compliance with a condition that a certain town should be made a station on the road. Jenkins *v.* Burlington, etc., R. Co., 29 Iowa 255; Meader *v.* Lowry, 45 Iowa 684. And see Cedar Falls, etc., R. Co. *v.* Rich, 33 Iowa 113; Courtright *v.* Stickler, 37 Iowa 382.

[4] Morrill *v.* Wabash, etc., R. Co., 96 Mo. 174, 36 Am. & Eng. R. Cas. 425.

and that the title of the railroad company was absolute.[1] But a mere colorable compliance with a condition that the road over a certain tract shall be used and operated as a railway, by using it for the storage of cars, while trains are run over another route, is not sufficient to prevent a forfeiture.[2] "In determining whether a condition subsequent in a deed has been broken or not, construction is required in nearly every case. But little assistance can be had from examining other cases, except to ascertain rules for interpretation. Each case differs so widely from all others that even rules of construction can not be wholly depended upon. The application of good sense and sound equity are as much to be relied upon as subtle and artificial rules of construction. The point, of course, to be arrived at in every case, is to ascertain the intention of the parties."[3]

§ 944. **When equity will interfere in case of a breach of conditions subsequent.**— Equity will not, as a general rule, lend its aid to enforce a forfeiture for the breach of a condition subsequent, but will sometimes cancel a deed as a cloud upon the grantor's title, where the right to a forfeiture is clear, and there is no adequate remedy at law.[4] Even after entry for condition broken the railroad company has a right to procced under the statute to condemn the land it occupies for a right

[1] Jeffersonville, etc., R. Co. *v.* Barbour, 89 Ind. 375. The court said: "The condition of the grant in the present case was in effect that the grantee should locate and occupy the lots as depot grounds. No time was mentioned, and the language does not, strictly construed, mean perpetuity. We think thirty years' occupancy of the lots as depot grounds was a substantial compliance with the condition."

[2] Hickox *v.* Chicago, etc., R. Co., 78 Mich. 615, 43 Am. & Eng. R. Cas. 613. But see dissenting opinion of Judges Campbell and Champlin, to the effect that the words "used and operated" in the deed under consideration referred to the railroad as a whole. And that the fact that the track laid upon this particular tract was used for switching purposes, while the cars were run over a parallel track, passing through the stations nearest to the plaintiff's farm, was not a breach of the condition.

[3] Jeffersonville, etc., R. Co. *v.* Barbour, 89 Ind. 375, 379, per Hammond, J.

[4] Memphis, etc., R. Co. *v.* Neighbors, 51 Miss. 412; Vicksburg, etc., R. Co. *v.* Ragsdale, 54 Miss. 200; Stringer *v.* Keokuk, etc., R. Co,, 59 Iowa 277, s. c. 13 N. W. R. 308.

of way.[1] And, in view of the hardship attending the ejectment of a railroad company from any part of its right of way, equity will enjoin proceedings to oust it from land upon which it has in good faith constructed its road, until it can have an opportunity to acquire title by condemnation.[2]

§945. **Covenants running with the land.**—An important difference between conditions and covenants is in the remedy allowed for a breach of them, and it has been held that words which may import either will be construed as one or the other, according to which construction is necessary that the party for whose benefit the provision is made may have a remedy.[3] The breach of a covenant involves the payment of damages only, and because of the hardship which usually attends the enforcement of a forfeiture, and the consequent aversion to forfeitures on the part of the courts,[4] stipulations and agreements contained in deeds are usually construed as covenants running with the land where complete relief can be given by a decree for specific performance or an award of damages, or where the language of the deed admits of a doubt as to whether a condition is intended.[5] Thus stipulations in the deed that the grantee shall fence its right of way[6] or construct farm cross-

[1] New York, etc., R. Co. *v.* Stanley, 35 N. J. Eq. 283, 10 Am. & Eng. R. Cas. 345.

[2] South & N. Ala. R. Co. *v.* Alabama, etc., R. Co., 102 Ala. 236, 14 So. R. 747; New York, etc., R. Co. *v.* Stanley, 35 N. J. Eq. 283; Harrington *v.* St. Paul, etc., R. Co., 17 Minn. 215; Jones *v.* Great Western R. Co., 1 Eng. Ry. & Canal Cas. 684. In Pittsburgh, etc., R. Co. *v.* Bruce, 102 Pa. St. 23, the court said, that an injunction might be obtained to restrain the execution of a judgment in ejectment that had been recovered until an assessment of damages under the statute could be had. Justice *v.* Nesquehoning Valley R. Co., 87 Pa. St. 28.

[3] Aikin *v.* Albany, etc., R. Co., 26 Barb. (N. Y.) 289.

[4] Relief from forfeiture is always proper when compensation in damages can be calculated with certainty. Giles *v.* Austin, 62 N. Y. 486; Nelson *v.* Carrington, 4 Munf. (Va.) 332; Hill *v.* Barclay, 16 Ves. 402. See Hagar *v.* Buck, 44 Vt. 285, 8 Am. Rep. 368; Messersmith *v.* Messersmith, 22 Mo. 369; Walker *v.* Wheeler, 2 Conn. 299; Voorhis *v.* Murphy, 26 N. J. Eq. 434.

[5] Blanchard *v.* Detroit, etc., R. Co., 31 Mich. 43; Hornback *v.* Cincinnati, etc., R. Co., 20 Ohio St. 81; 2 Washburn on Real Prop., 5.

[6] Hornback *v.* Cincinnati, etc., R. Co., 20 Ohio St. 81; Dayton, etc., R. Co. *v.* Lewton, 20 Ohio St. 401; Louisville, etc., R. Co. *v.* Power, 119 Ind. 269; Kentucky Cent. R. Co. *v.*

ings, or other conveniences,[1] or that it shall locate and maintain a depot at a certain point,[2] will be construed as covenants unless the language clearly makes them conditions. And the company will become bound to observe covenants contained in a deed which it accepts, to the same extent that it would be bound by the execution of an instrument signed by itself.[3] A railroad may covenant to pave and repair a street along which its track is laid,[4] or to permit other railroads, upon certain conditions, to use the right of way granted,[5] or to construct a switch upon the lands conveyed, and to stop trains thereat.[6] Covenants such as these, which are connected with, or require something to be done on or about the land, and become united with, and form a part of, the consideration for which the land, or some interest in it is parted with, run with the land,[7]

Kenney, 82 Ky. 154. But see Railway *v.* Bosworth, 46 Ohio St. 81, s. c. 38 Am. & Eng. R. Cas. 290. In Martin *v.* New York, etc., R. Co., 36 N. J. Eq. 109, the court enforced a covenant to fence which had been stricken out of the deed before it was signed, upon the promise of the receiver of the grantee company that the fences should be maintained. See Donisthorpe *v.* Fremont, etc., R. Co., 30 Neb. 142, 43 Am. & Eng. R. Cas. 583.

[1] Aikin *v.* Albany, etc., R. Co., 26 Barb. (N. Y.) 289; Congregation, etc., *v.* Texas Pac. R. Co., 41 Fed. R. 564. See, also, Illinois Cent. R. Co. *v.* Willenborg, 117 Ill. 203, s. c. 7 N. E. R. 698; Hull *v.* Chicago, etc., R. Co., 65 Iowa 713, s. c. 22 N. W. R. 940.

[2] Georgia So. R. Co. *v.* Reeves, 64 Ga. 492, s. c. 11 Am. & Eng. R. Cas. 333; Galveston, etc., R. Co. *v.* Pfeuffer, 56 Tex. 66; Gilmer *v.* Mobile, etc., R. Co., 79 Ala. 569; Dorsey *v.* St. Louis, etc., R. Co., 58 Ill. 65; Pitkin *v.* Long Island, etc., R. Co., 2 Barb. Ch. (N. Y.) 221; Sayre *v.* New York, etc., R. Co., 3 Duer (N. Y.) 54. But stipulations of this kind are often construed as conditions subsequent. Taylor *v.* Cedar Rapids, etc., R. Co., 25 Iowa 371; Horner *v.* Chicago, etc., R. Co., 38 Wis. 165; Blanchard *v.* Detroit, etc., R. Co., 31 Mich. 43. Where a deed recites that it is made "in consideration of the sum of one dollar, and the permanent location of a depot on grounds conveyed," the stipulation is a condition subsequent which imposes no personal obligation upon the grantee. Close *v.* Burlington, etc., 64 Iowa 149.

[3] Georgia S. R. Co. *v.* Reeves, 64 Ga. 492; Taylor's Landlord and Tenant, § 245.

[4] Mayor, etc., New York *v.* Second Ave. R. Co., 102 N. Y. 572.

[5] Joy *v.* City of St. Louis, 138 U. S. 1, 45 Am. & Eng. R. Cas. 655.

[6] Lydick *v.* Baltimore, etc., R. Co., 17 W. Va. 427, s. c. 11 Am. & Eng. R. Cas. 336; Pitkin *v.* Long Island, etc., Railroad, 2 Barb. Ch. (N. Y.) 221; Gilmer *v.* Mobile, etc., R. Co., 79 Ala. 569.

[7] Ruddick *v.* St. Louis, etc., R. Co., 116 Mo. 25, s. c. 22 S. W. R. 499, per

and bind it in the hands of any one who claims title through or under the covenantor,[1] with notice of the covenant. And the fact that the covenant is contained in the covenantor's title deeds, is sufficient notice to bind his assignee.[2]

§ 946. **Other covenants.**—So a railroad company may bind itself by a covenant to give a free annual pass over its road to the grantor and his family,[3] or to run trains to a certain point in a town,[4] or to employ the land-owner to transport freight across a certain river,[5] or to do or refrain from doing any act within the range of its power to contract.[6] But covenants of this kind, by which the grantee undertakes to do something for the personal convenience or benefit of the land-owner wholly disconnected from the use and occupation of the land conveyed, do not, as a general rule, run with the land,[7] and can not be

Burgess, J.; Peden *v.* Chicago, etc., R. Co., 73 Iowa 328, s. c. 35 N. W. R. 424; St. Louis, etc., Co. *v.* O'Baugh, 49 Ark. 418, s. c. 5 S. W. R. 711; Lake Erie, etc., R. Co. *v.* Priest, 131 Ind. 413, s. c. 31 N. E. R. 77; Kentucky Cent. R. Co. *v.* Kenney, 82 Ky. 154, s. c. 20 Am. & Eng. R. Cas. 458; Avery *v.* New York, etc., R. Co., 106 N. Y. 142, s. c. 12 N. E. R. 619, and cases cited in preceding notes.

[1] A covenant running with the land "is a covenant beneficial to the owner of the estate, and to no one but the owner of the estate, and which, therefore, may be said to be beneficial to the estate." Best, J., in Vernon *v.* Smith, 5 B. & Ald. 1; Vyvyan *v.* Arthur, 1 B. & C. 410; Aikin *v.* Albany R. Co., 26 Barb. (N. Y.) 289. A successor of the original company, by purchase at judicial sale, is bound by the covenant to fence. Midland R. Co. *v.* Fisher, 125 Ind. 19, s. c. 24 N. E. R. 756, and cases there cited.

[2] Joy *v.* City of St. Louis, 138 U. S. 1, s. c. 11 Sup. Ct. 243.

[3] Dodge *v.* Boston, etc., R. Co., 154 Mass. 299. See Pennsylvania Co. *v.* Erie, etc., R. Co., 108 Pa. St. 621; Eddy *v.* Hinnant, 82 Tex. 354, 18 S.W. R. 562; Ruddick *v.* St. Louis, etc., R. Co., 116 Mo. 25, s. c. 22 S. W. R. 499.

[4] People *v.* Louisville, etc., R.Co., 120 Ill. 48, s. c. 25 Am. & Eng. R. Cas. 235, 5 N. E. R. 379, 10 N. E. R. 657.

[5] Wiggins Ferry Co. *v.* Chicago, etc., R. Co., 73 Mo. 389, 5 Am. & Eng. R. Cas. 1.

[6] A land-owner may bind himself by a covenant with a railroad company for the shipment over its road of the entire product of his quarries or iron furnaces, but such a covenant does not bind his assignees, unless they expressly assume the obligation. Kettle River R. Co. *v.* Eastern R. Co., 41 Minn. 461, s. c. 40 Am. & Eng. R. Cas. 449, 43 N. W. R. 469, 6 L. R. A. 111; Kippell *v.* Bailey, 2 Mylne & K. 517. But see Bald Eagle, etc., R. Co. *v.* Nittany Val. R. Co., 171 Pa. St. 284, 33 Atl. R. 239; Tulk *v.* Moxhay, 2 Phil. (Eng. Ch.) 774.

[7] 1 Washburn on Real Prop., * page 326, *et seq.*; Gulf, etc., R. Co. *v.* Smith,

enforced against an assignee of the covenantor, unless the grant is expressly made subject to the condition that the estate shall be forfeited for a breach of the covenant.[1]

§ 947. Dedication of land to use of railroad.—The question as to whether land can be acquired by a railroad company by a common law dedication must be considered an open one. The question has arisen in a number of cases, in some of which it is said that a railroad is so far a public highway that whenever the owner of land has shown, by an unequivocal act or declaration, his purpose to dedicate the land to the use of a railway, and the company engaged in building the railway has acted in reference to and upon the faith of such declaration, the title of the railway company is complete.[2] But it has been held that a dedication will not be presumed from the peaceable occupancy and user of land for a right of way or for depot purposes by the company for any period less than that required to confer title by prescription under the statute of limitations.[3] And this occupancy must have been continuous, and with the actual knowledge of the owner or of some one having full power to represent him in disposing of the land.[4] In those states where the statute provides that the designation of land upon a duly acknowledged and recorded plat of a town or addition thereto, as

72 Tex. 122, s. c. 9 S. W. R. 865, 2 L. R. A. 281; West Virginia Trans. Co. *v.* Ohio River, etc., Co., 22 W. Va. 600; Dickey *v.* Kansas City, etc., R. Co., 122 Mo. 223, s. c. 26 S. W. R. 685. A covenant to have a terminus at a certain place, and not to extend the road beyond it, will not bind another corporation which succeeds to the ownership of the road. Lynn *v.* Mount Savage, etc., Co., 34 Md. 603. See, also, Piper *v.* Union Pac. R. Co., 14 Kan. 568; Close *v.* Burlington, etc., R. Co., 64 Iowa 149, s. c. 19 N. W. R. 886; Hammond *v.* Port Royal, etc., R. Co., 16 S. Car. 567; Guilfoos *v.* New York, etc., R. Co., 69 Hun (N. Y.) 593; Wilder *v.* Maine, etc., R. Co., 65 Me. 332.

[1] Ruddick *v.* St. Louis, etc., R. Co., 116 Mo. 25. But see Bald Eagle R. Co. *v.* Nittany Val. R. Co., 171 Pa. St. 284, 33 Atl. R. 239.

[2] Texas, etc., R. Co. *v.* Sutor, 56 Tex. 496, s. c. 11 Am. & Eng. R. Cas. 506. See Morgan *v.* Railroad Co., 96 U. S. 716; Denver Circle R. Co. *v.* Nestor, 10 Colo. 403; Texas, etc., R. Co. *v.* Sutor, 59 Tex. 29.

[3] Jones *v.* New Orleans, etc., R. Co., 70 Ala. 227.

[4] Daniels *v.* Chicago, etc., 35 Iowa 129, s. c. 14 Am. R. 490.

belonging to any individual or corporation, shall operate as a conveyance of such land for the uses and purposes therein specified, or intended,[1] there can be no doubt as to the right of a railway company to claim lands dedicated to it in this manner, since the making and recording of such a plat amounts to the execution of a conveyance to the company of the designated land.[2] But it is held that the intention to dedicate must be evidenced by the plat alone, and can not be proven by parol.[3] A common law or parol dedication can only be made to the public.[4] And since the lands acquired by a railroad corporation for the purposes of its enterprise, are, so far as the right of property is concerned, strictly private property, over which the corporation exercises exclusive control, the better opinion seems to be that property can not be dedicated by a common law dedication either for depot grounds,[5] or for a right of way[6]

[1] For instances of such statutes, see Rev. Stat. Ill. 1874, Ch. 109, §3; Rev. Stat. Ind. 1894, §4412.

[2] Morgan v. Railroad Co., 96 U. S. 716. In Ohio, it is held that the recording by a husband and wife, of a plat of an addition to a town or city, the title to which is in the wife, with a lot of ground designated as the depot of a railroad company whose road extends over the same ground, operates to invest the title of the lot in the company, either as a conveyance or by dedication. A *feme covert* in Ohio can only divest herself of title to realty by an act of conveyance made in conformity to the statute. Todd *v.* Pittsburg, etc., R. Co., 19 Ohio St. 514, holding that marking upon a plat one lot "depot of O. & P. Railroad" does not dedicate it. See Watson *v.* Milwaukee, etc., R. Co., 46 Minn. 321, 46 Am. & Eng. R. Cas. 543.

[3] Watson *v.* Chicago, etc., R. Co., 46 Minn. 321, 46 Am. & Eng. R. Cas. 543. See, also, Louisville, etc., R. Co. *v.* Stephens, 76 Ky. 401, 29 S. W. R. 14; City of Noblesville *v.* Lake Erie, etc., R. Co., 130 Ind. 1. But compare Morgan *v.* Railroad Co., 96 U. S. 716.

[4] Washburn on Easements, (2d ed.) 129, 175; Dillon on Munic. Corp., §510; Goddard on Easements, 263; Todd *v.* Pittsburg, etc., R. Co., 19 Ohio St. 514; Carpenter *v.* Gwynn, 35 Barb. (N. Y.) 395; McWilliams *v.* Morgan, 61 Ill. 89. (But see Morgan *v.* Railroad Co., 96 U. S. 716). Illinois Cent. R. Co. *v.* Indiana, etc., R. Co., 85 Ill. 211; State *v.* Strong, 25 Me. 297.

[5] Todd *v.* Pittsburg, etc., R. Co., 19 Ohio St. 514.

[6] Lake Erie, etc., R. Co. *v.* Whitham, 155 Ill. 514, s. c. 40 N. E. R. 1014; Louisville, etc., R. Co. *v.* Stephens, (Ky.) 29 S. W. R. 14; Watson *v.* Chicago, etc., R. Co., 46 Minn. 321, s. c. 46 Am. & Eng. R. Cas. 543. In this case the court, by Gilfillan, C. J., said: "There are two principal questions in the case —*First*, Was there a statutory donation or grant of the land in controversy to the defendant Clark W. Thompson, by means of the plat of the town of Wells? *Second*, May a railroad corporation acquire an ease-

for a railroad unless the dedication is made in accordance with

ment in lands by a common-law dedication of it to public use for railroad purposes? For, if the second question be answered in the affirmative, there can be no doubt of the defendants' title, as the facts found are sufficient to establish a dedication. The first of these questions is really covered by the decision in County Commissioners of Hennepin Co. *v.* Dayton, 17 Minn. 260. * * * * Such a donation or grant must be evidenced wholly by the plat. It can not rest partly upon the plat and partly in parol, any more than can a conveyance by deed. The intent to donate or grant must appear from the plat itself. * * * It is remarkable that there are so few decisions touching in any way the capacity of a railroad company to receive a common-law dedication of land for the purpose of a railway. The appellant refers us to 1 Ror. R. R., p. 322, where the author assumes that such dedication may be made, and to Daniels *v.* Chicago & N. W. R. Co., 35 Iowa 129; Texas & New Orleans R. Co. *v.* Sutor, 56 Tex. 496, 11 Am. & Eng. R. Cas. 506; and Morgan *v.* Chicago & A. R. Co., 96 U. S. 716,—in which the same thing seems to have been assumed, though in none of them is there anything to indicate that the question was raised. In Todd *v.* Pittsburg, Ft. W. & C. R. Co., 19 Ohio St. 514, referred to by the respondent, the court held directly that a railroad company can not acquire title to land by dedication. The appellant argues that, whenever the right of eminent domain may be exercised to appropriate private property to public use, the property, or an easement in it, may pass by a common-law dedication; and therefore, as lands for the use of a railroad company may be appropriated under the right of eminent domain, such a dedication may be made to a railroad company. It is not true, however, that a public use, which will justify taking private property under the right of eminent domain, will in all cases sustain a dedication to public use. * * * The rule that a right in the public to use the land of an individual may be vested by dedication, by acts *in pais*, when such a right can vest in an individual only by grant, is anomalous, and grows out of the necessity of the case, and has been accounted for on the ground that there is no grantee *in esse* capable of taking. The origin of the doctrine of dedication has sometimes been ascribed to Lade *v.* Shepherd, 2 Strange 1004, decided about 150 years ago. That is the earliest case in which we find the word 'dedication' used, and in which some of the requisites of a dedication are suggested. But, though it has been greatly developed and modified since that time, to meet the altered condition of public needs, the doctrine had its roots in the common law for centuries before that case. The public right, however, was not described as held by dedication, but by custom. As to the rights of the public, some requisites of a good custom are not retained in the law of dedication, most notably that in relation to the time or duration of the public uses. Others are, a custom to take a profit out of the land of another to use it for purposes of profit was not good. Gateward's Case, 6 Coke 60; Grimstead *v.* Marlowe, 4 Term R. 717; Mellor *v.* Spateman, 1 Saund. 339; Blewett *v.* Tregonning, 3 Adolph. & E. 1002; Waters *v.* Lilley, 4 Pick. (Mass.) 145; Pearsall *v.* Post, 20 Wend. (N. Y.) 111; Post *v.* Pearsall, 22 Wend. 425;

a statute, by which it is given the force and effect of a grant.[1]

Littlefield *v.* Maxwell, 31 Me. 134. All that could be claimed was an easement, as a right of way. The claim of right to take a profit from the soil of another had to be supported by grant or by prescription, which supposes a grant; and as the public, as such, could not take a grant, of course it could not take such a right. We have not been referred to any decided case, nor been able to find any, which decides that the law of dedication is not subject to this restriction, or which holds that a dedication may be made to take a profit out of the land, or to use it for purposes of profit. The case of Pearsall *v.* Post, especially, in the court of errors, goes over the whole doctrine, and denies that such a right can be claimed by dedication. Most of the land throughout the country, appropriated under the right of eminent domain, is taken and employed in the public use, through the agency of business corporations. They are authorized to employ the land taken, not only for the public benefit, in the public use, but for carrying on the business they are authorized to transact, not only to serve the public, but to serve their own private interests,—to make for themselves a profit out of the use of the land taken. Where land is to be employed in the public use, by a business corporation or an individual, there is no reason, founded on necessity, for the doctrine of dedication; because there is, in such case, a grantee *in esse* capable of taking a grant. Private property can not be acquired by dedication. * * * The lands acquired by the corporation, for the purposes of its enterprise, are, so far as the right of property is concerned, private property. If purchased, the corporation pays for them; if taken in the exercise of the right of eminent domain, it pays the compensation. It is true they are charged with a public duty, which the corporation, in consideration of the rights and powers conferred on it by the state, assumes to perform, and which the state can compel it to perform. But its rights in the lands as its own property are secure and inviolable. State *v.* Chicago, M. & St. Paul R. Co., 36 Minn. 402. The corporation, for its own profit and advantage, accepts the franchises offered by the state, and assumes to perform the functions and duties required by the state, not with property furnished it by the state, but with its own property. The ownership of the property is private, though the use required to be made of it is public. The private ownership prevents the acquisition of it by dedication."

[1] Morgan *v.* Railroad Co., 96 U. S. 716; Watson *v.* Chicago, etc., R. Co., 46 Minn. 321, s. c. 46 Am. & Eng. R. Cas. 543. But while Watson *v.* Railroad Co., *supra*, holds that the evidence of such a dedication must be made certain and complete by the map on which an intention to dedicate is noted, and that parol evidence of acts and declarations of the land-owner which accompanied or followed the recording of the map can not be received to prove an intention to dedicate, Morgan *v.* Railroad Co., *supra*, holds the contrary. In the latter case, in construing the Illinois statute with regard to dedication, which provides that a donation or grant marked or noted on the map or plat duly executed and recorded, shall vest in the grantee a fee-simple title to the land

§ 948. **Title by adverse possession.**—A railroad company may acquire title to land by adverse possession for the full period prescribed by the statute of limitations in the same manner as an individual.[1] But such possession must be continuous and under claim of right,[2] and of such a character as to give notice to the land-owner of the company's claim of title to the land.[3] Thus where a railway company has made no at-

"for uses and purposes therein named, expressed or intended," the court said: "The purposes of the grant are not required to be set forth, nor is there any limitation as to what they shall be. The power and will of the donor are unfettered. The provisions are simply a mode of conveyance which the grantor may pursue, if he chooses to do so. The language of the statute is clear and explicit. There is no room for doubt. * * * Was the intention of the appellant to dedicate the premises to the railroad company for its use for depot purposes, as claimed, 'named, expressed or intended'? Either, as to the use, is, according to the statute, sufficient. The facts to which we have adverted in the previous parts of this opinion seem to us conclusive upon the subject. The question must be resolved in the affirmative. If this view be correct, the legal title, by virtue of the statute, passed to the corporation with the right of user as to the premises for all depot purposes, but for none other. 'No particular form of words is required to the validity of a dedication. The dedication may be made by a survey and plat alone, without any declaration, either oral or on the plat, that it was the intention of the proprietor to set apart certain grounds for the use of the public. An examination of the cases referred to in the argument will show that dedications have been established in every conceivable way by which the intention of the dedicator could be evinced.' Godfrey *v.* City of Alton, 12 Ill. 29."

[1] Sherlock *v.* Louisville, etc., Ry. Co., 115 Ind. 22; Myers *v.* McGavock, 39 Neb. 843, s. c. 42 Am. St. R. 627; Texas, etc., R. Co. *v.* Gaines, (Tex.) 27 S. W. R. 266; Organ *v.* Railway Co., 51 Ark. 235; s. c. 11 S. W. R. 96; Cogsbill *v.* Railway Co., 92 Ala. 252, s. c. 9 So. R. 512, and authorities cited in following notes. See, also, Turner *v.* Union Pac. R. Co., 112 Mo. 542, s. c. 20 S. W. R. 673; American Bank Note Co. *v.* New York, etc., R. Co., 129 N. Y. 252; St. Louis, etc., R. Co. *v.* Nugent, 152 Ill. 119, s. c. 39 N. E. R. 263.

[2] Lehigh Valley R. Co. *v.* McFarlan, 43 N. J. Law 605; City of St. Paul *v.* Chicago, etc., R. Co. (Minn.), 63 N. W. R. 267; Peck *v.* Louisville, etc., R. Co., 101 Ind. 366. See, also, Borden *v.* Southside R. Co., 5 Hun (N.Y.) 184; Blaisdell *v.* Portsmouth, etc., R. Co., 51 N. H. 483; Peoria, etc., R. Co. *v.* Tamplin, 156 Ill. 285, s. c. 40 N. E. R. 960. A right to alter the grade of a street and lay additional track can only be acquired by twenty-one years' adverse user. Little Miami R. Co. *v.* Hambleton, 40 Ohio St. 496.

[3] A mere permissive enjoyment of land or of an easement thereon does not confer any adverse right. The claim must be of the entire title, exclusive of the title of any other person. Jones *v.* New Orleans, etc., R. Co., 70 Ala. 227; Peoria, etc., R. Co. *v.* Tamplin, 156 Ill. 285, s. c. 40 N. E.

tempt to use for a right of way certain lands adjoining its location, and is possessed of no paper title thereto, the fact that it has dug away some of the soil and piled some ties upon the land will not give it a title under adverse possession where these acts were not done under claim of ownership.[1] In the case cited the court said: "Mere acts of trespass upon vacant and unincumbered land, not amounting to an exclusive appropriation thereof, and not made under a *bona fide* claim of ownership, or under circumstances indicating such a claim, do not constitute an adverse possession within the meaning of the limitation laws. Such adverse possession can not be inferred, but must be proved."[2] The acts of ownership on the part of the railroad company, however, need be only such as the nature of the property and the condition of the road require. Thus where a railroad company, under a verbal agreement with the owner of a tract of land, staked off a right of way one hundred feet wide across the tract and built its road upon the middle twenty-five feet of the strip which it had staked off and continued in exclusive possession of the twenty-five foot strip for the full period of the statute of limitations, under claim of title to the full width of one hundred feet, and during most of that period maintained a section house at one point within this tract which extended back to the edge

R. 960. Where a railroad company entered into possession of land under an agreement for the payment of rent, its successor by purchase or consolidation could not claim to hold by adverse possession until it had given notice to the land-holder of its claim of title. And a mere failure to pay rent is not such a notice. Wittman *v.* Milwaukee, etc., R. Co., 51 Wis. 89. The right to have and maintain a culvert, so constructed as to cause plaintiff's land to be overflowed, can be acquired by a railroad company by proof of twenty years' user. But the user must have been such as to have subjected the company to an action at any time during the twenty years, and it must be shown that the overflow has, at regular or irregular intervals during the twenty years, covered the very land in controversy. Emery *v.* Raleigh, etc., R. Co., 102 N. Car. 209.

[1] Chicago, etc., R. Co. *v.* Galt, 133 Ill. 657, s. c. 44 Am. & Eng. R. Cas. 43. See, also, Merritt *v.* Northern R. Co., 12 Barb. (N. Y.) 605. But the possession of the contractors engaged in constructing the road is the possession of the company and starts the running of the statute of limitations if it has not already started. Snyder *v.* Chicago, etc., R. Co., 112 Mo. 527, s. c. 20 S. W. R. 885.

[2] McClellan *v.* Kellogg, 17 Ill. 498; Ambrose *v.* Raley, 58 Ill. 506.

of the one-hundred-foot strip originally staked off, it was held that the railroad company acquired title to the entire one hundred feet.[1] Where, however, there is no color of title and the right claimed depends solely upon user, the general rule is that the easement is measured by the user and will not extend beyond the *pedis possessio*.[2] This rule has been applied to highways and in other analogous cases, and we do not believe the fact that the statute allows a right of way of a certain width to be condemned necessarily gives a railroad company a right of way of the full statutory width by prescription where it has had adverse possession of a much narrower strip only. But it is doubtful if the general rule to which we have referred can be applied in all its strictness to railroad companies. It certainly can not be that they are confined to the exact width occupied by their track, for they must have room to safely operate their road. If they have no rights beyond their track, then an abutter might build up to the track and entirely prevent its use. As suggested in the Missouri case already cited, the nature of the road, its necessities and the character of the use should be taken into consideration together with the acts of the company, and the extent of the company's claim, as thus shown, should, we think, be deemed to determine the extent of its right. Much must necessarily depend upon the peculiar circumstances of each particular case. What we mean to say is that if the character and extent of the possession and the acts of the company, considered with reference to the nature of railroads, are such as to clearly indicate an adverse claim to a right of way of a certain width, a right of way to that extent may be acquired by prescription, although it is not all occupied by the track or any other structure.[3]

[1] Hargis *v.* Kansas City, etc., R. Co., 100 Mo. 210. See also Campbell *v.* Indianapolis, etc., R. Co., 110 Ind. 490; Florida Southern R. Co. *v.* Loring, 51 Fed. R. 932.

[2] Elliott on Roads and Streets, 136, and authorities there cited. Approved in Bartlett *v.* Beardmore, 77 Wis. 356, s. c. 46 N. W. R. 494, 496, and in Marchand *v.* Town of Maple Grove, 48 Minn. 281, s. c. 51 N. W. R. 606, 607. See, also, Wray *v.* Chicago, etc., R. Co., 86 Ill. 424; Illinois Cent. R. Co. *v.* Indiana, etc., R. Co., 85 Ill. 211; Jones *v.* Erie, etc., R. Co., 169 Pa. St. 333, 32 Atl. R. 535.

[3] See Prather *v.* Jeffersonville, etc., R. Co., 52 Ind. 16, 39, 41; Prather *v.*

§949. **Rights of railroad by entry under license.**—A license to enter upon land and construct a railroad thereon operates as a perfect defense to all acts done within the scope of such license, so long as proper skill and care are used,[1] for that which is done under authority given by a man is, in effect, his own act, and he can not make another responsible to him for his own acts. So, where a railroad has been located and constructed under a parol license which remains unrevoked, the company has the same right to prevent another company from taking its tracks as if it had condemned the land.[2] A license to do a certain act or series of acts carries with it all the incidents necessary to its exercise. Thus a license to take wood or stone from the grantor's land includes the right to enter with teams to haul it away.[3] And a license to build a railroad across certain lands carries with it the right to make the excavations and embankments which the character of the surface renders necessary.[4] But a railroad company is liable for damages caused by its negligence in the construction or operation of its road under a license from the land-owner.[5] A mere naked parol license to do certain acts upon the land of another does not create a permanent easement therein, but such a license may be revoked at any time before it has been acted upon by the licensee.[6] The death of the licensor before the license is acted upon amounts to a revocation of a license

Western Union Tel. Co., 89 Ind. 501. As to right to accretion, see Chicago, etc., R. Co. *v.* Groh, 85 Wis. 641, s. c. 55 N. W. R. 714; Saunders *v.* New York, etc., R. Co., 144 N. Y. 75, s. c. 26 L. R. A. 378, 43 Am. St. R. 729; Illinois Cent. R. Co. *v.* Illinois, 146 U. S. 387, s. c. 13 Sup. Ct. R. 110.

[1] Louisville, etc., Co. *v.* Thompson, 18 B. Mon. (Ky.) 735; Foot *v.* New Haven, etc., R. Co., 23 Conn. 214; Miller *v.* Auburn, etc., R. Co., 6 Hill (N. Y.) 61; Blaisdell *v.* Portsmouth, etc., R. Co., 51 N. H. 483; Tompkins *v.* Augusta, etc., R. Co., 21 S. Car. 420.

[2] Barre R. Co. *v.* Montpelier, etc., R. Co., 61 Vt. 1, s. c. 15 Am. St. R. 877.

[3] Clark *v.* Vermont, etc., R. Co., 28 Vt. 103.

[4] See Blaisdell *v.* Portsmouth, etc., R. Co., 51 N. H. 483.

[5] Selden *v.* Delaware, etc., Canal Co., 29 N. Y. 634; Mathews *v.* St. Paul, etc., R. Co., 18 Minn. 434.

[6] Messick *v.* Midland R. Co., 128 Ind. 81; Northern Pac. R. Co. *v.* Barnsville, etc., R. Co., 4 Fed. R. (2 McCrary 203) 298, 1 Am. & Eng. R. Cas. 8; Bigelow on Estoppel, 227, 228.

granted by parol.[1] There is a strong line of cases holding that a license to lay railroad tracks, or to erect other structures for the use of a railway company upon a person's land, is revocable even after the track is laid or the buildings constructed,[2] and that the licensor is not estopped to maintain an action at law for the recovery of the land by the fact that valuable improvements have been made upon the faith of the license.[3]

[1] Eggleston *v.* New York, etc., R. Co., 35 Barb. (N. Y.) 162; Watson *v.* Chicago, etc., R. Co., 46 Minn. 321, 46 Am. & Eng. R. Cas. 543; Bridges *v.* Purcell, 1 Dev. & B. (N. Car.) 492.

[2] Richmond, etc., R. Co. *v.* Durham, etc., R. Co., 104 N. Car. 658; Jackson & Sharp Co. *v.* Philadelphia, etc., R. Co., 4 Del. Ch. 180; Foot *v.* New Haven, etc., R. Co., 23 Conn. 214; Hetfield *v.* Central R. Co., 29 N. J. L. 571; Central R. Co. *v.* Hetfield, 29 N. J. L. 206; New Orleans, etc., R. Co. *v.* Moye, 39 Miss. 374; Eggleston *v.* New York, etc., R. Co., 35 Barb. (N. Y.) 162; Selden *v.* Delaware, etc., Canal Co., 29 N. Y. 634, 24 Barb. 362; Murdock *v.* Prospect Park, etc., R. Co., 73 N. Y. 579; Mathews *v.* St. Paul, etc., R. Co., 18 Minn. 434; Blaisdell *v.* Portsmouth, etc., R. Co., 51 N. H. 483; Hosher *v.* Kansas City, etc., R. Co., 60 Mo. 329; Irish *v.* Burlington, etc., R. Co., 44 Iowa 380; Maxwell *v.* Bay City Bridge Co., 41 Mich. 453; Baltimore, etc., R. Co. *v.* Algire, 63 Md. 319; Stevens *v.* Stevens, 11 Metcalf (Mass.) 251; Woodward *v.* Seely, 11 Ill. 157; St. Louis Stock Yards *v.* Wiggins Ferry Co., 112 Ill. 384; Hewlins *v.* Shippam, 5 B. & C. 221; Cocker *v.* Cowper, 1 C. M. & R. 418; Louisville etc., R. Co. *v.* Liebfried, (Ky.) 50 Am. & Eng. R. Cas. 202.

[3] Wood *v.* Michigan Air Line Co., 90 Mich. 334. In the note to Prince *v.* Case and Rerick *v.* Kern, 2 Amer. Leading Cases, 546, 557, 558, it is said: "An attempt to charge land with the burden of a way or other easement otherwise than by deed will consequently fail, from the insufficiency of the means employed, if the question arises at law, and is determined on strict legal principles. An additional safeguard was, moreover, given by the statute of frauds, under which no incorporeal hereditament can be granted or assigned without a writing signed by the party to be charged. It follows that no easement or charge on land can be created by an oral license, even when the intent is plain, because the parties choose to rest satisfied with unwritten evidence, while the law requires a writing, signed and under seal. * * * Title is the right to possession and enjoyment, and an irrevocable authority to possess and enjoy is virtually a title. If I can use the land of another for a purpose of my own, under an authority which he can not recall, the ownership relatively to that purpose is in me and not in him. To give an oral license an effect which is denied to a contract is, therefore, virtually to abrogate the statute of frauds." Citing Desloge *v.* Pearce, 38 Mo. 588; Houston *v.* Laffee, 46 N. H. 505. "These principles are so plain as to be indisputable at law, and the only question is how far they should be modified by equity. A chancellor may control the words of the statute in order to prevent it from being used as a cover for the commission of the frauds which it was meant to sup-

And most of these cases hold that the licensor is not bound, in order to maintain an action of ejectment, to reimburse the company for damages sustained by the revocation.[1] But the courts in most of the states where this rule is followed hold that a land-owner who grants permission to a railroad company to enter upon his lands and construct its road thereon may be enjoined from revoking the license until the company can perfect its title by condemnation,[2] and in Minnesota it is provided by statute that an action of ejectment brought by the land-owner in such a case may be converted into condemnation proceedings by the railroad company.[3] In those states of the

press, but the power to do this belongs solely to equity, and can not be exercised by a common law tribunal, without confounding jurisdictions which have hitherto been kept separate." Winslow *v.* Cooper, 104 Ill. 235; Wood *v.* Michigan Air Line R. Co., 90 Mich. 334.

[1] Batchelder *v.* Hibbard, 58 N. H. 269, and cases in preceding note. The land-owner's right to revoke a parol license and bring an action of ejectment is not impaired by mere inaction or delay in bringing suit, within the time allowed by the statute of limitations. Kremer *v.* Chicago, etc., R. Co., 51 Minn. 15, 51 Am. & Eng. R. Cas. 382; Galway *v.* Metropolitan El. R. Co., 128 N. Y. 132. A land-owner is not estopped to maintain an action of ejectment by the mere fact that he granted the company parol license to proceed with the road and occupy the land. Wood *v.* Michigan Air Line R. Co., 90 Mich. 334, 52 Am. & Eng. R. Cas. 37. *Contra* Baker *v.* Chicago, etc., R. Co., 57 Mo. 265.

[2] Conger *v.* Burlington, etc., R. Co., 41 Iowa 419; Pickert *v.* Ridgefield Park R. Co., 25 N. J. Eq. 316; New York, etc., R. Co. *v.* Stanley, 35 N. J. Eq. 283; Detroit, etc., R. Co. *v.* Brown, 37 Mich. 533; Brown *v.* Bowen, 30 N. Y. 519; Cook *v.* Pridgen, 45 Ga. 331; Baltimore, etc., R. Co. *v.* Algire, 63 Md. 319, 65 Md. 337; Foster *v.* Browning, 4 R. I. 47; Lacy *v.* Arnett, 33 Pa. St. 169. But though a parol license, amounting in terms to an easement, is revocable, as to future enjoyment, at law, and is determined by a conveyance of the estate upon which it was to be enjoyed, this is not the rule, in all cases, in courts of equity. In these courts, the future enjoyment of an executed parol license, granted upon a consideration, or upon the faith of which money has been expended, will be enforced at all events, where adequate compensation in damages could not be obtained. This will be done upon the two grounds of estoppel on account of fraud, and specific performance of a partly executed contract to prevent fraud. Snowden *v.* Wilas, 19 Ind. 10, 14.

[3] Minneapolis Western R. Co. *v.* Minneapolis, etc., R. Co., 58 Minn. 128. In this case the court said: "The finding, therefore, is of a naked license, carrying no estate in the land, and revocable at the will of the licensor. Johnson *v.* Skillman, 29 Minn. 95; Wilson *v.* St. Paul, etc., Railway Co., 41 Minn. 56; Minneapolis Mill Co. *v.* Minneapolis, etc., Ry. Co., 51 Minn. 304. This would seem to be entirely decisive of the case, but defendant

Union where law and equity are administered by the same court, relief is afforded in any given suit where a case for equitable relief is presented.[1] In the case cited the action was in form, an action at law for damages, and an answer showing a parol license and the expenditure of money on the faith thereof was held good. And in Maine,[2] New Hamp-

claims that, because plaintiff purchased after these tracks had been constructed, therefore it took the premises subject to the incumbrance of an easement in defendant to permanently maintain the tracks. The mere statement of the proposition carries with it its own refutation; for, plainly stated, it is that a conveyance of the premises by the licensor to a third party converts a mere license (which creates no estate in the land) into an easement, which is an interest in the land, and lies only in grant. We do not see why, on this line of reasoning, the same result would not have followed had defendant been a mere intruder or trespasser, for counsel's argument is that the purchaser must be deemed to have taken the land subject to the visible incumbrance then on it. So far from such being the case, the law is that a revocable license is revoked by a conveyance of the land by the licensor. Johnson *v.* Skillman, *supra;* Wilson *v.* Railway Co., *supra.* Counsel's argument is all based on a false premise, which begs the whole question. He assumes that when a railway company enters and builds its track on land under a license from the owner, it acquires a permanent easement in the land by virtue of the license thus acted on, and that thereafter the only right of the land-owner is his claim for compensation for the taking of the land for railway purposes. In some states—notably Wisconsin and Illinois—either by statute or by judicial decision, founded on supposed considerations of public policy, this is substantially the law; all actions by the land-owner, whatever their form, being in effect actions to recover compensation for the permanent appropriation of land already taken. If such were the law in this state, there would be at least some plausibility to defendant's contention. But we have repeatedly held that the law is otherwise. Watson *v.* Chicago, etc., Railway Co., 46 Minn. 321; Lamm *v.* Chicago, etc., Railway Co., 45 Minn. 71; Minneapolis Mill Co. *v.* Minneapolis, etc., Ry. Co., 51 Minn. 304. Under our statute the land-owner may revoke his license, and bring ejectment, which the railway company may, if it so elects, turn into a condemnation proceeding, and it is only then, and through that proceeding, that the railroad company acquires any easement in the land, or the land-owner any right to compensation for taking it for railway purposes. The defendant could not acquire title by prescription, because its possession was not adverse."

[1] Snowden *v.* Wilas, 19 Ind. 10, Perkins, J. In Indiana a land-owner will not be permitted to revoke a parol license under which the railroad company has actually built its road. Buchanan *v.* Logansport, etc., R. Co., 71 Ind. 265; Campbell *v.* Indianapolis, etc., R. Co., 110 Ind. 490.

[2] Ricker *v.* Kelly, 1 Me. 117; Clement *v.* Durgin, 5 Me. 9.

shire,[1] Pennsylvania,[2] Ohio,[3] Georgia,[4] Indiana,[5] Iowa,[6] and some other states,[7] it is held that where a parol license has been given, upon the faith of which moneys have been expended, the licensor and those claiming under him, with notice, will be estopped from revoking such license, when the licensee can not be placed *in statu quo*.[8] The occupancy and use of a strip of land by a railway company for its roadbed and track, and for the running of its trains, is sufficient notice of its equity to bind a purchaser from the original licensor,[9]

[1] Ameriscoggin Bridge Co. *v.* Bragg, 11 N. H. 102. But see Batchelder *v.* Hibbard, 58 N. H. 269, and Blaisdell *v.* Portsmouth, etc., R. Co., 51 N. H. 483, holding that a parol license is revocable.

[2] Rerick *v.* Kern, 14 S. & R. (Pa.) 267; Lacy *v.* Arnett, 33 Pa. 169; Campbell *v.* McCoy, 31 Pa. St. 263; Cumberland Valley R. Co. *v.* McLanahan, 59 Pa. St. 23.

[3] Wilson *v.* Chalfant, 15 Ohio 248; Pierson *v.* Cincinnati, etc., Canal Co., 2 Disney (Ohio) 100. See, also, Columbus, etc., R. Co. *v.* Williams, 52 Ohio St. —, s. c. 41 N. E. R. 261.

[4] Sheffield *v.* Collins, 3 Ga. 82; Southwestern R. Co. *v.* Mitchell, 69 Ga. 114; Cook *v.* Pridgen, 45 Ga. 331.

[5] Snowden *v.* Wilas, 19 Ind. 10; Buchanan *v.* Logansport, etc., R. Co., 71 Ind. 265; Evansville, etc., R. Co. *v.* Nye, 113 Ind. 223.

[6] Beatty *v.* Gregory, 17 Iowa 109; Wickersham *v.* Orr, 9 Iowa 253. See, also, Des Moines, etc., R. Co. *v.* Lynd (Iowa), 62 N. W. R. 806. But compare Conger *v.* Burlington, etc., R. Co., 41 Iowa 419.

[7] Washburn on Real Prop. 548; 2 Am. Leading Cases 682, note; Ames, C. J., in Foster *v.* Browning, 4 R. I. 47. In the following cases it has been decided that licenses could not be revoked after the expenditure of money on the faith of them. Clark *v.* Glidden, 60 Vt. 702; Williams *v.* Flood, 63 Mich. 487; Baker *v.* Chicago, etc., R. Co., 57 Mo. 265; Rhodes *v.* Otis, 33 Ala. 578; Williamston, etc., R. Co. *v.* Battle, 66 N. C. 540; New Orleans, etc., R. Co. *v.* Moye, 39 Miss. 374. See, also, Norfolk, etc., R. Co. *v.* Perdue, 40 W. Va. 442, s. c. 21 S. E. R. 755; Roberts *v.* Northern Pac. R. Co., 158 U. S. 1, s. c. 15 Sup. Ct. R. 756; Chicago, etc., Railroad Co. *v.* Goodwin, 111 Ill. 273; Pryzbylowicz *v.* Missouri, etc., R. Co., 17 Fed. R. 493.

[8] Messick *v.* Midland R. Co., 128 Ind. 81; Campbell *v.* Indianapolis, etc., R. Co., 110 Ind. 490; Midland R. Co. *v.* Smith, 113 Ind. 233; Currie *v.* Natchez, etc., R. Co., 61 Miss. 725. See this subject elaborately discussed in 2 Am. Leading Cases 684.

[9] Campbell *v.* Indianapolis, etc., R. Co., 110 Ind. 490; Roberts *v.* Northern Pac. R. Co., 158 U. S. 1, s. c. 15 Sup. Ct. R. 756. The habitual use of a passway under a railroad, stipulated for in the oral grant of the right of way, is sufficient to charge the purchaser of the road at a judicial sale with knowledge of the grantor's rights therein. Swan *v.* Burlington, C. R. & N. Ry. Co., 72 Iowa 650, 34 N. W. 457.

and it is held that a land-owner is chargeable with knowledge that a railroad is of such a permanent character that it can not well be removed or abandoned,[1] and that when he permits its construction across his land, he thereby waives his remedy by injunction or action for trespass for operating the road,[2] and is relegated to a proceeding for damages under the statute.[3] In such a proceeding, it has been held that the owner of the land should be awarded damages as of the date that the land was taken, and not the value of his land as increased by reason of the completion and operation of the road.[4] Where

[1] Harlow *v.* Marquette, etc., R. Co., 41 Mich. 336, s. c. 2 N. W. R. 48. But see Wood *v.* Michigan Air Line R. Co., 90 Mich. 334.

[2] Milwaukee, etc., R. Co. *v.* Strange, 63 Wis. 178, s. c. 20 Am. & Eng. R. Cas. 413; Roberts *v.* Northern Pac. R. Co., 158 U. S. 1, s. c. 15 Sup. Ct. R. 756; Hanlin *v.* Chicago, etc., Railway Co., 61 Wis. 515; Taylor *v.* Chicago, etc., R. Co., 63 Wis. 327, s. c. 22 Am. & Eng. R. Cas. 123; Provolt *v.* Chicago, etc., R. Co., 57 Mo. 256; McAulay *v.* Western Vt. R. Co., 33 Vt. 311; McClellan *v.* St. Louis, etc., R. Co., 103 Mo. 295, 46 Am. & Eng. R. Cas. 501; Reichert *v.* St. Louis, etc., R. Co., 51 Ark. 491. See Holloway *v.* Louisville, etc., R. Co., 92 Ky. 244, 17 S. W. Rep. 572.

[3] Richards *v.* Buffalo, etc., R. Co., 137 Pa. St. 524; Denver, etc., R. Co. *v.* School Dist., 14 Colo. 327; Baker *v.* Chicago, etc., R. Co., 57 Mo. 265; Cassidy *v.* Chicago, etc., R. Co., 70 Wis. 440; Buchner *v.* Chicago, etc., R. Co., 60 Wis. 264. "One who permits a railroad company to occupy and use his lands and construct its road (a *quasi* public work) thereon without remonstrance or complaint, can not afterward reclaim it free from the servitude he has permitted to be imposed upon it. His acquiescence in the company's taking possession and constructing its works under circumstances which made imperative his resistance, if he ever intended to set up illegality, will be considered a waiver. But while this presumed waiver is a bar to his action to dispossess the company, he is not deprived of his action in damages for the value of the land or for injuries done him by the construction or operation of the road." St. Julien *v.* Morgan, etc., R. Co., 35 La. Ann. 924. That acquiescence in the construction of the road does not bar the land-owner's right to recover damages, see Harlow *v.* Marquette, etc., R. R. Co., 41 Mich. 336; Perkins *v.* Maine Cent. R. Co., 72 Me. 95; Thornton *v.* Sheffield, etc., R. Co., 84 Ala. 109; Western Pa. R. Co. *v.* Johnston, 59 Pa. St. 290; Galveston, etc., R. Co. *v.* Pfeuffer, 56 Tex. 66; Payne *v.* Morgan's, etc., R. Co., 43 La. Ann. 981, 10 S. W. Rep. 10.

[4] Texas, etc., R. Co. *v.* Sutor, 56 Tex. 496. See Baltimore, etc., R. Co. *v.* Algire, 65 Md. 337. In Watson *v.* Chicago, etc., R. Co., 46 Minn. 321, 46 Am. & Eng. R. Cas. 543, the court held that an action of ejectment could be maintained against a railroad company for the recovery of land upon which it had constructed its road with the consent of the owner. And that the mesne profits from the date of the revocation of the license by the death

a license is granted by contract in writing for a valuable consideration, and coupled with an interest, the license is generally held to be irrevocable.[1] A license to occupy land for the right of way for a railroad will, in the absence of anything to the contrary, be construed to be a license to occupy the full width which the railroad is authorized by statute to acquire.[2] A railroad company, which has laid a track under a parol license from the land-owner, can enter upon the land and remove the rails and ties used in its construction, after the license is revoked.[3] But it has been held that where its occupation of the land is wrongful its track becomes a part of the reality and can not be removed.[4] The conveyance of an easement by deed can not be revoked.[5]

of the licensor should be allowed as damages. In Kremer *v.* Chicago, etc., R. Co., 51 Minn. 15, 51 Am. & Eng. R. Cas. 382, an assessment of damages as for a condemnation of the land was had in an action in ejectment for land held by a railroad company under a parol license, the railroad company having put in an answer praying for a condemnation; and the action of the court was approved on appeal.

[1] Williamston, etc., R. Co. *v.* Battle, 66 N. C. 540; Messick *v.* Midland R. Co., 128 Ind. 81; Burrow *v.* Terre Haute, etc., R. Co., 107 Ind. 432. It is a settled rule of law that a license can not be revoked so long as it is essential to the enjoyment of a vested interest created by the licensor. Provolt *v.* Chicago, etc., R. Co., 57 Mo. 256; McAulay *v.* Western Vt. R. Co., 33 Vt. 311; New Jersey, etc., R. Co. *v.* Van Syckle, 37 N. J. L. 496.

[2] Hargis *v.* Kansas City, etc., R. Co., 100 Mo. 210. But see, *ante*, § 948.

[3] Northern Central R. Co. *v.* Canton Co., 30 Md. 347; Dietrich *v.* Murdock, 42 Mo. 279; Justice *v.* Nesquehoning Valley R. Co., 87 Pa. St. 28. See Richmond, etc., R. Co., *v.* Durham, etc., R. Co., 104 N. C. 658.

[4] Meriam *v.* Brown, 128 Mass. 391. In this case the court said: "Not having filed any written location, the corporation has not taken or appropriated the plaintiff's land to its own use in such a sense as to justify its entry upon it or to obtain any legal title or right to use or occupy it. Hazen *v.* Boston, etc., R. Co., 2 Gray (Mass.) 574. It can not enter upon it, except as a trespasser, even for the purpose of removing the rails which it has placed there, and which, by their annexation to the soil, it has lost the right to remove." But see *post*, §§ 997, 998.

[5] New Jersey, etc., R. Co. *v.* Van Syckle, 37 N. J. L. 496; Hudson *v.* Leeds, etc., R. Co., 16 Q. B. 796. See, also, Galveston, etc., R. Co. *v.* Pfeuffen, 56 Tex. 66.

CHAPTER XXXVIII.

APPROPRIATION UNDER THE EMINENT DOMAIN.

§ 950. Definition and nature of the eminent domain.
951. Constitutional provisions and questions.
952. Public use and necessity—Who determines.
953. Delegation of the power of eminent domain.
954. Delegation of the power to railroad companies—Extent of authority.
955. Construction of statutes granting right to condemn.
956. Right of foreign and consolidated companies to condemn.
957. Exercise of the right by *de facto* corporations.
958. Right to condemn where road is leased or in hands of a receiver.
959. Right to condemn can not be delegated to contractor or construction company.
960. Purposes for which a railroad company may condemn.
961. Condemnation for roads to mines or manufacturing establishments.
§ 962. Condemnation of land for future use — Second appropriation.
963. What may be appropriated—Generally.
964. Property of other corporations.
965. Property of state or United States.
966. Property devoted to another public use.
967. Franchises.
968. Exclusive grants and franchises.
969. Exempt property.
970. Extent of taking.
971. Taking additional property.
972. Title or interest acquired.
973. Width taken for right of way.
974. Taking right of way of another road.
975. Crossing another road.
976. What constitutes a taking—Generally.
977. What constitutes a taking—Illustrative cases.
978. Property damaged or injured—Constitutional provisions.

§ 950. **Definition and nature of the eminent domain.**—In addition to the modes of acquiring a right of way of which we have already treated there is another of equal or greater importance, namely, the appropriation of property under the power of eminent domain. Of this power we shall treat generally in the present chapter in so far as it affects railroads.

Eminent domain is the right or power of a sovereign state to appropriate private property to particular uses for the purpose of promoting the general welfare.[1] It is distinguished from the power of taxation in that its exercise operates upon an individual without reference to what is exacted from any other individual or class of individuals, and without reference to his ability to contribute toward the necessities of government.[2] It is also distinguished from the police power, by which the state assumes to direct the use that an owner shall make of his property so as not to interfere with the reasonable use and enjoyment by others of their property,[3] and also from the power, exercised by states, of taking or destroying property in the course of actual warfare,[4] for the owner of the property taken or damaged in the exercise of these powers is not entitled to compensation,[5]

[1] Lewis on Eminent Domain, § 1. See, also, 1 Redfield on Railways, p. 228; Dillon on Municipal Corp., § 584; Cooley Const. Lims., p. 524; Randolph on Eminent Domain, § 2; Mills on Eminent Domain, § 2; East Tennessee, etc., R. R. Co. *v.* Love, 3 Head (Tenn.) 63; Consumers', etc., Trust Co. *v.* Harless, 131 Ind. 446, s. c. 29 N. E. R. 1062; Pollard's Lessee *v.* Hogan, 3 How. (U. S.) 212; Pittsburg, etc., Co. *v.* Benwood Iron Works, 2 L. R. A. 680, and note; Mifflin Bridge Co. *v.* Juniata County, 13 L. R. A. 431, and note.

[2] People *v.* Mayor, etc., of Brooklyn, 4 N. Y. 419; Hammett *v.* Philadelphia, 65 Pa. St. 146; City of Aurora *v.* West, 9 Ind. 74; Cincinnati, etc., R. Co. *v.* Clinton Co., 1 Ohio St. 77, 102; Griffin *v.* Dogan, 48 Miss. 11. Special assessments for betterments are also referable to the power of taxation and not that of eminent domain. Hagar *v.* Board of Supervisors, 47 Cal. 222; Williams *v.* Mayor of Detroit, 2 Mich. 560; White *v.* People, 94 Ill. 604; Garrett *v.* St. Louis, 25 Mo. 505; State *v.* Blake. 36 N. J. Law 442, s. c. 35 N. J. Law 208; Baltimore *v.* Greenmount Cemetery, 7 Md. 517; Woodhouse *v.* Burlington, 47 Vt. 300; Hill *v.* Higdon, 5 Ohio St. 243; Town of Macon *v.* Patty, 57 Miss. 378; Hammett v. Philadelphia, 65 Pa. St. 146; Davidson *v.* New Orleans, 96 U. S. 97.

[3] Chicago, etc., R. Co. *v.* Iowa, 94 U. S. 155; Peik *v.* Chicago, etc., R. Co., 94 U. S. 164; Munn *v.* People, 69 Ill. 80, affirmed, Munn *v.* Illinois, 94 U. S. 113; Hine *v.* New Haven, 40 Conn. 478; Inhabitants of Watertown *v.* Mayo, 109 Mass. 315; Roosevelt *v.* Godard, 52 Barb. (N. Y.) 533; Bass *v.* State, 34 La. Ann. 494; Davenport *v.* Richmond City, 81 Va. 639. Forbidding a railroad company to use its property in a way that would be dangerous to the lives of people is not a taking for public uses. Woodruff *v.* New York & N. E. R. Co., 59 Conn. 63, 45 Am. & Eng. R. Cas. 109, 112, note.

[4] Bell *v.* Louisville, etc., R. Co., 1 Bush (Ky.) 404; Ford *v.* Surget, 46 Miss. 130; Article in 13 Amer. Law Reg. N. S. 401; Lewis' EminentDom., § 8.

[5] See cases in preceding notes. And the right to destroy property to pre-

whereas the power of eminent domain can be effectively exercised only where due compensation is made. But the power of eminent domain embraces all cases where, by authority of the state, and for the public good, the property of the individual is taken, without his consent, for the purpose of being devoted to some particular use, either by the state itself or by a corporation, public or private, or by a private citizen,[1] provided only that the use be a public one.[2] The power of eminent domain has existed in all ages as an acknowledged attribute

vent the spreading of a fire, the ravages of a pestilence or other public calamity, is distinct from the right of eminent domain, and the owner can not claim compensation for property destroyed, even though the persons destroying it acted under authority of statute. American Print Works *v.* Lawrence, 23 N. J. L. 9 and 590, 615.

[1] Lewis on Eminent Domain, § 1. The right which belongs to the society or to the sovereign, of disposing, in case of necessity, and for the public safety, of all the wealth in the state, is called the *eminent domain.* Vattel, B. I. C. 20, § 244; Pollard's Lessee *v.* Hogan, 3 How. (U. S.) 212. See Enfield Toll Bridge *v.* Hartford, etc., R. Co., 17 Conn. 40; Edgewood R. Company's Appeal, 79 Pa. St. 257; Nichols *v.* Somerset, etc., R. Co., 43 Me. 356; McLauchlin *v.* Charlotte R. Co., 5 Rich. (S. Car. Law) 583; Beekman *v.* Saratoga, etc., R. Co., 3 Paige Ch. (N. Y.) 45; Freedle *v.* North Carolina R. Co., 4 Jones (N. C.) Law 89; Brown *v.* Beatty, 34 Miss. 227; Evansville, etc., R. Co. *v.* Grady, 6 Bush (Ky.) 144; Orr *v.* Quimby, 54 N. H. 590, 611; Todd *v.* Austin, 34 Conn. 78; Giesy *v.* Cincinnati, etc., R. Co., 4 Ohio St. 308.

[2] Boom Co. *v.* Patterson, 98 U. S. 403; Chicago, etc., R. Co. *v.* Wiltse, 116 Ill. 449; Giesy *v.* Cincinnati, etc., R. Co., 4 Ohio St. 308; County Court *v.* Griswold, 58 Mo. 175. It rests in the wisdom of the legislature to determine when, and in what manner, the public necessities require its exercise, and with the reasonableness of the exercise of that discretion the courts will not interfere. Swan *v.* Williams, 2 Mich. 427; Wilkin *v.* First Div. St. Paul, etc., R. Co., 16 Minn. 271; Central Branch U. P. R. Co. *v.* Atchison, etc., R. Co., 28 Kan. 453; Seacomb *v.* Milwaukee, etc., R. Co., 29 How. (N. Y.) Pr. 75; Bachler's Appeal, 90 Pa. St. 207. Some courts consider the necessity for the taking as an important element in deciding whether the property is to be employed for a public use. And that to justify the exercise of the power, "it must be impossible, or very difficult, at least, to secure the same public uses and purposes in any other way than by authorizing the condemnation of private property." Varner *v.* Martin, 21 W. Va. 534; Dayton Min. Co. *v.* Seawell, 11 Nev. 394; Jordan *v.* Woodward, 40 Me. 317; Ryerson *v.* Brown, 35 Mich. 333. But this is decidedly opposed to the weight of authority. It is no objection to the exercise of the power, that lands equally feasible could be obtained by purchase. Giesy *v.* Cincinnati, etc., R. Co., 4 Ohio St. 308.

of sovereignty.[1] It is inherent in every sovereign government,[2] and is not conferred by constitutions, but is limited and regulated by them.[3] It can not be surrendered by grant or contract,[4] since its continued exercise is essential to the existence of organized society.[5] This power exists in each of the

[1] "It seems to have been accurately defined, and distinctly recognized, in the Roman empire, in the days of Augustus, and his immediate successors, although, from considerations of policy and personal influence and esteem, they did not always choose to exercise the right, to demolish the dwellings of the inhabitants, either in the construction of public roads or aqueducts, or ornamental columns, but to purchase the right of way." 1 Redfield on Railways, p. 230.

[2] Brown *v.* Beatty, 34 Miss. 227; United States *v.* Jones, 109 U. S. 513; Penn. Mut., etc., Ins. Co. *v.* Heiss, 141 Ill. 35, s. c. 31 N. E. R. 138; Water Works Co. *v.* Burkhart, 41 Ind. 364; Weir *v.* St. Paul, etc., R. Co., 18 Minn. 155; Beekman *v.* Saratoga, etc., R. Co., 3 Paige (N. Y.) 45; Noll *v.* Dubuque, etc., R. Co., 32 Iowa 66; White *v.* Nashville, etc., R. Co., 7 Heisk. 518; Baltimore, etc., R. Co. *v.* Pittsburg, etc., R. Co., 17 W. Va. 812, 841. Being an attribute of sovereignty, the power of eminent domain does not inhere in a territorial government. Pratt *v.* Brown, 3 Wis. 603; Newcomb *v.* Smith, 1 Chandler (Wis.) 71. But a territory may exercise the power by express delegation of authority from congress. Warren *v.* First Div. St. Paul, etc., R. Co., 18 Minn. 384. The Cherokee Nation is not a sovereign state and, therefore, does not possess the power of eminent domain. Cherokee Nation *v.* Southern Kansas R. Co., 135 U. S. 641.

[3] Elliott on Roads and Streets, 141, and other authorities there cited. See, also, Fort Leavenworth R. Co. *v.* Lowe, 114 U. S. 525; West River Bridge Co. *v.* Dix, 6 How. (U. S.) 507; Bloodgood *v.* Mohawk, etc., R. Co., 18 Wend. (N. Y.) 9, s. c. 31 Am. Dec. 313; Central Branch, etc., R. Co. *v.* Atchison, etc., R. Co., 28 Kan. 453, s. c. 10 Am. & Eng. R. Cas. 528.

[4] Cooley Const. Lim., *281, *525; Greenleaf's Cruise on Real Property, Vol. II, p. 67, note. See Eastern R. Co. *v.* Boston, etc., R. Co., 111 Mass. 125; Illinois, etc., Canal *v.* Chicago, etc., R. Co., 14 Ill. 314; Baltimore, etc., Turnpike Co. *v.* Union R. Co., 35 Md. 224; People *v.* Mayor, etc., of New York, 32 Barb. (N. Y.) 102; Alabama, etc., R. Co. *v.* Kenney, 39 Ala. 307. In his work on Constitutional Limitations Judge Cooley says: "When the existence of a particular power in the government is recognized on the ground of necessity, no delegation of the legislative power of the people can be held to vest authority in the department which holds it in trust, to bargain away such power, or to so tie up the hands of the government as to preclude its repeated exercise, as often and under such circumstances as the needs of the government may require." Cooley Const. Lim., p. *525.

[5] Raleigh, etc., R. Co. *v.* Davis, 2 Dev. & B. Law (N. C.) 451. "The right of eminent domain, that is, the ultimate right of the sovereign power to appropriate, not only the public property, but the private property of all the citizens within the territorial sovereignty, to public purposes, is in-

states of the Union whether it is expressly conferred by the constitution or not,[1] and extends to taking public lands of the United States that lie within the borders of the state exercising the power.[2] And it may also be exercised by the United States government in the discharge of its constitutional powers to secure land for military roads, light houses, and other conveniences and necessities of government.[3] This power extends to taking property for any purpose and in any manner, by which the general welfare may be advanced, excepting so far as it is limited by constitutional restrictions.[4]

herent in the government; without this power, the state could not establish and open a highway of any kind. No railroad, canal or turnpike could be constructed; no ground upon which to build a public building could be procured by the state or government, in any other way than by contract with the owner." Water Works Co. *v.* Burkhart, 41 Ind. 364, per Osborn, J.

[1] Boom Co. *v.* Patterson, 98 U. S. 403; Brown *v.* Beatty, 34 Miss. 227.

[2] United States *v.* Railroad Bridge Co., 6 McLean (U. S.) 517.

[3] Matter of United States, 96 N. Y. 227; People *v.* Humphrey, 23 Mich. 471; Darlington *v.* United States, 82 Pa. St. 382; United States *v.* Oregon R., etc., Co., 16 Fed. Rep. 524, 14 Am. & Eng. R. Cas. 23; Kohl *v.* United States, 91 U. S. 367; United States *v.* Gettysburg, etc., R. Co., (U. S.) 16 Sup. Ct. R. 427; Elliott on Roads and Streets,143. But the United States may, and usually does, make use of the officers, tribunals and institutions of the states as its agents, in the accomplishment of its governmental functions, where this can be done with the consent of the state. And, in the absence of any declaration to the contrary, the consent of the state will be presumed. Ft. Leavenworth R. Co. *v.* Lowe, 114 U. S. 525–532; United States *v.* Jones, 109 U. S. 513; Matter of United States, *supra*. And in some cases it has been held that the legislature can delegate to the agent of the United States the right of eminent domain for the purpose of obtaining land for a site for a post-office or other public buildings. Burt *v.* Merchant's Ins. Co., 106 Mass. 356; Gilmer *v.* Lime Point, 18 Cal. 229; Reddall *v.* Bryan, 14 Md. 444. There is strong authority, however, for holding that a state can not exercise the power of eminent domain on behalf of another sovereignty, and that condemnation proceedings on behalf of the United States must be prosecuted by authority of its own laws. People *v.* Humphrey, 23 Mich. 471, per Cooley, J; Darlington *v.* United States, 82 Pa. St. 382; Jones *v.* United States, 48 Wis. 385.

[4] "The accepted theory upon this subject appears to be this: In every sovereign state there resides an absolute and uncontrolled power of legislation. In Great Britain this complete power rests in the parliament; in the American states it resides in the people themselves as an organized body politic. But the people, by creating the constitution of the United States, have delegated this power as to certain subjects, and under certain restrictions, to the congress of the Union,

§ 951. **Constitutional provisions and questions.**—The constitution of the United States[1] and the constitutions of nearly

and that portion they can not resume, except as it may be done through amendment of the national constitution. For the exercise of the legislative power, subject to this limitation, they create, by their state constitution, a legislative department upon which they confer it; and granting it in general terms, they must be understood to grant the whole legislative power which they possessed, except so far as at the same time they saw fit to impose restrictions. While, therefore, the parliament of Britain possesses completely the absolute and uncontrolled power of legislation, the legislative bodies of the American states possess the same power except, *first*, as it may have been limited by the constitution of the United States; and, *second*, as it may have been limited by the constitution of the state. A legislative act can not, therefore, be declared void, unless its conflict with one of these instruments can be pointed out." Cooley Const. Limit., 172, 173; People *v.* New York Cent. R. Co., 34 Barb. (N. Y.) 123, 138; People *v.* Supervisors, 17 N. Y. 235; Gentry *v.* Griffith, 27 Tex. 461; Derby Turnpike Co. *v.* Parks, 10 Conn. 522, 543; Town of Danville *v.* Pace, 25 Gratt. (Va.) 1; Chicago, etc., R. Co. *v.* Smith, 62 Ill. 268; Yancy *v.* Yancy, 5 Heisk. (Tenn.) 353; Norris *v.* Abingdon Academy, 7 Gill & J. (Md.) 7; Hobart *v.* Supervisors, 17 Cal. 23; Williams *v.* Detroit, 2 Mich. 560; Macon, etc., R. Co. *v.* Davis, 13 Ga. 68; Cotten *v.* County Commissioners, 6 Fla. 610; Butler's Appeal, 73 Pa. St. 448; Inhabitants of Durham *v.* Lewiston, 4 Me. 140; Challiss *v.* Atchison, etc., R. Co., 16 Kan. 117; Baltimore, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 17 W. Va. 812, 841; Winona, etc., R. Co. *v.* Waldron, 11 Minn. 515, 539; United States *v.* Jones, 109 U. S. 518; Raleigh, etc., R. Co. *v.* Davis, 2 Dev. & B. Law (N. C.) 451; Central R. Co. *v.* Hetfield, 29 N. J. Law 206. In some cases it is said that the only limitation upon the exercise of the right of eminent domain—the power of the state to take or authorize the taking of private property for public use—is that contained in the state constitutions. Wilson *v.* Baltimore and P. R. Co., 5 Del. Ch. 524. But see Elliott on Roads and Streets, 142. For cases holding that the legislature can not pass any law opposed to natural right and justice, see Bowman *v.* Middleton, 1 Bay (S. Car.) 252; Harness *v.* Chesapeake, etc., Canal Co., 1 Md. Ch. 248; Bradshaw *v.* Rodgers, 20 Johns. (N. Y.) 103; Terrett *v.* Taylor, 9 Cranch (U. S.) 43, per Story, J.; Cairo, etc., R. Co. *v.* Turner, 31 Ark. 494; Doe *v.* Georgia R., etc., Co., 1 Ga. 524; Johnston *v.* Rankin, 70 N. C. 550; Petition of Mount Washington Road Co., 35 N. H. 134.

[1] Amendments of 1791, Art. 5. The provision in the constitution of the United States that private property shall not be taken for public use without just compensation, applies only to the operations of the federal government, and is not a limitation upon the power of the states. Pumpelly *v.* Green Bay Co., 13 Wall. (U. S.) 166; Barron *v.* Mayor, etc., of Baltimore, 7 Peters (U. S.) 243; Concord R. Co. *v.* Greely, 17 N. H. 47; Cairo, etc., R. Co. *v.* Turner, 31 Ark. 494; Raleigh, etc., R. Co. *v.* Davis, 2 Dev. & B. Law (N. Car.) 451; Livingston *v.* Mayor, etc., of New York, 8 Wend. (N. Y.) 85; Martin *v.* Dix, 52 Miss. 53; Renthorp *v.* Bourg,

all the states of the Union[1] require a just compensation to be made for all property taken for public use, and most of them require the compensation to be paid or secured before the property is taken.[2] It can only be taken pursuant to "the law of the land," and, as constitutions do not create or execute the right of eminent domain, there must be a statute, in some way authorizing the seizure,[3] but when a valid statute is enacted conferring the right to condemn and providing for "due process of law," it stands as the law of the land.[4] The constitutional provision that "the right of trial by jury shall remain inviolate," does not require that a jury trial should be provided for in condemnation cases, and the legislature may deny a trial by jury.[5] But the constitutions of some of the states expressly

4 Martin (O. S.) (La.) 97; Parham *v.* Justices, 9 Ga. 341; Lewis Em. Dom., § 11. *Contra*, Doe *v.* Georgia R., etc., Co., 1 Ga. 524; Scudder *v.* Trenton, etc., Co., 1 N. J. Eq. 694. The fourteenth amendment, however, does seem to apply to state action. Elliott Roads and Streets, 142; Randolph Em. Dom., § 36. See Davidson *v.* New Orleans, 96 U. S. 97; Kentucky Railroad Tax Cases, 115 U. S. 321; Scott *v.* City of Toledo, 36 Fed. R. 385, and compare Eldridge *v.* Binghamton, 120 N. Y. 309; Wilson *v.* Baltimore, etc., R. Co., 5 Del. Ch. 524.

[1] Lewis on Eminent Dom., §§ 14 to 52, (1888); Stimson's Am. Stat., § 91, (1886).

[2] Stimson's Am. Stat., § 93 (1886), citing constitutions of New Jersey, Pennsylvania, Ohio, Indiana, Michigan, Iowa, Minnesota, Kansas, Maryland, West Virginia, Kentucky, Arkansas, Texas, California, Oregon, Nevada, South Carolina, Georgia, Alabama, Louisiana. But in Indiana, Michigan, Texas and Oregon compensation need not precede the taking, where property is taken by the state; nor in New Jersey, West Virginia and California, when the property is taken either by the state or a municipal corporation. Stimson's Am. Stat., § 93 (1886.) It is not competent for the legislature to prescribe the amount of compensation to be paid for the property. What is "just compensation" is a judicial question. Pennsylvania R. Co. *v.* Baltimore, etc., R. Co., 60 Md. 263.

[3] 2 Dillon's Munic. Corp., §§ 602, 604; Elliott on Roads and Streets, 148, 149; Chicago, etc., Railroad Co. *v.* Lake, 71 Ill. 333; Galveston, etc., R. Co. *v.* Mud Creek, etc., Co., 1 Tex. App. (Civil Cases) 169; Phillips *v.* Dunkirk, etc., R. Co., 78 Pa. St. 177; Allen *v.* Jones, 47 Ind. 438; Mills Em. Dom., 384.

[4] Cooley's Const. Lim., 528; Alexander, etc., R. Co. *v.* Alexander, etc., R. Co., 75 Va. 780; Secombe *v.* Railroad Co., 23 Wall. (U. S.) 108. See, also, note to Bank *v.* Cooper, 24 Am. Dec. 537; Mills Em. Dom., § 84.

[5] Elliott on Roads and Streets, 149; Beekman *v.* Saratoga, etc., R. Co., 3 Paige Ch. (N. Y.) 45, s. c. 22 Am. Dec. 679; Scudder *v.* Trenton, etc., Co., 1 N. J. Eq. 694, s. c. 23 Am. Dec. 756; Backus *v.* Lebanon, 11 N. H. 19; s. c. 35 Am. Dec. 466; Copp *v.* Hen-

require that the compensation shall be determined by a jury.[1]

§ 952. **Public use and necessity—Who determines.**—The courts almost uniformly agree in holding that property can only be taken under the power of eminent domain for some use in which the public interest is involved,[2] unless the power to condemn property for private uses has been expressly delegated by a provision in the constitution.[3] They also agree that the power of eminent domain can only be exercised to meet some public necessity; that it is created by and grows out of an existing necessity. But the legislature is the proper

niker, 55 N. H. 179; Willyard *v.* Hamilton, 7 Ohio 111, s. c. 30 Am. Dec. 195. See, also, United States *v.* Engerman, 46 Fed. R. 176; State *v.* Lyle, 100 N. Car. 497.

[1] Randolph Em. Dom., § 316.

[2] Concord R. Co. *v.* Greely, 17 N. H. 47; Bloodgood *v.* Mohawk, etc., R. Co., 18 Wend. (N. Y.) 9, 56; Bangor R. Co. *v.* McComb, 60 Me. 290; Beekman *v.* Railroad Co., 3 Paige (N. Y.) 45; New Central Coal Co. *v.* George's Creek Coal, etc., Co., 37 Md. 537; Waddell's Appeal, 84 Pa. St. 90; Sadler *v.* Langham, 34 Ala. 311; Tyler *v.* Beacher, 44 Vt. 648; Valley City Salt Co. *v.* Brown, 7 W. Va. 191; Varner *v.* Martin, 21 W. Va. 534; Osborn *v.* Hart, 24 Wis. 89; Witham *v.* Osburn, 4 Ore. 318; Bankhead *v.* Brown, 25 Iowa 540; Brown *v.* Beatty, 34 Miss. 227; Lorenz *v.* Jacob, 63 Cal. 73; McQuillen *v.* Hatton, 42 Ohio St. 202; Dickey *v.* Tennison, 27 Mo. 373; Hand Gold Min. Co. *v.* Parker, 59 Ga. 419. The power can only be exercised to supply some existing public need or to gain some present public advantage; not with a view to contingent results dependent on a projected speculation. Edgewood R. Co.'s Appeal, 79 Pa. St. 257.

[3] In Coster *v.* Tide Water Co., 18 N. J. Eq. 54, 63, the chancellor says: "There is no prohibition in the constitution of this state, or in any of the state constitutions, that I know of, against taking private property for private use. But the power is nowhere granted to the legislature. The constitution vests in the senate and general assembly the legislative or law-making power. They can make laws, the rules prescribed to govern our civil conduct. They are not sovereign in all things; the executive and judicial power is not vested in them. Taking the property of one man and giving it to another is not making a law or rule of action, it is not legislation, it is simply robbery." See this subject fully discussed in Lewis on Em. Dom., § 157, *et seq.*; Cooley Const. Limit., *530, *et seq.* The provision of the Colorado constitution, recognizing the right to appropriate private property for private ways of necessity, does not include the right to take and use it for the construction of private railroads. People *v.* District Court, 11 Colo. 147, 17 Pac. 298.

authority to determine whether a necessity exists for the exercise of the power and its determination of the question is conclusive.[1] The propriety of the exercise of the right of eminent domain is a political or legislative, and not a judicial, question; and the manner of its exercise by the legislature, except as to the matter of compensation, is unrestricted. The legislature is not bound to submit the question of the propriety of the exercise of the right of eminent domain to a judicial tribunal, but may exercise it itself, or delegate it to a jury, commission, or any other body as it sees fit.[2] It has been held, however, that no more property can be taken than is required to meet the necessity which the legislature has declared to exist, and that the legislature can not authorize a corporation to take *all* of a tract of land without the owner's consent when only a *part* thereof is necessary for the prosecution of a public enterprise.[3] And

[1] National Docks R. Co. *v.* Central R. Co., 32 N. J. Eq. 755, 763; Baltimore, etc., R. Co. *v.* Pittsburg, etc., R. Co., 17 W. Va. 812; Beekman *v.* Saratoga, etc., R. Co., 3 Paige (N. Y.) 45; Buffalo, etc., R. Co. *v.* Brainard, 9 N. Y. 100; United States *v.* Oregon R., etc., Co., 16 Fed. R. 524; Aldridge *v.* Tuscumbia, etc., R. Co., 2 Stew. & P. (Ala.) 199; Whiteman's Exr. *v.* Wilmington, etc., R. Co., 2 Harr. (Del.) 514; Challiss *v.* Atchison, etc., R. Co., 16 Kan. 117, 126; Chicago, etc., R. Co. *v.* Town of Lake, 71 Ill. 333; Water Works Co. *v.* Burkhart, 41 Ind. 364; Consumers', etc., Trust Co. *v.* Harless, 131 Ind. 446, s. c. 29 N. E. R. 1062; Moore *v.* Sanford, 151 Mass. 285, 7 L. R. A. 151, and note; Lent *v.* Tillson, 72 Cal. 404; City of Savannah *v.* Hancock, 91 Mo. 54; Tyler *v.* Beacher, 44 Vt. 648; Chicago, etc., R. Co. *v.* Wiltse, 116 Ill. 449; Town of Cherokee *v.* Sioux City, etc., Co., 52 Iowa 279; Roanoke City *v.* Berkowitz, 80 Va. 616; Shoemaker *v.* United States, 147 U. S. 282, s. c. 13 Sup. Ct. R. 361; Elliott on Roads and Streets, 145, 146. Like the power to tax, it resides in the legislative department to which the delegation is made. It may be exercised directly or indirectly by that body, and it can only be restrained by the judiciary when its limits have been exceeded or its authority has been abused or perverted. Kramer *v.* Cleveland, etc., R. Co., 5 Ohio St. 140. When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance. Boom Co. *v.* Patterson, 98 U. S. 403; Chicago, etc., R. Co. *v.* Wiltse, 116 Ill. 449; County Court *v.* Griswold, 58 Mo. 175; Giesy *v.* Cincinnati, etc., R. Co., 4 Ohio St. 308.

[2] State *v.* Rapp, 39 Minn. 65, s. c. 38 N. W. R. 926; State *v.* Stewart, 74 Wis. 620, s. c. 43 N. W. R. 947, 6 L. R. A. 394; People *v.* Smith, 21 N. Y. 595; Chicago, etc., R. Co. *v.* Town of Lake, 71 Ill. 333; Challiss *v.* Atchison, etc., Co., 16 Kan. 117; Elliott on Roads and Streets, 146.

[3] Dunn *v.* Charleston, Harper (S. Car.) Law, 189; Baltimore *v.* Calumet,

the question as to whether the particular use for which property is sought to be taken in any case is a public use, unlike the somewhat similar question of the necessity or expediency of taking property for public use, is a judicial question.[1] The authorities as to what constitutes a public

23 Md. 449; *In re* Albany Street, 11 Wend. (N. Y.) 149; Embury *v.* Conner, 3 Comst. (N. Y.) 511. In this latter case, Jewett, J., speaking for the court, said: "It needs no argument to show that the end and design of this section was not to take private property for the use of the public. It manifestly goes upon the ground that the property so authorized to be taken is not wanted for the purpose of forming or improving a street, the object in view for which the proceedings are instituted." And he refers with approval to *In re* Albany Street, *supra*, in which the court holds that if the provision was meant to authorize the corporation to take additional property not needed for public use, *with the consent of the owner*, it was valid. "But if it was to be taken literally, that the commissioners might, against the consent of the owner, take the whole lot, when only a part was required for public use, and the residue to be applied to private use, it assumed a power which the legislature did not possess." In England, under the statute, where the taking of a part of the premises destroys the value of the remaining portion for the purpose for which it is used, the owner can compel the company to take the whole. Thus a man having his dwelling-house in a tract of two and one-eighth acres of ground, surrounded by brick walls, used part of the land as a nursery garden for trade purposes. It was held that he was entitled under § 92 of the land clause act, 1845, to compel a railway company, proposing, without actually touching the house, to take the greenhouses and a part which had been planted and used for ornamental purposes, to take the whole of the land. Salter *v.* Metropolitan District R. Co., L. R. 9 Eq. 432. And a manufactory which run partly by water-power was permitted to compel a railroad company that proposed to take the bed of the stream from which the water-power was obtained, to take the whole manufactory. Furniss *v.* Midland R. Co., L. R. 6 Eq. 473.

[1] Pittsburgh, etc., R. Co. *v.* Benwood Iron Works, 31 W. Va. 710, s. c. 8 S. E. R. 453, 2 L. R. A. 680; Sadler *v.* Langham, 34 Ala. 311; McQuillen *v.* Hatton, 42 Ohio St. 202; *In re* St. Paul, etc., R. Co., 34 Minn. 227; City of Savannah *v.* Hancock, 91 Mo. 54; St. Joseph, etc., R. Co. *v.* Hannibal, etc., R. Co., 94 Mo. 535, s. c. 6 S. W. R. 691; Concord R. Co. *v.* Greely, 17 N. H. 47; New Central Coal Co. *v.* George's Creek Coal, etc., Co., 37 Md. 537; Consolidated Channel Co. *v.* Central Pac. R. Co., 51 Cal. 269; Stockton, etc., R. Co. *v.* Stockton, 41 Cal. 147; Varner *v.* Martin, 21 W. Va. 534, 550; Dayton, etc., Mining Co. *v.* Seawell, 11 Nev. 394; Coster *v.* Tide Water Co., 18 N. J. Eq. 54; Bankhead *v.* Brown, 25 Iowa 540; Loughbridge *v.* Harris, 42 Ga. 500; Matter of Deansville Cemetery Assn., 66 N. Y. 569, s. c. 23 Am. R. 86; Tyler *v.* Beacher, 44 Vt. 648; Talbot *v.* Hudson, 16 Gray (Mass.) 417; Anderson *v.* Turbeville, 6 Coldw. (Tenn.) 150; Denver, etc., Co. *v.* Union Pac. R. Co., 34 Fed. R. 386; Logan *v.* Stogdale, 123 Ind. 372, 8 L. R. A. 58, and note.

use are hopelessly conflicting, some cases holding that the term "public use" is equivalent to "public benefit,"[1] and that whatever is beneficially employed for the community is of public use,[2] while some other cases hold that to constitute a public use the public must assume control of the property taken, or some right to use the property must pass to the public.[3] It is generally conceded that, to be public, it is not essential that the user should be such as to directly benefit all, or any considerable part, of the entire community,[4] but the use and benefit must, as a general rule, be common to all members of the community who choose to avail themselves of it,[5] although it has been held that a union depot company organized to provide depot and terminal facilities for a number of railroads may be authorized to condemn property for that purpose.[6]

[1] Olmstead *v.* Camp, 33 Conn. 532; Seely *v.* Sebastian, 4 Ore. 25; Talbot *v.* Hudson, 16 Gray (Mass.) 417; Beekman *v.* Saratoga, etc., R. Co., 3 Paige (N. Y.) 45, 73; Pittsburgh *v.* Scott, 1 Pa. St. 309; Bellona Company's Case, 3 Bland Ch. (Md.) 442; Hand Gold Min. Co. *v.* Parker, 59 Ga. 419.

[2] Aldridge *v.* Tuscumbia, etc., R. Co., 2 Stew. & P. (Ala.) 199.

[3] Varner *v.* Martin, 21 W. Va. 534; Sholl *v.* German Coal Co., 118 Ill. 427; Memphis Freight Co. *v.* Memphis, 4 Coldw. (Tenn.) 419; Jenal *v.* Green Island Drainage Co., 12 Neb. 163; Matter of Eureka, etc., Manf. Co., 96 N. Y. 42; West River Bridge Co. *v.* Dix, 6 How. (U. S.) 507, 546.

[4] Gilmer *v.* Lime Point, 18 Cal. 229; Sherman *v.* Buick, 32 Cal. 241; Sadler *v.* Langham, 34 Ala. 311; Warren *v.* Bunnell, 11 Vt. 600; O'Reiley *v.* Kankakee Valley, etc., Co., 32 Ind. 169; Aldridge *v.* Tuscumbia, etc., R. Co., 2 Stew. & Por. (Ala.) 199; Bloomfield, etc., Co. *v.* Richardson, 63 Barb. (N.Y.) 437; Chicago, etc., R. Co. *v.* Porter, 43 Minn. 527, s. c. 2 Lewis Am. R. & Corp. R. 415, and note on page 425; Talbot *v.* Hudson, 16 Gray (Mass.) 417; Shaver *v.* Starrett, 4 Ohio St. 494; McQuillen *v.* Hatton, 42 Ohio St. 202; Riche *v.* Bar Harbor Water Co., 75 Me. 91, 28 Alb. L. J. 498; Elliott on Roads and Streets, 146, 147, quoted with approval in Township of Madison *v.* Gallagher, 159 Ill. 105, s. c. 42 N. E. R. 316, 317.

[5] Coster *v.* Tide Water Co., 18 N. J. Eq. 54; Williams *v.* School District, 33 Vt. 271; Olmstead *v.* Camp, 33 Conn. 532; McQuillen *v.* Hatton, 42 Ohio St. 202; Township Board *v.* Hackmann, 48 Mo. 243; Elliott on Roads and Streets, 146. It does not depend upon the amount of business, but upon the right of the public generally to use the road or conduct business with it as a common carrier. Kettle River R. Co. *v.* Eastern R. Co., 41 Minn. 461, s. c. 43 N. W. Rep. 469, 40 Am. & Eng. R. Cas. 449, 6 L. R. A. 111; Concord R. Co. *v.* Greely, 17 N. H. 47. But see Pittsburgh, etc., R. Co. *v.* Benwood Iron Works, 31 W. Va. 710, s. c. 8 S. E. R. 453.

[6] Fort Street Union Depot Co. *v.* Morton, 83 Mich. 265, s. c. 3 Lewis Am. R. & Corp. Cas. 438.

§ 953. **Delegation of the power of eminent domain.**—The legislature may appropriate property under the power of eminent domain by an act specifying the property required and the use to which it is to be devoted,[1] and when it has declared the necessity for taking certain property by regular enactment, such act must be held to be, for this purpose, the law of the land, and no further finding or adjudication can be essential, unless the constitution of the state expressly so requires;[2] or it may declare the purpose for which property is to be taken and leave the selection of the property to be taken to whatever agencies it pleases ; for it has the sole power to judge what persons, corporations, or other agencies may properly be clothed with this power, subject only to the limitations imposed by the constitution.[3] Thus the right to take private property for a recognized public use may be conferred upon an individual,[4] or upon a corporation, whether municipal,[5] or pri-

[1] Mims *v.* Macon, etc., R. Co., 3 Ga. 333; Baltimore, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 17 W. Va. 812; Hingham, etc., Turnpike Co. *v.* County of Norfolk, 6 Allen (Mass.) 353; Township of Mahoney *v.* Comry, 103 Pa. St. 362; *In re* Towanda Bridge Co., 91 Pa. St. 216; Smedley *v.* Erwin, 51 Pa. St. 445; Genet *v.* Brooklyn, 99 N. Y. 296; Matter of Application of Mayor, etc., of New York, 99 N. Y. 569 (affirming 34 Hun 441); Matter of Union Ferry Co., 98 N. Y. 139; Boom Co. *v.* Patterson, 98 U. S. 403; Lewis on Eminent Domain, § 242.

[2] Kramer *v.* Cleveland, etc., R. Co., 5 Ohio St. 140; Secombe *v.* Railroad Co., 23 Wall. (U. S.) 108; Alexandria, etc., R. Co. *v.* Alexandria, etc., R. Co., 75 Va. 780, 10 Am. & Eng. R. Cas. 23; Cooley's Constitutional Limitations, *528.

[3] Ash *v.* Cummings, 50 N. H. 591; Gilmer *v.* Lime Point, 18 Cal. 229; Concord R. Co. *v.* Greely, 17 N. H. 47; Tide Water Canal Co. *v.* Archer, 9 Gill & J. (Md.) 479; Yost's Report, 17 Pa. St. 524; Elliott on Roads and Streets, 148.

[4] Matter of Petition of Kerr, 42 Barb. (N. Y.) 119; Town of Lebanon *v.* Olcott, 1 N. H. 339; Pratt *v.* Brown, 3 Wis. 603; Lawrence *v.* Morgan's La., etc., R. Co., 39 La. Ann. 427; Morgan *v.* Louisiana, 93 U. S. 217; Moran *v.* Ross, 79 Cal. 159, 21 Pac. Rep. 547, 39 Am. & Eng. R. Cas. 1. The provision of the Cal. Const., Art. 1, § 14, that a corporation can not exercise the right of eminent domain except upon certain conditions, does not imply a prohibition against the exercise of such right by individuals. And it is immaterial to the right of an individual to condemn land for a railroad that a railroad corporation had previously located a road on that line, and built on a part of it. Moran *v.* Ross, *supra.*

[5] Inhabitants of Wayland *v.* County Commissioners, 4 Gray (Mass.) 500; Gardner *v.* Newburgh, 2 Johns. (N. Y.) Ch. 162; Mayor, etc., of New York *v.* Bailey, 2 Denio (N. Y.) 433; *In re* Rochester Water Commissioners, 66

vate,[1] except in so far as the constitution forbids. And it may be conferred by a general act or general incorporation laws upon all individuals or corporations complying with the terms of such laws.[2]

§ 954. Delegation of the power to railroad companies—Extent of authority.—Since railroads are regarded as of public utility, the delegation to a railroad corporation of the power to take, by proceedings *in invitum*, the necessary lands upon which to build its road, is upheld by all the courts.[3] But a

N. Y. 413; Ham *v.* Salem, 100 Mass. 350; Reddall *v.* Bryan, 14 Md. 444; Kane *v.* Baltimore, 15 Md. 240; Burden *v.* Stein, 27 Ala. 104. The right to condemn property under the laws of the state may be conferred on the United States government. Gilmer *v.* Lime Point, 18 Cal. 229; Burt *v.* Merchants' Ins. Co., 106 Mass. 356. *Ante*, § 950.

[1] Bloodgood *v.* Mohawk, etc., R. Co., 18 Wend. (N. Y.) 9; Buffalo, etc., City R. Co. *v.* Brainard, 9 N. Y. 100; Concord R. Co. *v.* Greely, 17 N. H. 47; Mims *v.* Macon, etc., R. Co., 3 Ga. 333; Hand Gold Mining Co. *v.* Parker, 59 Ga. 419; Louisville, C. & C. R. R. Co. *v.* Chappell, Rice L. (S. C.) 383; Tide-Water Canal Co. *v.* Archer, 9 Gill & J. (Md.) 479.

[2] National Docks R. Co. *v.* Central R. Co., 32 N. J. Eq. 755; Central R. Co. *v.* Pennsylvania R. Co., 31 N. J. Eq. 475; Weir *v.* St. Paul, etc., R. Co., 18 Minn. 155. A general statute authorizing the creation of an indefinite number of railroad corporations, making such corporations common carriers, and requiring them to be constantly engaged in such public employment, may also constitutionally authorize them to take private property for their roads on making compensation. Buffalo, etc., R. Co. *v.* Brainard, 9 N. Y. 100.

[3] Beekman *v.* Saratoga R. Co., 3 Paige Ch. (N. Y.) 45; Rensselaer, etc., R. Co. *v.* Davis, 43 N. Y. 137; *In re* City of Buffalo, 68 N. Y. 167; Kramer *v.* Cleveland, etc., R. Co., 5 Ohio St. 140; Ash *v.* Cummings, 50 N. H. 591; London, etc., R. Co. *v.* Grand Junction Canal Co., 1 Eng. R. & Canal Cas. 224; Cairo, etc., R. Co. *v.* Turner, 31 Ark. 494; Enfield Toll Bridge *v.* Hartford, etc., R. Co., 17 Conn. 40; Buffalo Bayou, etc., R. Co. *v.* Ferris, 26 Tex. 588; San Francisco, etc., R. Co. *v.* Caldwell, 31 Cal. 367; Lexington, etc., R. Co. *v.* Applegate, 8 Dana (Ky.) 289; Louisville, etc., R. Co. *v.* Chappell, Rice L. (S. C.) 383; Secomb *v.* Milwaukee, etc., R. Co., 49 How. Pr. (N. Y.) 75; Bonaparte *v.* Camden, etc., R. Co., 1 Baldwin (U. S.) 205. For many additional authorities see *post*, § 960. The legislature can not, in the exercise of the right of eminent domain, provide for the appropriation of private property to a mere private enterprise, in which the public have manifestly no interest. But railroad companies, even when owned by individuals, are not private enterprises merely, and the legislature may authorize such incorporations to take the necessary private property to the use of their roads *in invitum*. Brown *v.* Beatty, 34 Miss. 227.

general law in regard to the assessment of damages in condemnation proceedings will not supersede the provisions of special charters on the subject,[1] unless a clear legislative intent to give it that effect is manifested.[2] Where the power to take all necessary lands for use in the construction of a public work is delegated to one or more individuals or to a corporation, the courts are generally concluded, by the good faith determination of such agency, as to the necessity for taking any particular lands,[3] so long as the use to which they are to be devoted is a

[1] Norfolk, etc., R. Co. *v.* Ely, 95 N. C. 77; State *v.* Trenton, 36 N. J. Law 198; State *v.*Clarke, 25 N. J. Law 54; North Missouri R. Co. *v.* Gott, 25 Mo. 540; Hudson River R. Co. *v.* Outwater, 3 Sandf. (N. Y.) 689.

[2] McCrea *v.* Port Royal R. Co., 3 S. Car. 381; Moore *v.* Superior, etc., R. Co., 34 Wis. 173; Lewis Em. Dom., § 248. But a corporation whose charter provides a mode of condemnation may proceed under the general law for the assessment of damages when it chooses to do so. Cascades R. Co. *v.* Sohns, 1 Wash. Ter. 557.

[3] Smith *v.* Gould, 59 Wis. 631, 61 Wis. 31. See Chicago, etc., R. Co. *v.* Town of Lake, 71 Ill. 333; Baltimore, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 17 W. Va. 812; Doe *v.* North Staffordshire R. Co., 16 Q. B. 526. In Deitrichs *v.* Lincoln, etc., R. Co., 13 Neb. 361, it is said that the question as to the necessity of taking the lands is *prima facie* a question for the corporation to determine. A large discretion must be accorded to a railroad company in determining its route and the location of its tracks, turnouts, switches, and depot-houses, for which land may be taken, subject, of course, to judicial supervision to prevent abuse of such discretion. Colorado E. R. Co. *v.* Union P. R. Co., (C. C. D. Colo.) 7 R. R. & Corp. L. J. 373, 41 Fed. R. 293. In New York Central R. Co. *v.* Metropolitan Gas Light Co., 5 Hun (N. Y.) 201, Davis, P. J., speaking for the court, said: "Upon the point that the lands proposed to be taken are not necessary, because it might be practicable for the respondents to lay their tracks upon their own lands by adopting another curve, we are not prepared to concur with the appellant's counsel. It is not a question of possibilities, nor of strict practicabilities within the opinion of engineers. No route was ever surveyed for a railroad which was not open to such objections, and if the right to take lands was to be determined by conflicting evidence whether, after all, the tracks might not, with greater or equal convenience, be laid elsewhere, the construction of a road would be attended with the most serious embarrassments. Reasonable necessity must be shown, but a reasonable discretion must be allowed to the officers who locate the tracks of a railroad, for it can not be presumed that the corporation is unnecessarily incurring heavy expenses in obtaining lands, when those it already has would answer its purposes. We think enough has been shown to bring this case within the rule of the authorities in respect to this question. Matter of N. Y. & Harlem R. R. Co. *v.* Kip, 46 N. Y. 546; Matter of Boston and Albany R. Co., 53 N. Y. 574.

public use.[1] But this rule is subject to the limitation that the taking must be within the delegated power. Thus an authority to condemn lands "adjoining their road as constructed on their right of way as located," does not include power to take lands which merely adjoin a side-track leading from the railroad route to a freight house,[2] and authority to take necessary lands to "widen" the right of way does not confer power to take adjoining lands upon which to relay the main track at such a distance from the former line as to amount to a relocation.[3] So, where the charter of a railroad company authorized it to take land contiguous to the line of its road for depots and other appurtenances, provided the amount so taken should not exceed five acres, it was held that the company could not take, without the consent of the owner, as a site for a warehouse, a tract of land four hundred yards from the line of their road together with a narrow strip of land extending from their main track to the site of the proposed warehouse, on which to build a side-track or branch road, although the whole quantity required for the warehouse and the road leading to it would not exceed five acres.[4] It is said that the power of a railroad to take lands is limited to what is necessary in order that it may fulfill its public duties.[5] But the necessity

[1] Courts have the right to determine whether the use is public or not, and to restrain the appropriation of lands for any other than a public use. Consolidated Channel Co. *v.* Central Pacific R. Co., 51 Cal. 269; Stockton, etc., R. Co. *v.* Stockton, 41 Cal. 147; *In re* St. Paul, etc., R. Co., 34 Minn. 227; New Central Coal Co. *v.* George's Creek Coal, etc., Co., 37 Md. 537; Concord R. Co. *v.* Greely, 17 N. H. 47; Sadler *v.* Langham, 34 Ala. 311; McQuillen *v.* Hatton, 42 Ohio St. 202.

[2] State *v.* United New Jersey, etc., R. Co., 43 N. J. Law 110. See, also, Tudor *v.* Chicago, etc., R. Co., 154 Ill. 129, s. c. 39 N. E. R. 136.

[3] Beck *v.* United New Jersey, etc., R. Co., 39 N. J. Law 45.

[4] Bird *v.* Wilmington, etc., R. Co., 8 Rich. (S. Car.) Eq. 46.

[5] Tracy *v.* Elizabethtown, etc., R. Co., 80 Ky. 259. See South Carolina R. Co. *v.* Blake, 9 Rich. L. (S.Car.)228. In the first case cited the court said: "Even where it is conceded that the use is public, the necessity and extent of the exercise of the power of eminent domain belongs to the legislature, subject to two conditions—first, that just compensation shall be made; and, second, that the property desired to be condemned will conduce, *to some extent*, to the accomplishment of the public object to which it is to be de-

which will justify a taking is not such an imperative necessity as renders the lands sought to be condemned indispensable to the operation of the road, for the company may take lands which are reasonably requisite to its use.[1] The fact that other lands may be taken by which the route of a railway between its charter termini can be shortened,[2] or that another location would do less damage,[3] or that other lands in the vicinity which would answer its purpose just as well could be obtained by purchase,[4] is not sufficient reason for interference by the courts with the action of a railroad corporation in locating its road.[5]

voted. With the *degree* of necessity, or the extent to which the property will advance the public purpose, the courts have nothing to do." And in the case from South Carolina it was held that an application by a railroad company for the appointment of commissioners to assess the value of land sought to be taken should set forth the particular purpose for which it is needed, and should be accompanied by affidavits or other evidence showing the necessity for the appointment and if the land-owner traverses the existence of a necessity justifying the condemnation, a trial and decision must be had.

[1] Matter of New York Central R. Co., 77 N. Y. 248; Philadelphia, etc., R. Co. *v.* Williams, 54 Pa. St. 103; Toledo, etc., R. Co. *v.* Daniels, 16 Ohio St. 390; Eldridge *v.* Smith, 34 Vt. 484; Hannibal, etc., R. Co. *v.* Muder, 49 Mo. 165; Southern Pac. R. Co. *v.* Raymond, 53 Cal. 223; Mansfield, etc., R. Co. *v.* Clark, 23 Mich. 519; Sadd *v.* Maldon, etc., R. Co., 6 Exch. 143. A railroad corporation which has full authority to construct its road upon any route which it may adopt, subject to the condition that it shall not cross the streets of a city without permission from the city council, can lay out its road through the city and condemn and for a right of way without first obtaining permission to cross intervening streets. The necessity for the use of certain property in the construction and operation of a railroad need not be made certain before the property is condemned. Chicago, etc., R. Co. *v.* Dunbar, 100 Ill. 110.

[2] South Minnesota R. Co. *v.* Stoddard, 6 Minn. 150; Hentz *v.* Long Island R. Co., 13 Barb. (N. Y.) 646.

[3] New York, etc., R. Co. *v.* Young, 33 Pa. St. 175; New York, etc., R. Co. *v.* Metropolitan Gas-Light Co., 5 Hun (N. Y.) 201. A particular route sought to be condemned by a railroad company for the use of its road is not rendered unnecessary because of the existence of another route equally good and convenient, both for the property-owner and the company. California C. R. Co. *v.* Hooper, 76 Cal. 404, 18 Pac. R. 599. See, also, Colorado, etc., R. Co. *v.* Union Pac. R. Co., 41 Fed. R. 293.

[4] Eldridge *v.* Smith, 34 Vt. 484; Ford *v.* Chicago, etc., R. Co., 14 Wis. 609; Lodge *v.* Philadelphia, etc., R. Co., 8 Phila. (Pa.) 345; New York, etc., R. Co. *v.* Kip, 46 N. Y. 546.

[5] The discretion exercised by a railway corporation in selecting land for its purposes will not be interfered with unless it clearly appears that it has exceeded its powers or acted in bad faith. Fall River Iron Works *v.* Old

A railroad company which has leased land to other parties for purposes which increased railroad travel, is not required to resume possession of such land under a power reserved by the lease, and employ it for its own necessary structures before it can condemn other land for that purpose. In a recent case, in proceedings to condemn land, it appeared that the petitioner's road ran to a beach much frequented as a summer resort, and furnished the transportation thereto, and that there was great need of a station, for the accommodation of passengers. The petitioner owned land at the beach, which had been leased to persons who had fitted it up as a pleasure ground, for the accommodation of visitors to the beach; and a station built on this land would destroy, in a large measure, the usefulness of the place as a summer resort, whereby the petitioner's business would be injured. It was held that the petitioner was entitled to have land condemned for such station purposes, even though the land owned and leased by it was available.[1] But one court has held that a railroad company can not condemn lands for any purpose when it already owns lands equally useful for that purpose.[2]

§ 955. **Construction of statutes granting right to condemn.**— The exercise of the power of eminent domain by a railroad or other corporation for public use being against common right, it can not, ordinarily, be implied or inferred from a mere grant of authority to construct public works,[3] but must be given in express terms or by necessary implication.[4] And it is said that

Colony R. Co., 5 Allen (Mass.) 221; Virginia R. Co. *v.* Elliott, 5 Nev. 358; South Carolina R. Co. *v.* Blake, 9 Rich. L. (S. Car.) 228; Cotton *v.* Mississippi, etc., Boom Co., 22 Minn. 372; Board of Supervisors *v.* Gorrell, 20 Gratt. (Va.) 484. The general allegation in a petition for the condemnation of certain lands by a railroad company, that "a part of each of said lands is necessary to petitioner for its right of way, side-tracks, depot and depot grounds, freight yards, shops and appurtenances, for the construction and operation of its road," was held to be a sufficient statement of the purposes for which the land was sought to be condemned. Suver *v.* Chicago, etc., R. Co., 123 Ill. 293.

[1] *In re*, New York Central, etc., R. Co., 8 N. Y. Supp. 290, aff'd 121 N. Y. 665, mem.

[2] New Central Coal Co. *v.* George's Creek Coal Co.. 37 Md. 537.

[3] Allen *v.* Jones, 47 Ind. 438; People *v.* City of Rochester, 50 N. Y. 525.

[4] Miami Coal Co. *v.* Wigton, 19 Ohio St. 560; Schmidt *v.* Densmore,

an implication in favor of such right will not control unless it arises from a necessity so absolute that, without it, the grant itself will be defeated.[1] Statutes granting the power of eminent domain to corporations will be strictly construed.[2] But such a construction will be given, if possible, as will carry into effect the manifest purpose for which the act was passed.[3]

§ 956. **Right of foreign and consolidated companies to condemn.**—A foreign corporation may be authorized to exercise the power of eminent domain, in the absence of any constitutional provision to the contrary.[4] But foreign corporations are forbidden to exercise that power by the constitutions of some of the states,[5] and a statute conferring the right of emi-

42 Mo. 225; Butler *v.* Thomasville, 74 Ga. 570.

[1] Pennsylvania R. Co.'s Appeal, 93 Pa. St. 150.

[2] Chicago, etc., R. Co. *v.* Wiltse, 116 Ill. 449; Alabama Gt. Southern R. Co. *v.* Gilbert, 71 Ga. 591; Jersey City *v.* Central R. Co., 40 N. J. Eq. 417; Pittsburgh, etc., R. Co. *v.* Bruce, 102 Pa. St. 23; Southern Pac. R. Co. *v.* Wilson, 49 Cal. 396; Spofford *v.* Bucksport & B. R. Co., 66 Me. 26; Lea *v.* Johnston, 9 Ired. (N. C.) Law 15; Washington Cemetery *v.* Prospect, etc., R. Co., 68 N. Y. 591; Cooley's Const. Lim., 530. "An act of this sort deserves no favor; to construe it liberally would be sinning against the rights of property." Bland, J., in Binney's Case, 2 Bland Ch. (Md.) 99. "There is no rule more familiar or better settled than this: that grants of corporate power, being in derogation of common right, are to be strictly construed; and this is especially the case where the power claimed is a delegation of the right of eminent domain, one of the highest powers of sovereignty pertaining to the state itself, and interfering most seriously and often vexatiously with the ordinary rights of property." Currier *v.* Marietta, etc., R. Co., 11 Ohio St. 228.

[3] Pittsburgh *v.* Scott, 1 Pa. St. 309; Bellona Company's Case, 3 Bland Ch. (Md.) 442; Lewis on Eminent Domain, § 254.

[4] Abbott *v.* New York, etc., R. Co., 145 Mass. 450, s. c. 15 N. E. R. 91; Matter of Peter Townsend, 39 N. Y. 171; New York, etc., R. Co. *v.* Young, 33 Pa. St. 175; Baltimore, etc., R. Co. *v.* Harris, 12 Wall. (U. S.) 65; Southwestern, etc., R. Co. *v.* Southern, etc., Co., 46 Ga. 43; Gray *v.* St. Louis, etc., R. Co., 81 Mo. 126; *In re* Marks, 6 N. Y. Supp. 105; Baltimore, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 17 W. Va. 812; State *v.* Sherman, 22 Ohio St. 411; Dodge *v.* Council Bluffs, 57 Iowa 560.

[5] Foreign corporations are forbidden to exercise the right of eminent domain in Arkansas. Const. 1874, Art. 12, § 11. In Nebraska this restriction applies only to foreign railroad corporations. Const. 1875, Art. 11, § 8. Under said section, no foreign railroad corporation doing business in the state can exercise the right of eminent domain, or have power to acquire right of way or real estate for

nent domain upon "railroad corporations organized under the laws of this state" has been held to operate as a denial of the right to foreign railroad corporations.[1] A domestic railroad company does not lose its right to condemn by consolidation, under the laws of its own state, with a foreign railroad company.[2] The consolidated corporation, in such a case, is regarded as a domestic corporation within the meaning of the statutes regulating condemnation proceedings.[3] But, as shown in the next section, there must be some law authorizing or ratifying the consolidation.[4]

§ 957. **Exercise of the right by de facto corporations.**—As a rule the legal existence of a *de facto* corporation can be ques-

depot or other uses, unless it organizes as a corporation under the state laws. State *v.* Scott, 22 Neb. 628, s. c. 36 N. W. R. 121; Trester *v.* Missouri Pac. R. Co., 23 Neb. 242, s. c. 36 N.W. R. 502. A foreign corporation, which has not become a corporation under the laws of Nebraska, can not avail itself of the services of another corporation to acquire a right of way, and may be enjoined from appropriating property for a right of way, although the property has been condemned in the name of another corporation. Koenig *v.* Chicago, B. & Q. R. Co., 27 Neb. 699, s. c. 43 N. W. R. 423. The article of the Nebraska constitution which provides that no foreign railroad corporation, doing business in that state, shall exercise the right of eminent domain, or have power to acquire the right of way or real estate for depot or other uses, until it shall have become a body corporate, pursuant to and in accordance with the laws of that state, does not prohibit existing companies, one of which is a domestic corporation, from becoming a body corporate by consolidation, providing such consolidation is made pursuant to the laws permitting the same, and by which it became "a body corporate, pursuant to and in accordance with the laws of this state." State *v.* Chicago, B. & Q. R. Co., 25 Neb. 156; State *v.* Missouri Pac. R. Co., 25 Neb. 164; State *v.* Chicago, St. P., M. & O. R. Co., 25 Neb. 165.

[1] Holbert *v.* St. Louis, etc., R. Co., 45 Iowa 23. See, also, St. Louis, etc., R. Co. *v.* Foltz, 52 Fed. R. 627, where it was held that even if the company could not condemn land for a right of way and depot grounds, it might acquire the same by contract or estoppel.

[2] Toledo, etc., R. Co. *v.* Dunlap, 47 Mich. 456, s. c. 11 N. W. R. 271; Mineral Range R. Co. *v.* Detroit, etc., Co., 25 Fed. R. 515. Nor by the fact that its stock is held abroad. Amoskeag, etc., Co. *v.* Worcester, 60 N. H. 522.

[3] *In re* St. Paul, etc., R.Co., 36 Minn. 85, s. c. 30 N. W. R. 432; State *v.* Chicago, etc., R. Co., 25 Neb. 156, s. c. 41 N. W. R. 125. See, also, California Cent. R. Co. *v.* Hooper, 76 Cal. 404.

[4] American L. & T. Co. *v.* Minnesota, etc., R. Co. (Ill.) 42 N. E. R. 153.

tioned only by the state in a direct proceeding instituted for that purpose. Accordingly, the courts will not enjoin a corporation from condemning land for a public purpose on the ground that the corporation was irregularly organized,[1] nor will they, in many jurisdictions, allow the legality of the incorporation of a *de facto* railroad corporation to be questioned in condemnation proceedings.[2] And it has been held a land-owner should not be permitted to prove, as a defense to condemnation proceedings instituted by a regularly organized railroad corporation, that the company was incorporated not for a public use, but for the private purposes of the corporators only, and that there was no public necessity for the road.[3] But to constitute

[1] Reisner *v.* Strong, 24 Kan. 410; McAuley *v.* Columbus, etc., R. Co., 83 Ill. 348; Aurora, etc., R. Co. *v.* Miller, 56 Ind. 88. A court of equity will not extend its aid by injunction to an assignee of a lease of land through which a railroad company seeks to condemn a right of way, when it is shown that the assignee who is denying the power of the company to condemn land under its charter, is the president of a rival road, but he will be left to his remedy at law. Piedmont, etc., R. Co. *v.* Speelman, 67 Md. 260. In Ward *v.* Minnesota and N. W. R. Co., 119 Ill. 287, the court held that the fact that an engineer had been appointed, that the line of the proposed road had been located, and other steps taken toward the building of the road, being corporate acts, tended to show that petitioner was a corporation *de facto*.

[2] Brown *v.* Calumet Riv. R. Co., 125 Ill. 600; Niemeyer *v.* Little Rock, etc., R. Co., 43 Ark. 111, s. c. 20 Am. & Eng. R. Cas. 174; Cincinnati, etc., R. Co. *v.* Danville, etc., R. Co., 75 Ill. 113; National Docks, etc., R. Co. *v.* Central R. Co., 32 N. J. Eq. 755; Oregon Cascade Co. *v.* Baily, 3 Ore. 164; Aurora, etc., R. Co. *v.* Miller, 56 Ind. 88. But it has been held in Ohio that corporate existence and the right to exercise the power of eminent domain can only be derived from legislative enactment. And that a company claiming to act under a special charter must show that both have been conferred upon it by a valid law, and that it has substantially complied with the conditions which that law has annexed to the power, before it can demand a judgment of condemnation. Atkinson *v.* Marietta, etc., R. Co., 15 Ohio St. 21. And that a railroad company organized under the general railroad law of that state must, in order to sustain a proceeding for appropriating land, show the certificate and public record of its organization to be strictly in conformity with the requisitions of the law. Atlantic, etc., R. Co. *v.* Sullivant, 5 Ohio St. 276. See, also, New York, etc., Co. *v.* New York, 104 N. Y. 1; St. Joseph, etc., R. Co. *v.* Shambaugh, 106 Mo. 557; Matter of Brooklyn, etc., R. Co., 72 N. Y. 245; Miller *v.* Prairie, etc., R. Co., 34 Wis. 533; Orrick School Dist. *v.* Dorton, 125 Mo. 439, s. c. 28 S. W. R. 765; Lewis Em. Dom., § 391.

[3] Powers *v.* Hazelton, etc., R. Co., 33 Ohio St. 429. See, also, Rudolph *v.*

even a *de facto* corporation, there must be some law under which it could legally have been incorporated, and an attempt to consolidate where there is no law authorizing it will not enable the consolidated company to acquire a right of way either by condemnation or contract.[1]

§ 958. **Right to condemn where road is leased or in hands of a receiver.**—It is said that personal rights and privileges granted to a corporation can only be exercised by its board of directors,[2] or other governing body. The power of eminent domain is granted as a personal trust, and can not be delegated or transferred without legislative sanction; accordingly, it is held that neither the purchasers,[3] nor the lessees,[4] of a railroad can exercise the right without express authority.[5]

Pennsylvania, etc., R. Co., 166 Pa. St. 430, s. c. 31 Atl. R. 131; Aurora, etc., R. Co. *v.* Lawrenceburgh, 56 Ind. 80.

[1] American L. & T. Co. *v.* Minnesota, etc., R. Co., (Ill.) 42 N. E. R. 153, and authorities cited. See, also, New Brighton, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 105 Pa. St. 14, approved in Washington, etc., R. Co. *v.* Coeur D'Alene R., etc., Co., 160 U. S. 101, s. c. 16 Sup. Ct. R. 231.

[2] Eastern R. Co. *v.* Boston, etc., R. Co., 111 Mass. 125.

[3] Atkinson *v.* Marietta R. Co., 15 Ohio St. 21; Mahoney *v.* Spring Valley Water Works, 52 Cal. 159; Breslin *v.* Somerville Horse R. Co., 145 Mass. 64. But see, as to purchaser at judicial sale, North Carolina, etc., R. Co. *v.* Carolina Cent. R. Co., 83 N. Car. 489; Lawrence *v.* Morgan's, etc., R. Co., 39 La. Ann. 427. *Ante*, § 519.

[4] Mayor of Worcester *v.* Norwich, etc., R. Co., 109 Mass. 103; Lewis *v.* Germantown, etc., R. Co., 16 Phila. (Pa.) 608. As a manufacturing company can not, by lease from a railroad company, acquire the right of eminent domain, a municipal council can not authorize it to build a railroad track on a street, such track being shown to be a nuisance. Appeal of Hartman Steel Co., (Pa.) 18 Atl. Rep. 553.

[5] See Lawrence *v.* Morgan's La., etc., R. Co., 39 La. Ann. 427, as to the effect of a transfer of its franchises by a corporation under legislative authority. In Abbott *v.* New York, etc., R. Co., 145 Mass. 450, Holmes, J., speaking for the court, said: "It seems to us clear that a corporation, by consent of the legislature, may take this power as *quasi* successor of another corporation to which it was originally granted, and it is not very material whether the legislative consent be regarded as authorizing a transfer of the old power, or more strictly as delegating a new power in the same terms as the old. See State *v.* Sherman, 22 Ohio St. 411, 428. The substance of the transaction is seen in the cases of Boston, etc., Railroad Co. *v.* Midland Railroad Co., 1 Gray (Mass.) 340. But there is reason to confine it to such cases. See Atkinson *v.* Railroad Co., 15 Ohio St. 21; Coe *v.* Columbus, etc., Railroad Co., 10 Ohio St. 372, 387; Hall *v.* Sullivan Railroad Co., 21 Law. Rep. 138, 141. When

And where its road can not be successfully operated without the acquisition of the property sought to be condemned, a company which has leased all its property and franchises[1] may exercise the right of eminent domain, even though the lease is for the entire life of the corporation and the property is

the power is claimed under the form of a transfer, rather than of an original grant, the legislative consent or grant may be inferred somewhat more readily than when the whole question is new, because the legislature has already adjudicated the use to be public, and has granted a co-extensive power. See Black *v.* Delaware, etc., Canal Co., 22 N. J. Eq. 130, 402. For, while it is very plain that the power could not be transferred to or exercised by a purchaser from the original donee, without such consent or grant in this commonwealth, (Braslin *v.* Somerville, etc., Railroad Co., 145 Mass. 64; Com. *v.* Smith, 10 Allen 448) the reasons which have led some courts and judges to doubt the need of such consent for the transfer of franchises show that the *delectus personarum* is of little more than theoretical importance, and is the least determining element in the more common cases where the power is conferred. Shepley *v.* Atlantic, etc., Railroad Co., 55 Me. 395, 407; Kennebec, etc., Railroad Co. *v.* Portland, etc., Railroad Co., 59 Me. 9, 23; Miller *v.* Rutland, etc., Railroad Co., 36 Vt. 452, 492; Bickford *v.* Grand Junction Railway Co., 1 Can. Sup. Ct. 696, 738. And this reasoning is of equal force, whether the power to take land by eminent domain is called a franchise or not. Coe *v.* Railroad Co. *ubi supra;* Chicago, etc., R. Co., *v.* Dunbar, 95 Ill. 571; Pierce *v.* Emery, 32 N. H. 484, 507, 511, 513. Finally, the legislative consent may be expressed by way of ratification of what purports to be a transfer already executed.' Shaw *v.* Norfolk, etc.,Railroad Co., 5 Gray (Mass.) 162, 180, 16 Gray 407, 410; Galveston Railroad Co. *v.* Cowdrey, 11 Wall. (U. S.) 459. And it may be gathered by implication from a series of acts. East Boston, etc., R. Co. *v.* Eastern Railroad Co., 13 Allen (Mass.) 422." But a railroad company which has leased its property and franchises for the entire term of its corporate existence may condemn land to serve the necessities of its lessee. Matter of New York, etc., R. Co., 35 Hun 220, affirmed, 99 N. Y. 12. See Deitrichs *v.* Lincoln, etc., R. Co., 13 Neb, 361; Kip *v.* New York, etc., R. Co., 67 N. Y. 227; Chicago, etc., R. Co. *v.* Ill. Cent. R. Co., 113 Ill. 156. And a domestic corporation, organized at the instance of a foreign company, which is forbidden to exercise the power of eminent domain, may condemn land for the purpose of leasing it to such foreign corporation. Lower *v.* Chicago, etc., R. Co., 59 Iowa 563.

[1] Matter of New York, etc., R. Co., 99 N. Y. 12, 35 Hun 220; Kip *v.* New York, etc., R. Co., 67 N. Y. 227; Chicago, etc., R. Co. *v.* Ill. Cent. R. Co., 113 Ill. 156; Deitrichs *v.* Lincoln, etc., R. Co., 13 Neb. 361. See, also, *In re* New York, etc., R. Co., 63 Hun 629, s. c. 17 N.Y. Supp. 778; Memphis,etc., R. Co. *v.* Railroad Comrs., 112 U. S. 609, s. c. 5 Sup. Ct. R. 299.

taken solely for the use of the lessee.[1] As the corporate existence is not terminated by the appointment of a receiver, it would seem that the right to condemn remains in the corporation and does not, ordinarily, pass to the receiver. But it has been held that a receiver may condemn land for the purpose of completing an undertaking already begun,[2] and, if this be true, it would seem that he might condemn land when necessary to the maintenance and operation of a road already completed. He should, however, first obtain authority to do so from the court in which the receivership is pending.[3]

§ 959. **Right to condemn can not be delegated to contractor or construction company.**—A corporation which is empowered to take materials for the construction of works of a public nature can not delegate this power to a contractor who engages to furnish his own materials.[4] It may, however, appropriate materials by condemnation for the benefit of a contractor who is building its works under such a contract.[5] A construction company can not take land for railway purposes, and if the railroad company adopts its acts in appropriating land it must pay just compensation.[6] But if the railroad company does not authorize or ratify the act of a contractor in taking land, his action is not binding upon the company.[7]

[1] Matter of New York, etc., R. Co., 99 N. Y. 12, 35 Hun 220.

[2] Moran *v.* Lydecker, 27 Hun (N. Y.) 582. See Lehigh, etc., Co. *v.* Cent. R. Co., 35 N. J. Eq. 379.

[3] Minneapolis, etc., R. Co *v.* Minneapolis, etc., R. Co., 61 Minn. 502, s. c. 63 N. W. R. 1035.

[4] Lyon *v.* Jerome, 26 Wend. (N. Y.) 485; Schmidt *v.* Densmore, 42 Mo. 225; *contra*, Lesher *v.* Wabash Navigation Co., 14 Ill. 85. It has been held that the railroad company may authorize the contractor to condemn property in its name. Buchanan, etc., Bank *v.* Cedar Rapids, etc., R. Co., 62 Iowa, 494.

[5] Ten Broeck *v.* Sherrill, 71 N. Y. 276. And where the statute authorizes any agent or servant of the corporation to enter upon contiguous lands belonging to private owners and take therefrom materials for use in the construction of its road, the corporation may authorize the contractors to take materials whenever they can not be readily obtained by purchase. Vermont Central R. Co. *v.* Baxter, 22 Vt. 365; Bliss *v.* Hosmer, 15 Ohio 44.

[6] Bloomfield R. Co. *v.* Grace, 112 Ind. 128, s. c. 13 N. E. R. 680.

[7] Waltemeyer *v.* Wisconsin, etc., R. Co., 71 Iowa 626.

§ 960. Purposes for which a railroad company may condemn.—A railroad company which is charged with the performance of the duties of a common carrier is, as we have seen, so far a public enterprise that it may be empowered to condemn the lands needed for the construction and maintenance of its line.[1] But experience has shown that corporations are

[1] New York, etc., R. Co. *v.* Kip, 46 N. Y. 546; Beekman *v.* Saratoga R. Co., 3 Paige Ch. (N. Y.) 45; Brown *v.* Beatty, 34 Miss. 227; Enfield Toll Bridge Co. *v.* Hartford, etc., R. Co., 17 Conn. 40; Ash *v.* Cummings, 50 N. H. 591; Kramer *v.* Cleveland, etc., R. Co., 5 Ohio St. 140. But it has been held that a private railroad for the carriage of coal or ores from the company's mines can not be built or operated under the power of eminent domain. People *v.* Pittsburgh, etc., R. Co., 53 Cal. 694; McCandless' Appeal, 70 Pa. St. 210; Edgewood R. Co.'s Appeal, 79 Pa. St. 257. Under a charter declaring that a corporation may operate a railroad, with necessary lines of telegraph and with power to construct branches, the fact that it is given authority to extend its road to coal lands which it owns has been held not to take away its character as a public railroad corporation, which can exercise the power of eminent domain. Colorado E.R.Co. *v.* Union P.R.Co. (C.C.D.Colo.) 7 R. R. & Corp. L. J. 373, 41 Fed. R. 293. Where land is taken for its use by a railway corporation having the right to exercise the power of eminent domain, the question whether the use is public or private depends upon the right of the public to use the road and to require the corporation, as a common carrier, to transport freight or passengers over the same, and not upon the amount of business. Kettle River R. Co. *v.* Eastern Ry. Co., 41 Minn. 461. If all the people have a right to use it the use is public, although the number who require the use may be small. Chicago, B. & N. R. Co. *v.* Porter, 43 Minn. 527, 43 Am. & Eng. R. Cas. 170. It was held by the court of appeals of New York that a railroad in the gorge of the Niagara River from the falls to the whirlpool, which did not connect with any public highway, which could only be reached by passing over the state reservation or private lands; which could have no habitations along or freight traffic over the road; whose sole business would be to convey sight-seers along Niagara River; and the season of whose operations is confined to four months of the year, could not be built under the general railroad law of that state; and that such a road would not be such a public use as could justify the exercise of the power of eminent domain in its behalf. *In re* Niagara Falls, etc., R. Co., 108 N. Y. 375. See Denver R., etc., Co. *v.* Union Pac. R. Co., 34 Fed. Rep. 386. See the following authorities in support of the proposition that a railroad is such a public use that the power of eminent domain may be exercised in its behalf. Bloodgood *v.* Mohawk, etc., R. Co., 14 Wend. (N. Y.) 52, 18 Wend. 9; Buffalo, etc., R. Co. *v.* Brainard, 9 N. Y. 100; Bradley *v.* New York, etc., R. Co., 21 Conn. 294; Louisville, etc., R. Co. *v.* Chappell, Rice L. (S. Car.) 383; Concord R. Co. *v.* Greely, 17 N. H. 47; San Francisco, etc., R. Co. *v.* Caldwell, 31 Cal. 367; Contra Costa R. Co. *v.* Moss, 23 Cal. 323; Weir *v.* St. Paul, etc., R. Co., 18 Minn. 155; Newby *v.*

sometimes formed under the general railroad laws for the furtherance of mere private enterprises. Accordingly it is held that the corporation which claims the right to exercise the power of eminent domain must not only be able to show a legislative warrant, but it must be able, further, to establish, if the right is challenged, that the particular scheme in which it is engaged is a railroad enterprise within the true meaning of the decisions which justify the taking of private property for railroad purposes; and that the taking of private property for the purposes to which the corporation proposes to devote it is a taking for public use.[1] The question as to what are the legitimate uses which a railroad may make of property in its public character has given rise to much litigation. It is held that a railroad company may condemn land for a right of way, not only for its main road but for any branch or lateral roads which its charter authorizes it to build,[2] that it may take lands for depots,[3] freight houses,[4] turnouts and side tracks,[5]

Platte County, 25 Mo. 258; Aldridge *v.* Tuscumbia, etc., R. Co., 2 S. & P. (Ala.) 199; O'Hara *v.* Lexington, etc., R. Co., 1 Dana (Ky.) 232; Arnold *v.* Covington, etc., Bridge Co., 1 Duv. (Ky.) 372; Whiteman *v.* Wilmington, etc., R. Co., 2 Harr. (Del.) 514; Raleigh, etc., Co. *v.* Davis, 2 D. & B. L. (N. Car.) 451; Buffalo Bayou, etc., R. Co. *v.* Ferris, 26 Tex. 588; Bonaparte *v.* Camden, etc., R. Co., 1 Baldw. (U. S.) 205.

[1] *In re* Niagara Falls, etc., R. Co., 108 N. Y. 375, s. c. 15 N. E. R. 429; Denver R., etc., Co. *v.* Union Pacific R. Co., 34 Fed. Rep. 386; *In re* Rochester, etc., R. Co., 59 Hun 617, s. c. 12 N. Y. Supp. 566.

[2] Newhall *v.* Galena, etc., R. Co., 14 Ill. 273. Where the construction of terminal branches and spur tracks of a railroad to points upon a river front, for the accommodation of business and shipping interests, is essential to any successful operation of a railroad, they must be held to be for public use as much as the main line. Toledo, S. & M. R. Co. *v.* East Saginaw & St. C. R. Co., 72 Mich. 206, s. c. 40 N. W. R. 436.

[3] Hannibal, etc., R. Co. *v.* Muder, 49 Mo. 165; Giesy *v.* Cincinnati, etc., R. Co., 4 Ohio St. 308; Small *v.* Georgia, etc., R. Co., 87 Ga. 602, s. c. 13 S. E. R. 694. The power of a railroad company to take lands for a railroad implies the power to take them for depot buildings. State *v.* Railroad Comrs., 56 Conn. 308, 15 Atl. R. 756. See Jager *v.* Dey, 80 Iowa 23, s. c. 45 N. W. R. 391, 42 Am. & Eng. R. Cas. 683; Carmody *v.* Chicago, etc., R. Co., 111 Ill. 69; note in 9 L. R. A. 295.

[4] Matter of New York Central R. Co., 77 N. Y. 248; Matter of New York, etc., R. Co. *v.* Kip, 46 N. Y. 546; *In re* New York, etc., R. Co., 77 N. Y. 248. But see Cumberland Valley R. Co. *v.* McLanahan, 59 Pa. St. 23. See New York Central, etc., R. Co *v.* Metropolitan Gas Light Co., 5 Hun (N. Y.) 201; *post*, p. 356.

[5] Cleveland, etc., R. Co. *v* Speer, 56

yard room,[1] shops to repair cars and engines used on the road,[2] or other similar conveniences which require a particular location with reference to the company's road.[3] And it has been

Pa. St. 325; Philadelphia, etc., R. Co. *v.* Williams, 54 Pa. St. 103; Protzman *v.* Indianapolis, etc., R. Co., 9 Ind. 467; Toledo, etc., R. Co. *v.* Daniels, 16 Ohio St. 390; St. Louis, etc., R. Co. *v.* Petty, 57 Ark. 359. In Getz's Appeal, 3 Am. & Eng. R. Cas. 186, 10 W. N. C. (Pa.) 453, the court held that the right to condemn land for the construction of sidings to private warehouses and manufacturing establishments is clearly within the constitutional power of the legislature to confer upon railroad companies, because the public interest is thereby subserved by reason of the increased facilities afforded for developing the resources of the state and promoting the general wealth and prosperity of the community. And in South Chicago R. Co. *v.* Dix, 109 Ill. 237, the court held that, "A side track can surely be none the less such, because, in addition to the purposes of a side track proper, it subserves some other private individual use." But the court admitted that the railroad company could not take land for the construction of an independent branch road to subserve only private interests. And in a later case before the same court, where the question whether a private branch road could be constructed by a railroad under its power of eminent domain at a point where a switch was not needed, was directly presented and the court held that it could not. The court said: "The fact that the building of collateral branch roads may add to the earnings of the main line and increase its business will not authorize appellant to build the same under its charter and condemn lands therefor. * * * Nor is it material to the determination of this question that the proposed track is only a half or three-quarters of a mile in length, or that great loss would occur to the brick-works company, if it be not built. Appellee's land is sought to be taken, and it can, as to his right, make no possible difference whether the proposed line is long or short. If the railroad company may condemn appellee's land for the purposes indicated, why may it not build any distance it may choose for like purposes, or from Danville, its eastern terminus, to St. Louis, if thereby its revenues would be increased, and the interests of the points to which it should build be promoted thereby? The legislature has conferred no such power upon appellant. It is apparent from the proofs that the purpose and use intended was not such a use as is contemplated by the grant of power under which appellant was acting, and that, therefore, no appropriation of appellant's land for such purpose could be made." Chicago, etc., R. Co. *v.* Wiltse, 116 Ill. 449. See, *post*, §§ 961, 971.

[1] Rensselaer, etc., R. Co. *v.* Davis, 43 N. Y. 137; Eldridge *v.* Smith, 34 Vt. 484.

[2] Southern Pac. R. Co. *v.* Raymond, 53 Cal. 223; Hannibal, etc., R. Co. *v.* Muder, 49 Mo. 165; Chicago, etc., R. Co. *v.* Wilson, 17 Ill. 123; Low *v.* Galena, etc., R. Co., 18 Ill. 324; State *v.* Comrs. of Mansfield, 23 N. J. L. 510; Virginia, etc., R. Co. *v.* Elliott, 5 Nev. 358.

[3] Graham *v.* Connersville, etc., R. Co., 36 Ind. 463; Ewing *v.* Alabama, etc., R. Co., 68 Miss. 551, s. c. 9 So. R. 295; Nashville, etc., R. Co. *v.* Cowardin, 11 Humph. (Tenn.) 348; Protzman *v.*

held that a railway company may take lands under the general law for the purpose of laying tracks from its main line to stock-yards which it has established for convenience in handling live stock transported over its road,[1] and the fact that

Indianapolis, etc., R. Co., 9 Ind. 467; Mansfield, etc., R. Co. *v.* Clark, 23 Mich. 519; Lawrence *v.* Morgan's, etc., Co., 39 La. Ann. 427; Reed *v.* Louisville Bridge Co., 8 Bush (Ky.) 69; South Carolina R. Co. *v.* Blake, 9 Rich. L. (S. Car.) 228; Sadd *v.* Maldon, etc., R. Co., 6 Exchq. 143; Lewis on Eminent Domain, § 170. Railroads have been permitted to condemn land for parallel tracks along the whole line of a road. *In re* New York Central R. Co., 67 Barb. (N. Y.) 426. For a telegraph line along the right of way. Prather *v.* Jeffersonville, etc., R. Co., 52 Ind. 16. And for stock-yards at a station upon the line. *In re* New York Cent. R. Co., 63 N. Y. 326. To deny a petition of a railway company for the condemnation of land for a side-track or similar appurtenance, it should appear that the property sought to be taken is not required for the convenient operation of the road. *In re* New York Central R. Co., 77 N. Y. 248; Matter of Boston, etc., R. Co., 53 N. Y. 574; South Chicago, etc., R. Co. *v.* Dix, 109 Ill. 237; Smith *v.* Chicago, etc., R. Co., 105 Ill. 511; Cleveland, etc., R. Co. *v.* Speer, 56 Pa. St. 325. Where a railroad was prohibited from holding land except for the "construction of the road or for depots, toll-houses, and other necessary works," it was held that the railroad had no implied authority to take and hold land for a warehouse. Cumberland Valley R. Co. *v.* McLanahan, 59 Pa. St. 23.

[1] New York, etc., R. Co. *v.* Metropolitan Gas Light Co., 5 Hun 201, 6 Hun 149, affirmed 63 N. Y. 326. The first time this case was before the court, Davis, P. J., speaking for the court said: "It hardly needs an argument to establish that in a city like New York depots for freight and for the vast number of cattle and other live stock that are constantly being transported to the city, are as much within the purposes for which railroads are constructed, and as necessary to their operation as depots for the accommodation of passenger traffic. The argument, indeed, is more strongly in favor of the former, for while a railroad company might, with safety to itself, leave its passengers upon a public street to take care of themselves upon their individual responsibility, it could not do so with respect to the animals it transported, but must securely keep them from injuring and annoying the public, until proper delivery to owners or consignees. * * * A railroad corporation can not take land under the right of eminent domain for the purpose of founding a town or city on the plea that when founded it will furnish business to the road of the company. But it is quite another question if the company be the lawful owner of lands on which it has founded and erected a city, whether it may not lawfully acquire, under eminent domain, the lands necessary to connect its tracks, being within its lawful route, within that city. *A fortiori* would the same reasoning apply where the track to be laid was primarily to erections within the rule of necessity and only incidentally to those which fall within the class of

such tracks will also pass by private business establishments is no objection to the exercise of the power.[1] After the railroad company has taken property it may devote it to any of these or similar uses without incurring a forfeiture or becoming liable to a new assessment of damages.[2] A railroad company may also condemn land over which to divert the course of a stream where it is found necessary in the construction of the road.[3] It may take springs near its road for a supply of water for its engines upon making compensation therefor when it can not be otherwise obtained.[4] And it has been held that it may

business conveniences. We are therefore of opinion that the appellants are not protected by the rule that lands can not be taken 'for subsidiary and extraordinary purposes,' but that this case is clearly covered by the ruling of the court of appeals in the matter of the petition of the New York & Harlem R. R. Co. *v.* Kip, 46 N. Y. 546."

[1] New York Central R. Co. *v.* Metropolitan Gas Light Co., 5 Hun (N. Y.) 201.

[2] Curtis *v.* St. Paul, etc., R. Co., 20 Minn. 28. See "Right of Way of Rail-Road Company," 42 Cent. L. J. 156.

[3] Baltimore, etc., R. Co. *v.* Magruder, 34 Md. 79; Valley Railway Co. *v.* Bohm, 34 Ohio St. 114; Johnson *v.* Atlantic, etc., R. Co., 35 N. H. 569; Pugh *v.* Golden Valley R. Co., L. R. 12 Ch. Div. 274. An act granting to railroad corporations the right to condemn property for the purpose of diverting a stream of water too frequently crossed by its road, or in any case where the safety and convenience of the operation of the road will be promoted, was upheld by the supreme court of Iowa, in so far as it authorized the condemnation of land to make changes, which would promote the safety of the travelling public, the court holding that taking property for such an object was taking it for public use. But the court refused to decide whether the legislature could constitutionally authorize the taking of land for such a purpose, merely to promote the convenience and economy of the company. Reusch *v.* Chicago, etc., R. Co., 57 Iowa 687. It is only in case of necessity that such power exists. Mere convenience or saving of expense to the company will not justify it. Pugh *v.* Golden Valley R. Co., L. R. 12 Chi. Div. 274. See Stodghill *v.* Chicago, etc., R. Co., 43 Iowa 26. Under a power to condemn lands it was held that the right to the flow of the stream could not be taken without taking the bed of the stream. Watson *v.* Acquackanonck Water Co., 36 N. J. L. 195, and see Garwood *v.* New York Cent. R. Co., 83 N. Y. 400. A railroad charter authorizing it to enter upon lands necessary for the construction and maintenance of its road gives it power to take land for railroad purposes only, and not for the purpose of widening or altering streets, and an attempt upon the part of a railroad company to take the land of a citizen for the latter purpose is a nullity. Chicago & N. W. R. Co. *v.* Galt, 133 Ill. 657, s. c. 24 N. E. R. 674.

[4] Strohecker *v.* Alabama, etc., R.

condemn land for a track to a public landing,[1] or to a public warehouse or elevator.[2] But a railroad company can not condemn lands for uses not connected with the conduct of its business of a common carrier such as the erection of dwellings for its employes,[3] or the erection of a manufacturing establishment to supply the road with rolling stock and other necessary equipment.[4] Where the statute expressly authorizes it, a rail-

Co., 42 Ga. 509. Where a spring is destroyed, the owner can recover compensation therefor. Lehigh Valley R. Co. *v.* Trone, 28 Pa. St. 206; Winklemans *v.* Des Moines, etc., R. Co., 62 Iowa 11; Peoria, etc., R. Co., *v.* Bryant, 57 Ill. 473; Parker *v.* Boston, etc., R. Co., 3 Cush. (Mass.) 107. But damages caused by draining a spring in making excavations to build the road will be presumed to have been included in the sum awarded by the commissioners on condemnation, or agreed upon by the land-owner and the company in case the right of way was purchased. Hougan *v.* Milwaukee, etc., R. Co., 35 Iowa 558; Aldrich *v.* Cheshire R. Co., 21 N. H. 359.

[1] Toledo, etc., R. Co. *v.* East Saginaw, etc., R. Co., 72 Mich. 206; Rensselaer, etc., R. Co. *v.* Davis, 43 N. Y. 137. Under the Illinois water-craft act of July 1, 1887, a railroad company can not condemn land for a landing for water-craft. Thomas *v.* St. Louis & C. R. Co. (C. C. S. D. Ill.) 37 Fed. R. 839.

[2] Fisher *v.* Chicago, etc., R. Co., 104 Ill. 323; Chicago, etc., R. Co. *v.* Garrity, 115 Ill. 155. A railroad may take land on which to pile lumber to be used on the road and brought to it to be transported thereon. Eldridge *v.* Smith, 34 Vt. 484.

[3] Rensselaer, etc., R. Co. *v.* Davis, 43 N. Y. 137; State *v.* Commissioners of Mansfield, 23 N. J. Law 510 (criticised in State *v.* Hancock, 35 N. J. L. 537); Eldridge *v.* Smith, 34 Vt. 484; Nashville, etc., R. Co. *v.* Cowardin, 11 Humph. (Tenn.) 347.

[4] Matter of New York, etc., R. Co. *v.* Kip, 46 N. Y. 546; West River Bridge Co. *v.* Dix, 6 How. (U. S.) 507, 546. In Eldridge *v.* Smith, 34 Vt. 484, 493, the court says: "Is an establishment for the manufacture of railroad cars a legitimate purpose, so that the company would have a right to take land for it against the will of the owner? The defendants say, that as the company must necessarily have cars in order to carry on their business, therefore they must have the right to manufacture them, and have works for that purpose. But this argument proves too much. Railroads must have iron in great quantities, for their track and other purposes. Does this authorize them to take ore beds and lands for forges and foundries, and manufacture their own iron? They must have wood, sleepers and timber for depots, and large quantities of lumber of various kinds. Does this authorize them to take timbered lands, and sites for mills, against the will of the owners? They must have glass, nails, paint, and many other things. Can they, by compulsory measures, provide themselves the means to manufacture them all? We think it clear they can not. If the company must manufacture their own cars or go without, then, doubtless, their manufacture would be regarded as a necessity of

road company may condemn lands lying outside the location for the purpose of procuring materials, if the purpose for which they are taken is disclosed in the petition,[1] but under a general authority to condemn land for the purposes of the road it has been held that no such power can be exercised.[2] Where the charter of a railroad company authorizes it to enter upon lands adjacent to its roadway and to occupy them "for any purpose useful or necessary in the construction or repair of such roads," upon payment of damages, the company, by its servants and employes, has a right to enter upon lands adjoining its road-

the railroad, but the manufacture of cars and engines is a distinct branch of mechanical industry, carried on wholly independent of any connection with railroads, and is a branch of business in which railroads do not usually engage at all; and in this case it seems to have been quickly demonstrated, that it was better to rely on supplying themselves with cars by purchase from those whose legitimate business it was to make them. Although railroad companies must have engines and cars, iron, lumber, wood and many other things in large quantities, in order to build and operate their roads, it is supposed they can supply themselves as private persons do, by purchase in the ordinary way, and they are not created or designed to be independent of all other branches of industry and business in the country, but to be additional aids to their successful development. The company must have shops for the repair of cars and engines, as they are so often needed, and as they can not well be moved for repairs, nor can facilities be found for repairs in the country generally, but the company were already supplied with all necessary accommodations for repairs. We are of opinion that an establishment for the manufacture of cars is not a legitimate railroad necessity so that the company could properly condemn land on which to erect one."

[1] Valley R. Co. *v.* Bohm, 34 Ohio St. 114; Vermont Central R. Co. *v.* Baxter, 22 Vt. 365. The general railroad laws of twenty-seven states authorize the taking of land in addition to the specified width of the railroad right of way for procuring materials, such as stone, gravel and timber. Stimson's Am. Stat. (1892) § 8742.

[2] New York, etc., R. Co. *v.* Gunnison, 1 Hun (N. Y.) 496. A railroad company which constructs a branch line through a man's land under a permissive license from him to construct and use the track thereon, and use the same so long as it shall be used for railroad purposes, acquires no title to stone excavated in building the road but not required in its construction. And it can not remove such stone and devote it to other purposes without his permission. Chapin *v.* Sullivan R. Co., 39 N. H. 564. Land required only for the purpose of excavating materials can not be permanently taken under a power to take the land that may be necessary in constructing the road. Eversfield *v.* Mid-Sussex R. Co., 3 DeG. & J. 286.

way, and erect temporary buildings for the use of its workmen, such as stables, wagon houses, blacksmith shops, depots, and the like, provided it takes no more land than is necessary for its purposes.[1]

§ 961. **Condemnation for roads to mines or manufacturing establishments.**—In several of the states provision has been made for the construction of short lateral railroads leading from mills, quarries, mines, or other real estate requiring development, to some navigable stream, railroad or canal, and authorizing the exercise of the power of eminent domain in building them. The most elaborate provision for such roads is made in Pennsylvania,[2] where, as long ago as 1832, an act was passed providing that the owner of any land, mills, quarries, coal mines, lime kilns or other real estate might condemn lands for a railroad to any existing railroad, canal or navigable stream not exceeding a distance of three miles, and imposing upon railroads built under the act the duty of carrying freight for whomsoever would pay a specific compensation.[3] Statutes authorizing the construction of similar roads have been upheld in Maryland and Missouri upon the ground that the roads when constructed were charged with the duties of common carriers of all freight and

[1] Lauderbrun *v.* Duffy, 2 Pa. St. 398; Vermont Central R. Co. *v.* Baxter, 22 Vt. 365.

[2] See a summary of the legislation and decisions on this subject in Waddell's Appeal, 84 Pa. St. 90.

[3] Purdon's Statutes, p. 492; Boyd *v.* Negley, 40 Pa. St. 377; Lewis' Eminent Domain, § 171. Of this act, the supreme court of Pennsylvania speaks as follows: "The truth is, when a lateral railroad is laid upon intervening lands, private property is not taken for private use. * * * The private property is taken for public use,—for clear and definite objects of a public nature which are of sufficient importance to attract the sanction of the sovereign. That an individual expects to gain thereby, and has private motives for risking the whole of the necessary investment and acquires peculiar rights in the work, detracts not a whit from the public aspects of it. * * * * It was found, as public improvements penetrated the interior, that many productive mines and manufactories situated near them were still separated by the land of an unneighborly owner, which must be crossed or tonnage lost to the public improvements. To compel such owners to admit a right of passage was not to take away from them a fair participation in the public improvements, and to compensate them for the land occupied was to do all they had a right to claim. They hold their land, as every man does, subject to the call of the government." Hays *v.* Risher, 32 Pa. St. 169.

passengers offered for transportation, and were therefore public highways.[1] And in New Jersey the courts have sustained an

[1] New Central Coal Co. *v.* George's Creek Coal Co., 37 Md. 537; Dietrich *v.* Murdock, 42 Mo. 279. See Brown *v.* Corey, 43 Pa. St. 495; Colorado Eastern R. Co. *v.* Union Pacific R. Co., (U. S. C. C.) 44 Am. & Eng. R. Cas. 10. In this latter case, Phillips, J., said: "The character of this corporation is first to be determined from the language of its charter. It is declared to be a railroad to be operated as such between given points, with necessary lines of telegraphs and with power to construct branches. As incident to its apparent character, the general statute of the state imposed upon it the burden and duty of acting as a common carrier of freight and passengers. * * * Does the fact that the grant authorizing the company to extend its road from the eastern designated point of Sand creek to its coal lands, with branches to other lands, *ex vi termini*, destroy or take away its character as a public railroad corporation? I am unable to discover sufficient reason or authority for such conclusion. In the *first* place, if this extension can be deemed a special power, it in no sense is inconsistent with, or contradictory of, the general terms of the grant, so that they may not stand together; and, *second*, the power to build to the coal or other lands of the petitioner, without more, should in favor of the legality of the franchise be considered as merely designating the terminus of the eastern extension of the road, or the termini of its branches, and not as a palpable indication that the real motive of its promoters was to develop their coal fields, and conduct a private traffic in their products. If such object in fact existed, it was *in pais*, and must be found in evidence, *dehors* the record." After stating that the evidence showed the road to extend from Denver to the coal fields, a distance of seventeen miles, and to have been constructed at a cost of $80,000, by a company with a nominal capital of $500,000, four-fifths of which consisted of its coal lands, that it was built through a sparsely settled country, in which the population had since increased, and that it had from the first run trains daily, carrying the United States mail, and such passengers and freight as were offered for transportation, he continued: "Its beginning may have been small, but if the right to exercise the power of eminent domain should have been denied in the early history of railroads in this country, because of their small beginnings, it is not too much to say that some of the great, mammoth railroad enterprises which have developed and strengthened the commerce and wealth of the country would have perished in their infancy. In Chicago & N. W. R. Co. *v.* Chicago & E. R. Co., 112 Ill. 589, 25 Am. & Eng. R. Cas. 158, the court says: 'The company, as we have just seen, was organized under a valid charter, and is shown to have done corporate acts under it. That was sufficient to establish a *prima facie* right to take the property in question; * * * and this *prima facie* right can not be successfully assailed in a mere collateral proceeding, as is sought to be done here.' And in the later case of Ward *v.* Minnesota & N. W. R. Co., 119 Ill. 287, the chief justice says: 'There is some proof that the petitioner is a corporation *de facto*, and that is all the law requires in this class of cases. There is evidence, although it may be slight,

act which authorizes the condemnation of land for building short underground railroads leading from mines to points from which the products of such mines can readily be sent to market,

of corporate acts done by petitioner. It appears that an engineer has been appointed, the line of the proposed road has been located, and other steps taken toward the building of the road. * * * These are corporate acts, and tend to show petitioner is a corporation *de facto*.' It does seem to me that the right of eminent domain should not necessarily be denied to a railroad corporation because of the fact that the primary and chief inducement moving its promoters was to develop private coal mines, and bring their products to market. 'The true criterion by which to judge of the character of the use is whether the public may enjoy it by right, or only by permission, and not to whom the tax or toll for supporting them is paid.' Mill's Em. Dom., § 14. And Lewis' Em. Dom., §§ 160, 161, asserts that: 'In determining whether the use in such case is public or not, it is an immaterial consideration that the control of the property is vested in private persons, who are actuated solely by motives of private gain. * * The inquiry must necessarily be, what are the objects to be accomplished? not who are the instruments for attaining them? * * * The public use required need not be the use or benefit of the whole public or state, or any large portion of it. It may be for the inhabitants of a small or restricted locality, but the use and benefit must be common, not to particular individuals or estates.' Or, as 1 Wood Ry. Law, § 226, puts it: 'The question is whether it is of so much benefit or advantage to the community, either directly or indirectly, that it can not be said to be wholly private in its effect and operation.' In Contra Costa R. Co. *v.* Moss, 23 Cal. 323, the court says: 'It is urged that the plaintiffs are constructing a railroad from a coal mine in the mountains, through a desolate region, to navigable waters, to enable it to get coal ready to market, and that this is a mere private use, and therefore they have no right to appropriate the property of others to its purposes without its consent. * * The plaintiffs, in common with other railroad companies organized under this act, are bound by these provisions which make it obligatory upon them to act as common carriers. * * * The fact that their road does not connect points of present commercial importance can not affect the rights of the plaintiffs. Railroads often make commercial points by their construction, and a large and cheap supply of coal * * * is one of the great necessities of the state, and a matter in which the whole state is interested.' In the progress of civilization, municipal existence as well as the maintenance of rural populations without timber supply, may be so dependent upon a large supply of coal for fuel as to render railroads for its transportation alone of imperative public necessity. It would, in fact, be difficult to conceive of an object of greater public use. It is as much so as the freightage of breadstuffs, meats and other necessary supplies for human sustenance in our large cities, or compact communities, depending upon exterior sources for their production. It would be no answer to their claim to be public corporations to say, for instance, that a community like Denver was not wholly dependent upon this road for

and expressly requiring roads built under its provisions to carry freight for any one having occasion to make use of them.[1] In Iowa a mine owner is permitted by statute to condemn land for

its supply of fuel, as there are other railroads which may bring such supply. Competition is not only the life of trade (or at least is yet supposed to be by the common people), but the multiplication of products and the facilities for getting them to market, tend to cheapen the necessaries of life to the masses; and in the most beneficent and legitimate sense they should retain their character as public necessities. Government itself is maintained to promote the general welfare, and the right of eminent domain has its root in this soil. Be this as it may in the light of adjudications, certainly it comes both within the letter and the spirit of a public railroad corporation where such an object, as above indicated, is coupled with the obligation, inseparably affixed by the statute to the franchise itself, to become also a common carrier of passengers and freight, and the corporation actually performs such duty to the public. The evidence in this case shows that for the greater period, and in the latter years, of the existence and operation of this road, its business has been confined principally to the carrying of passengers and general freight, however small it may have been. What is said by Depue, J., in Decamp *v.* Hibernia Underground R. Co., 47 N. J. Law 43, respecting a like proceeding, where a railroad began in a mine, is quite pertinent: 'This enterprise does not lose the character of a public use because of the fact that the projected railroad is not a thoroughfare, and that its use may be limited by circumstances to a comparatively small part of the public. Every one of the public having occasion to send materials, implements, or machinery for mining purposes into, or to obtain ores from, the several mining tracts adjacent to the location of this road, may use the railroad for that purpose, and of right may require the company to serve him in that respect; and that is the test which determines whether the use is public. Nor will any motive of personal gain which may have influenced the projectors in undertaking the work take from it its public character. * * * A particular improvement palpably for private advantage only will not become a public use because of the theoretical right of the public to use it. But where the franchise is in its nature a public franchise, as the transportation of freight is, and the object to be promoted is one that concerns the public interests, as the development of the mining resources of a state does, the improvement is essentially a public benefit and advantage; and if there be no restriction on the right of the public to use it, and no inability to use it, except such as arises from the circumstances, the court, in determining whether the improvement is such a public use as that the right of condemnation shall extend to it, will not scan closely the number of individuals profited by it. Indeed, it would not be possible to indicate the number of persons, or define the area of the limits to which the benefit of such an improvement may extend.'"

[1] De Camp *v.* Hibernia Underground R. Co., 47 N. J. L. 43, affirmed 47 N. J. L. 518. In this case the road constructed was only two-thirds of a mile long.

a "public way" to any highway or railroad. In sustaining a proceeding under this act the supreme court of that state said: "We think that it makes no difference that the mine owner may be the only member of the public who may have occasion to use the way after it has been established. The character of a way, whether it is public or private, is determined by the extent of the right to use it, and not by the extent to which that right is exercised. If all the people have the right to use it, it is a public way, although the number who have occasion to exercise the right is very small."[1] And a well-known text-writer[2] has expressed the opinion that there is no reason why lateral roads should not be constructed, if they are required to serve the public, as occasion requires. In South Carolina, it is held that, under the constitution of that state, corporations created for mining or manufacturing purposes may be authorized by statute to construct and operate a railroad, tramway, turnpike or canal for their own use and purposes, to and from their works, or place of business, or to connect with some navigable stream, or with some existing railroad, turnpike or other public highway, not to exceed ten miles in length, and may be empowered to condemn, for the use of such road, the right of way in lands over which the road may pass, upon making compensation therefor to the owner.[3] On the other hand, the supreme court of Illinois has held that a right of way for a short railroad or tramway leading from a coal mine to a railroad can not be taken by condemnation proceedings instituted by the company owning the coal mine, placing its decision on the ground that the business of mining coal is of a strictly private character, and that the coal company would be

[1] Phillips *v.* Watson, 63 Iowa 28. In Lower *v.* Chicago, etc., Railroad Co., 59 Iowa 563, the right of the company to build a lateral road, 15 miles long, was sustained, although the road was built at the instigation of private individuals and from motives of private gain.

[2] 1 Lewis' Eminent Domain, § 171. A road or canal constructed by the public or a corporation is a public highway for the public benefit if the public have a right of passage thereon by paying a reasonable, stipulated, uniform toll. Bonaparte *v.* Camden, etc., Railroad Co., Baldw. (U. S.) 205; National Docks Railway Co. *v.* Central Railroad Co. 32 N. J. Eq. 755.

[3] *Ex parte* Bacot, 36 S. Car. 125, 50 Am. & Eng. R. Cas. 597.

at liberty to operate the tramway or not, at its pleasure, and without regard to the interests of the public.[1] And several of the courts have held that railroad corporations have no authority to condemn land for side-tracks or switches leading to private manufacturing establishments, for their own private benefit.[2] The supreme court of West Virginia has held that a

[1] Sholl *v.* German Coal Co., 118 Ill. 427. See Edgewood R. Co.'s Appeal, 79 Pa. St. 257.

[2] Chattanooga, etc., R. Co. *v.* Felton, 69 Fed. R. 273. A spur track from the line of a railroad with which it does not connect except at one point, running to mills belonging to private concerns and operated for private profit, is not for a public use which will authorize the condemnation of land for a right of way. Kyle *v.* Texas & N. O. R. Co., (Tex.) 4 L. R. A. 275. Evidence that all who wish to avail themselves of a proposed railroad switch, branch road, or lateral work, can do so, is not sufficient to show that the use of the work will be for the benefit of the public. Pittsburgh, W. & K. R. Co. *v.* Benwood Iron Works, 31 W. Va. 710, 2 L. R. A. 680, 5 R. R. & Corp. L. J. 324, 8 S. E. 453. In St. Louis, etc., R. Co. *v.* Petty, 57 Ark. 359, which was a case in which a railroad sought to condemn land for a side-track near the lands of a coal company, Cockrill, C. J., said: "The vexed question for determination is, is the company seeking to condemn the land for railroad purposes—that is, for public use? The appellee argues that the proof shows that the railway's proceeding to condemn is prosecuted, not for its own use, but for the use and benefit of the Western Coal and Mining Company—a corporation which owns and operates a coal mine near the appellant's line of railway. The managers of the railway were probably instigated by the coal company to institute the condemnation proceedings, and they doubtless intended that the coal company should derive a benefit therefrom. But those facts alone do not furnish a legal reason sufficient to warrant judicial interference with the power delegated to the corporation by the legislature. If the land is needed for legitimate railroad purposes, the motive which influenced the railway managers in undertaking the work will not take from it its public character. A proposed public user will not be enjoined by the courts upon the ground that it will further private interest. De Camp *v.* Hibernia, etc., Railroad Co., 47 N. J. Law 43; National Docks R. Co. *v.* Central R. Co., 32 N. J. Eq. 755; South Chicago, etc., Railway Co. *v.* Dix, 109 Ill. 237; Dunham *v.* Hyde Park, 75 Ill. 371; Lewis Em. Dom., § 646. A railway can not exercise the right of eminent domain to establish a private shipping station for an individual shipper. If the station is for the exclusive use of a single individual, or of a collection of individuals less than the public, that stamps it as a private use, and private property can not be taken for private use. The fact that the railway's business would be increased by the additional private facilities is not enough to make the use public. Rensselaer, etc., Railway Co. *v.* Davis, 43 N. Y. 137. To be public, the user must concern the public. If it is an aid in facilitating the business for which the public agency is authorized to exercise the power to condemn, or

road from a salt mine was not of such a public character as to permit the condemnation of a right of way.[1] And, in a late case,[2] the same court held that even a corporation formed under the general railroad law of the state could not condemn land on which to build a short line of road for the declared purpose of "transporting freight to and from certain steel works."

if the public may enjoy the use of it, not by permission, but of right, its character is public. When once the character of the use is found to be public, the court's inquiry ends, and the legislative policy is left supreme, although it appears that private ends will be advanced by the public user. It is common for the interest of some individuals to be advanced, while that of others is prejudiced, by the location of railway stations and switches, when there is no motive on the part of the railway officials to discriminate between them. The same effect is seen in the original location of every line of railway. But the courts do not assume to interfere with the right of the company to locate its line stations, or switches. In this case the railway located its side-tracks contiguous to the mine of the coal company, rather than to that of the appellee, who is a rival miner. The evidence is abundant that side-tracks were necessary to facilitate and hasten the business offered to the company at that point. That of itself is sufficient to give public character to the use to which the land was to be devoted. Moreover, at that point, upon this very land, as the proof shows, there is established a shipping station for coal. The railway's franchise empowers it to establish none but public stations. It can place no unreasonable restraint on the right of the public to use it. If the railway maintains a coal-shipping station at that point, and unreasonably refuses to accord to the appellee, or others who have occasion to ship coal therefrom, facilities for doing so, the courts can afford a remedy for the wrong; and if the railway abuses the privileges of condemning private property to a public use, by turning the property acquired to a private use, doubtless the easement it acquired by condemnation may be revoked, and the possession restored to the owner of the fee. The fact that the tracks are extended upon the lands of the coal company for its exclusive use is not a matter to concern the appellee, for the reason before stated; that is, a public use is first subserved. If no use could be made of the side-tracks except to subserve the interest of the coal company, the power to condemn could not be exercised for that purpose. Sholl *v.* German Coal Co., 118 Ill. 427. But, as we have seen, that is not this case. * * * * There are numerous cases holding that a railway built for the purpose of reaching a coal mine or a manufacturing establishment is a public enterprise, entitled to use the power of eminent domain, provided the public has the power to use it. That right makes the use public. Lewis Em. Dom., § 171, and cases cited in notes; Mills Em. Dom., § 28; Kettle River R. Co. *v.* Eastern R. Co. of Minnesota, 41 Minn. 461; Phillips *v.* Watson, 63 Iowa 28; DeCamp *v.* Hibernia Railroad Co., 47 N. J. Law 43; Hays *v.* Risher, 32 Pa. St. 169, 177."

[1] Salt Co. *v.* Brown, 7 W. Va. 191.

[2] Pittsburgh, etc., R. Co. *v.* Benwood Iron Works, 31 W. Va. 710.

The court said: "The mere declaration in a petition that the property is to be appropriated to public use does not make it so, and evidence that the public will have a right to use it amounts to nothing in the face of the fact that the only incentive to ask for the condemnation was private gain, and it was apparent that the general public had no interest in it.'"[1] In a late case in one of the United States courts it was held that a projected railroad twelve miles long, connecting two other railroads and passing through valuable timber lands from which the projector and principal stockholder expected to procure bark for his tanneries, was a private enterprise, and that the company seeking to construct it was not entitled to exercise the right of eminent domain.[2]

[1] Pittsburgh, etc., R. Co. *v.* Benwood Iron Works, 31 W. Va. 710, 36 Am. & Eng. R. Cas. 531. This case contains an exhaustive review of the authorities touching the power to condemn land for a railroad leading to a private establishment. See, also, Denver R., etc., Co. *v.* Union Pac. R. Co., 34 Fed. R. 386, where it was said, per Judge Hallett: "The inquiry is not as to what the company was organized for, or whether it will be a public or private corporation, but what the road will be, the structure itself, if any such thing will be made." Chicago, etc., R. Co. *v.* Wiltse, 116 Ill. 449.

[2] Weidenfeld *v.* Sugar Run R. Co., 48 Fed. R. 615. Judge Reed said: "Whether the use is a public one, for which private property may be taken, is a judicial question. If the use itself is found to be only private, or, further, if the use being public, the appropriation can in no respect be subservient thereto, it is the duty of the judicial department to protect the citizen by proper remedies from the taking of his property, whether attempted in open disregard of, or under color of law. Pierce R. R. 146; Boom Co. *v.* Patterson, 98 U. S. 403. * * * In the case of Edgewood R. Company's Appeal, 79 Pa. St. 257, it appeared, as in this case, that a number of persons had procured a charter for a railroad company, and, under cover of constructing a railroad for public use, were engaged in the construction of a railroad from a tract of coal owned by themselves, to the Pennsylvania Railroad. A bill was filed by a property-owner to restrain the appropriation, by virtue of the power of eminent domain conferred upon the railroad company, of a portion of his property for its uses. The supreme court of Pennsylvania, finding the facts to be that the railroad was projected and constructed with the primary object of connecting the coal mines with the Pennsylvania Railroad, held that the railroad was being constructed for private purposes under cover of a charter obtained under the general railroad laws of the state; that there appeared a perversion of an enactment passed for one purpose in order to subserve other and inconsistent purposes; that the charter of the defendant company did not warrant the appropriation of the land of the plaintiff for the purpose to which the defendant had applied it; and that it did not possess the right or

The corporation was organized under the general railroad law of the state, and its projectors claimed that it was organized for a public purpose, but failed, on the trial, to show any public use or necessity for the railroad, or that it would obtain any public traffic when constructed.[1] It has been held by the court of appeals of New York that a company organized under the general laws of that state for the formation of elevated tramway corporations, and owning a road one terminus of which was upon private property. and could only be reached by means of a private road, and which was used solely for the transportation of stone for a private corporation in which the incorporators were financially interested, could not exercise the power of eminent domain. The fact that the corporation was ready to carry freight offered to it by any person, providing that such freight was suitable for transportation in the overhead buckets with which the road was provided in lieu of cars, to the extent of its surplus capacity after supplying the wants of the private corporation, was held insufficient to show that it was a public use.[2]

§ 962. **Condemnation of land for future use—Second appropriation.**—It has been held that a railroad company may take lands that will be required in the future to accommodate a growing business, where it acts in good faith.[3] But it can not,

franchise to do the acts which had resulted in the injury of which the plaintiff complained." In Western Pennsylvania R. Company's Appeal, 104 Pa. St. 399, the same court, commenting upon the Edgewood R. Co. Case, said: "A charter authorizing the building of a public railroad did not warrant the construction of a purely private one. * * * The question was one of corporate power, and that question was determined by the inspection of the charter of the company proposing to exercise the power."

[1] It would seem that this point made by the court was not well taken, as it had been shown to the court that another railroad company was seeking to build a railroad over nearly the same route chosen by the Sugar Run Co., and it was as one of the stockholders of that other company that the plaintiff claimed the right to sue.

[2] *In re* Split Rock Cable Road Co., 128 N. Y. 408. To be public, the user must concern the public. If it is an aid in facilitating the business for which the public agency is authorized to exercise the power to condemn, or if the public may enjoy the use of it, not by permission, but of right, its character is public. St. Louis, etc., R. Co. *v.* Petty, 57 Ark. 359.

[3] Lodge *v.* Philadelphia, etc., R. Co., 8 Phila. (Pa.) 345.

under pretense of acquiring lands for future use, take them for purposes of speculation, or to prevent their acquisition by competing lines.[1] Nor will a collateral enterprise remotely connected with the operation of the road justify the assertion of the right of eminent domain without authority other than a general law to condemn for railroad purposes.[2] In determining the quantity to be taken, however, where the authority exists, the prospective needs of the company may be considered to a reasonable extent.[3] As a general rule, a single appropriation does not exhaust the power;[4] and, new appropriations may be made from time to time as the necessities of the road may require.[5] So, of course, a futile effort to condemn does not exhaust the power and prevent the company from afterwards proceeding in the proper manner to condemn.[6]

§ 963. **What may be appropriated—Generally.**—All kinds of property, and every variety and degree of interest in property, may be taken under the power of eminent domain by the state or by a corporation acting under the authority of the leg-

[1] Rensselaer, etc., R. Co. *v.* Davis, 43 N. Y. 137; *In re* New York Cent., etc., R. Co., 59 Hun 7, s. c. 8 N. Y. Supp. 290.

[2] *In re* Rochester, etc., R. Co., 110 N. Y. 119, s. c. 17 N. E. R. 678.

[3] *In re* New York, etc., R. Co., 77 N. Y. 248; Lodge *v.* Philadelphia, etc., R. Co., 8 Phila. (Pa.) 345.

[4] Elliott on Roads and Streets, 177; Randolph on Eminent Domain, § 116; Ewing *v.* Alabama. etc., R. Co., 68 Miss. 551, s. c. 9 So. R. 295; *Contra* Mills Em. Dom., § 58.

[5] Prather *v.* Jeffersonville, etc., R. Co., 52 Ind. 16; Peck *v.* Louisville, etc., R. Co., 101 Ind. 366; Deitrichs *v.* Lincoln, etc., R. Co., 13 Neb. 361; Atchison, etc., R.Co. *v.* Patch, 28 Kan. 470; New York, etc., R. Co. *v.* Welsh, 69 Hun 619, s. c. 23 N. Y. Supp. 195; *In re* New York, etc., R. Co., 67 Barb. (N. Y.) 426; South Carolina, etc., R. Co. *v.* Blake, 9 Rich. L. (S. Car.) 228; Virginia, etc., Co. *v.* Lovejoy, 8 Nev. 100; Chicago, etc., Co. *v.* Wilson, 17 Ill. 123; Fisher *v.* Chicago, etc., Co., 104 Ill. 323. But see Mason *v.* Brooklyn, etc., Co., 35 Barb. (N. Y.) 373; Kenton County Court *v.* Bank Lick Turnpike Co., 10 Bush. (Ky.) 529; Brigham *v.* Agricultural, etc., Co., 1 Allen (Mass.) 316; Morris, etc., R. Co. *v.* Central, etc., Co., 31 N. J. L. 205.

[6] State *v.* Dover, etc., R. Co., 43 N. J. L. 528, s. c. 14 Am. & Eng. R. Cas. 87; Trustees of Cincinnati, etc., R. Co. *v.* Haas, 42 Ohio St. 239, s. c. 22 Am. & Eng. R. Cas. 164; Williams *v.* Hartford, etc., R. Co., 13 Conn. 397.

islature.[1] Mortgaged property,[2] easements,[3] property in the hands of a receiver,[4] and property held by the petitioner under a lease, may all be taken by a railroad corporation under a general grant of power to condemn property necessary for its use.[5] The fact that the petitioner has confirmed certain rights to a land-owner by contract does not preclude it from condemning those rights.[6] Thus, where a land-owner had contracted with a railroad company for the construction of a particular crossing, his right to have it constructed was held subject to condemnation,[7] and where one railroad accepted from another a grant of a right of way across the grantor's road thirty feet wide, on condition that it should only be used for two tracks, it was held that the grantee could condemn an additional twenty feet to be occupied by two more tracks.[8] And the fact that the

[1] New York, etc., R. Co. *v.* Boston, etc., R. Co., 36 Conn. 196; Metropolitan City R. Co. *v.* Chicago West. Div. R. Co., 87 Ill. 317; Eastern R. Co. *v.* Boston, etc., R. Co., 111 Mass. 125; Alabama, etc., R. Co. *v.* Kenney, 39 Ala. 307; People *v.* Baltimore, etc., R. Co., 117 N. Y. 150, s. c. 22 N. E. R. 1026; Water Works Co. *v.* Burkhart, 41 Ind. 364; Lewis Eminent Domain, § 262.

[2] Alabama, etc., R. Co. *v.* Kenney, 39 Ala. 307; Long Dock, etc., Co. *v.* Morris, etc., R. Co., (N. J.) 30 Am. & Eng. R. Cas. 431, and note.

[3] Buffalo, etc., R. Co. *v.* Overton, 35 Hun (N. Y. 157; Town of Rensselaer *v.* Leopold, 106 Ind. 29. Rights of way may be taken. *In re* Galena, etc., R. Co., 73 Ill. 494; Boston Gas Light Co. *v.* Old Colony R. Co., 14 Allen (Mass.) 444; Baltimore, etc., R. Co. *v.* Reaney, 42 Md. 117; Sixth Ave. R. Co. v. Kerr, 72 N. Y. 330; Brown *v.* Corey, 43 Pa. St. 495.

[4] Western Union Tel. Co. *v.* Atlantic, etc., Tel. Co., 7 Biss. (U. S.) 367; Central R. Co. *v.* Pennsylvania R. Co., 31 N. J. Eq. 475.

[5] De Camp *v.* Hibernia Underground R. Co., 47 N. J. L. 43; Coster *v.* New Jersey, etc., R. Co., 24 N. J. L. 730; Kip *v.* New York, etc., R. Co., 6 Hun 24, affirmed, 67 N. Y. 227; Secomb *v.* Milwaukee, etc., R. Co., 49 How. Pr. (N. Y.) 75.

[6] Brimmer *v.* Boston, 102 Mass. 19.

[7] Matter of New York, etc., R. Co., 44 Hun (N. Y.) 194. The right of eminent domain can not be impaired or defeated by any private contract between a corporation and the owner of property which the legislature may subsequently deem necessary for public use. Cornwall *v.* Louisville & N. R. Co., 87 Ky. 72, 9 Ky. L. R. 924, 7 S. W. R. 553.

[8] Chicago, etc., R. Co. *v.* Illinois Cent. R. Co. 113 Ill. 156. Where land is dedicated for the use of a railroad, upon the condition that no greater width than that dedicated shall ever be taken, the condition will not prevent the condemnation of other land subsequently needed; but equity may compel the company to compensate the owner for all the land, both that dedicated and that condemned, as a

land was granted with covenants for quiet enjoyment by the state or municipality which seeks to condemn it, does not affect the power,[1] since it can not be surrendered by grant or contract,[2] and all grants by the state are held to be made upon the implied condition that the property conveyed shall be subject to the power of eminent domain.[3] Land or any estate therein may be taken although the owner is under legal disabilities.[4] Dwelling-houses and other buildings may also be taken when necessary, under statutory authority.[5]

§ 964. **Property of other corporations.**—The property of a corporation as well as that of an individual, is liable to be taken under the right of eminent domain, when authorized by the legislature, upon payment of just compensation.[6] Thus, the property of colleges may be taken,[7] and so, also, may the prop-

condition of allowing more land to be taken. Cornwall *v.* Louisville, etc., R. Co., 87 Ky. 72.

[1] Brimmer *v.* Boston, 102 Mass. 19; Philadelphia, etc., R. Co. *v.* Philadelphia, 9 Phila. (Pa.) 563; Beekman *v.* Saratoga, etc., R. Co., 3 Paige (N. Y.) 45; Young *v.* McKenzie, 3 Ga. 31; Jackson *v.* Winn's Heirs, 4 Littell (Ky.) 322.

[2] Cooley Const. Lim., pp. *286, *525; *ante*, § 950.

[3] Beekman *v.* Saratoga, etc., R. Co., 3 Paige 45; Todd *v.* Austin, 34 Conn. 78; Harding *v.* Goodlett, 3 Yerg. (Tenn.) 41.

[4] East Tennessee, etc., R. Co. *v.* Love, 3 Head (Tenn.) 63; Watson *v.* New York Central R. Co., 47 N. Y. 157; North Pennsylvania R. Co. *v.* Davis, 26 Pa. St. 238; Alabama, etc., R. Co. *v.* Kenney, 39 Ala. 307; Indiana, etc., R. Co. *v.* Brittingham, 98 Ind. 294; Hotchkiss *v.* Auburn, etc., R. Co., 36 Barb. (N. Y.) 600.

[5] Wells *v.* Somerset, etc., R. Co., 47 Me. 345; Forney *v.* Fremont, etc., R. Co., 23 Neb. 465, s. c. 36 N. W. R. 806; Marlor *v.* Philadelphia, etc., R. Co., 166 Pa. St. 524, s. c. 31 Atl. R. 255. But, as we shall hereafter see, it is frequently provided that such property shall not be taken.

[6] Eastern R. Co. *v.* Boston, etc., R. Co., 111 Mass. 125, s. c. 15 Am. R. 13; Alabama, etc., R. Co. *v.* Kenney, 39 Ala. 307; Toledo, etc., R. Co. *v.* Detroit, etc., R. Co., 62 Mich. 564, s. c. 4 Am. St. R. 875; Lake Shore, etc., R. Co. *v.* Chicago, etc., R. Co., 97 Ill. 506, s. c. 2 Am. & Eng. R. Cas. 440; City of Bridgeport, etc., R. Co. *v.* New York, etc., R. Co., 36 Conn. 255, s. c. 4 Am. R. 63; note in 9 Am. St. R. 137; Chicago, etc., R. Co. *v.* Metropolitan, etc., R. Co., 152 Ill. 519, s. c. 38 N. E. R. 736; Old Colony R. Co. *v.* Framingham, etc., Co., 153 Mass. 561, s. c. 27 N. E. R. 662; New York, etc., R. Co. *v.* Metropolitan, etc., Co., 63 N. Y. 326; notes to 24 Am. R. 551; 10 Am. & Eng. R. Cas. 31, 14 Am. & Eng. R. Cas. 42; Mills Em. Dom., § 41, and authorities cited in following notes *infra*.

[7] *In re* St. Paul, etc., R. Co., 34 Minn. 227; University of Minnesota *v.*

erty of turnpikes[1] or toll bridge companies,[2] railroad companies,[3] and other corporations of a public or *quasi* public character[4] where such taking is authorized by the legislature, but not otherwise.[5] Any property may be taken of either a private or a *quasi*

St. Paul, etc., R. Co., 36 Minn. 447; Trustees of Belfast Academy *v.* Salmond, 11 Me. 109. So may the cemetery of a religious corporation. *Re* New York Street, etc., 133 N. Y. 329, s. c. 16 L. R. A. 180.

[1] Lafayette Plank Road Co. *v.* New Albany, etc., R. Co., 13 Ind. 90; Armington *v.* Barnet, 15 Vt. 745; Backus *v.* Lebanon, 11 N. H. 19; Baltimore, etc., Turnp. *v.* Baltimore, etc., R. Co., 81 Md. 247, s. c. 31 Atl. R. 854,

[2] West River Bridge Co. *v.* Dix, 6 How. (U. S.) 507; Enfield Toll Bridge Co. *v.* Hartford, etc., R. Co., 17 Conn. 454; Northampton Bridge Case, 116 Mass. 442; Crosby *v.* Hanover, 36 N. H. 404; Red River Bridge Co. *v.* Clarksville, 1 Sneed (Tenn.) 176.

[3] Iron R. Co. *v.* Ironton, 19 Ohio St. 299; Chicago, etc., R. Co. *v.* Lake, 71 Ill. 333; Pennsylvania R. Co. *v.* Baltimore, etc., R. Co., 60 Md. 263; Northern Pac. R. Co. *v.* St.Paul, etc., R.Co., 3 Fed. R. 702; Sixth Avenue R. Co. *v.* Kerr, 45 Barb. 138, affirmed 72 N. Y. 330; New York, etc., R. Co. *v.* Boston, etc., R. Co., 36 Conn. 196; Baltimore, etc., R. Co. *v.* North, 103 Ind. 486; St. Paul Union Depot Co. *v.* City of St. Paul, 30 Minn. 359. This rule, it is said, is subject to the limitation that property can only be taken from the hands of one individual or corporation and placed in the hands of another under the power of eminent domain to serve a *different* public use. And whether the new use is different from the present one is a judicial question for the courts to decide. Lake Shore, etc.,R. Co. *v.* Chicago, etc., R. Co., 100 Ill.21. Taking the property of one man and giving it to another, is not making a law, or rule of action; it is not legislation, it is simply robbery. Coster *v.* Tide Water Co., 18 N. J. Eq. 54, 63. In Googins *v.* Boston, etc. R. Co., 155 Mass. 505, it was held competent for the legislature to authorize one railroad company to appropriate the land on which another railroad was constructed. And that,by such authority the second company could take the land absolutely, and not merely the rights of the first company therein.

[4] West Boston Bridge Co. *v.* County Comrs., 10 Pick. (Mass.) 270; Hazen *v.* Essex Co., 12 Cush. (Mass.) 475; White *v.* South Shore R. Co., 6 Cush. (Mass.) 412; Boston Water Power Co. *v.* Boston, etc., R. Co., 23 Pick. (Mass.) 360; New York Central, etc., R. Co. *v.* Metropolitan Gas Light Co., 63 N. Y. 326; *In re* City of Brooklyn, 143 N. Y. 596, s. c. 38 N. E. R. 983; Village of Hyde Park *v.* Oakwoods Cemetery Association, 119 Ill. 141; *In re* Opening Twenty-second Street, 15 Phila. 409, affirmed 102 Pa. St. 108.

[5] Enfield Toll Bridge Co. *v.* Hartford, etc., R. Co., 17 Conn. 454; Smith *v.* Conway, 17 N. H. 586; Barber *v.* Andover, 8 N. H. 398; Board of Supervisors v. McFadden, 57 Miss. 618; Kenton County Court *v.* Bank Lick Turnpike Co., 10 Bush (Ky.) 529; State *v.* Newark, 28 N. J. L. 529 (canal can not be condemned); State *v.* Montclair R. Co., 35 N. J. L. 328. The proprietary right which a street railway has in its track is subject to the right of eminent domain. Canal & C. Street R. Co. *v.* Crescent City R. Co., 41 La. Ann. 561. A contract by

public corporation not used or needed for the transaction of its business,[1] or in which the necessary easement can be taken without detriment to the public interests.[2] General authority

a railroad company giving a street railway the exclusive right to build its road over its land to its depot, is not a monopoly, but an easement granted by the owner of the fee, and can be taken for public use by due process of law. Fort Worth St. R. Co. *v.* Queen City R. Co., 71 Tex. 165, 9 S. W. R. 94. The statute of Virginia, which provides that telegraph companies may construct their lines "along and parallel to any of the railroads of the state," does not authorize the condemnation of a right of way by a telegraph company along and upon the right of way of a railroad company. Lewis, P., and Hinton, J., dissenting. Postal Telegraph Cable Co. *v.* Norfolk & W. R. Co., 88 Va. 920.

[1] Oregon, etc., R. Co. *v.* Baily, 3 Ore. 164; Peoria, etc., R. Co. *v.* Peoria, etc., R. Co., 66 Ill. 174; Iron R. Co. *v.* Ironton, 19 Ohio St. 299; Matter of New York Central, etc., R. Co. *v.* Metropolitan, etc., Co., 63 N. Y. 326. "Lands held by a corporation or by a public body, but not used for or necessary to a public purpose, but simply as a proprietor and for any private purpose to which they may be lawfully applied, may be taken as if held by an individual owner. The property rights of a corporation in lands not held in trust for a public use, are no more sacred than those of individual proprietors. The law only protects from condemnation for public purposes lands actually held by authority of the sovereign power for or necessary to some public purpose or use. Lands held upon a special trust for a public use can not be appropriated to another public use without special authority from the legislature." Matter of Rochester Water Commissioners, 66 N. Y. 413; Cincinnati, etc., R. Co. *v.* Belle Centre, 48 Ohio St. 273, s. c. 27 N. E. R. 464.

[2] Matter of Rochester Water Works, 66 N. Y. 413; Morris R. Co. *v.* Central R. Co., 31 N. J. L. 205; Matter of New York Central, etc., R. Co. *v.* Metropolitan, etc., R. Co., 63 N. Y. 326. When the latter case was first before the supreme court *sub nom* New York Central R. Co. *v.* Metropolitan Gas Light Co., 5 Hun (N. Y.) 201, the court said: "The courts will act circumspectly and only on strong necessity, in allowing property devoted to uses of great public benefit to be taken; but where such necessity is shown to exist the power to act seems entirely clear. In this case the property sought to be taken is not, and never has been, in actual use for the purposes of the gas company. Doubtless, the use of their lands in the future, when the appellants come to need them, as they anticipate, will be more convenient without the additional tracks of the railroad than with them; but the railroad now crosses their land with several tracks, and the addition of two or three more, on land adjoining the present tracks does not strike us as necessarily destructive of the uses to which the appellants wish to put their lands. The injury can not be, as it seems to us, so greatly enhanced beyond what is already done, that their remaining land becomes useless to them. It is to be presumed that they will be protected to the extent that the act provides for, in their facilities of crossing and enjoying access to and from the divided parcel of their land, by the commissioners, or

to condemn is usually deemed sufficient in such cases;[1] but where the property is already devoted to the public use and is reasonably necessary to enable the corporation to perform all its duties to the public, general authority is not, ordinarily, sufficient to justify its taking for an inconsistent use.[2]

§ 965. **Property of state or United States.**—Property held by the state,[3] or by the United States,[4] for sale or settlement,

by the court, on the coming in of their report. And this, we think, is all, under the circumstances they are entitled to claim."

[1] Boston Water, etc., Co. *v.* Boston, etc., R. Co., 23 Pick. (N. Y.) 360; St. Louis, etc., R. Co. *v.* Hannibal, etc., Co., 125 Mo. 82, s. c. 28 S. W. R. 483; Baltimore, etc., R. Co. *v.* Pittsburg, etc., R. Co., 17 W. Va. 812, 852; Pittsburg, etc., R. Co. *v.* Southwest, etc., R. Co., 77 Pa. St. 173; North Carolina, etc., R. Co., *v.* Carolina Cent. R. Co., 83 N. Car. 489; New York, etc., R. Co. *v.* Boston, etc., R. Co., 36 Conn. 196; Wheeling Bridge, etc., *v.* Wheeling, etc., Co., 34 W. Va. 155, s. c. 11 S. E. R. 1009; Matter of New York, etc., R. Co., 99 N. Y. 12, and authorities cited in last two notes, *supra*.

[2] Appeal of Pitts. Junction R. Co.,122 Pa. St. 511, s. c. 9 Am. St. R. 128; Armiston, etc., R. Co. *v.* Jacksonville, etc., R. Co., 82 Ala. 297, s. c. 2 So. R. 710; Housatonic R. Co. *v.* Lee, etc., R. Co., 118 Mass. 391; Providence, etc., R. Co. *v.* Norwich, etc., R. Co., 138 Mass. 277, 279; Baltimore, etc., R. Co. *v.* North, 103 Ind. 486; Suburban R., etc., Co. *v.* New York, 128 N. Y. 510; Lake Shore, etc., R. Co. *v.* New York, etc., R. Co., 8 Fed. R. 858; Evergreen Cemetery Assn. *v.* New Haven, 43 Conn. 234; Dublin, etc., R. Co. *v.* Navan, etc., R. Co., 5 Ir. Rep. (Eq. Ser.) 393. See, also, *post*, § 966. The authority must be expressly granted or implied from "a necessity so absolute," it is said, "that, without it the grant itself will be defeated." Appeal of Sharon R. Co., 122 Pa. St. R. 533, s. c. 9 Am. St. R. 133, and note; Pennsylvania R. Co.'s Appeal, 93 Pa. St. 150; Inhabitants of Springfield *v.* Connecticut, etc., R. Co., 4 Cush. (Mass.) 63; Hickock *v.* Hine, 23 Ohio St. 523, s. c. 13 Am. R. 255; Milwaukee, etc., R. Co. *v.* City of Faribault, 23 Minn. 167; Barre R. Co. *v.* Montpelier, etc., R. Co., 61 Vt. 1, s. c. 4 L. R. A. 785, and note.

[3] See Indiana Central R. Co. *v.* State, 3 Ind. 421. Most of the states in which public lands are still held for sale provide by statute for the assessment of damages for lands of the state taken for railroad uses. See Stimson's Am. Stat. (1892), § 8745. See also Burbank *v.* Fay, 65 N. Y. 57; *In re* New York, etc., R. Co., 29 Hun (N. Y.) 269; *In re* New York, etc., R. Co., 77 N. Y. 248; Hobart *v.* Ford, 6 Nev. 77; Benson *v.* Mayor, 10 Barb. (N. Y.) 223.

[4] United States *v.* Railroad Bridge Co., 6 McLean (U. S.) 517; Union Pacific R. Co. *v.* Burlington, etc., R. Co., 3 Fed. Rep. 106; Grinter *v.* Kansas Pac. R. Co., 23 Kan. 642; Hendricks *v.* Johnson, 6 Porter (Ala.) 472. See, also, Flint, etc., R. Co. *v.* Gordon, 41 Mich. 420.

may be taken for railroad purposes, but not that devoted to particular uses of the government.[1] In Indiana it has been held, erroneously as we are inclined to think, that where the legislature authorizes a company to construct its road between two designated points, the company has a right to take any land of the state between such points, on the authorized line, which may be necessary for its purpose, and the court refused to enjoin a company which had located its road across a portion of the land which had been purchased by the state for its institution for educating the deaf and dumb.[2] In Illinois, however, it has been held that a charter giving authority "to enter upon, take possession of, and use any lands, streams, and materials of every kind," and granting to the company "all such lands, materials and privileges belonging to the state," did not give such company a right to take land owned by the state as a site for its institution for the education of the blind.[3] It is said that "if it is necessary that the United States government should have an eminent domain still higher than that of the state, in order that it may fully carry out the objects and purposes of the constitution, then it has it."[4] But, as a general rule, "while a grant from one government may supersede and abridge franchises and rights held at the will of the grantor, it can not abridge any property rights of a public character, created by the authority of another sovereignty," and property of a state although devoted to a public use, such as a street or road, "is property devoted to the public uses of the state, and it is not within the competency of the national

[1] United States *v.* Ames, 1 W. & M. (U. S.) 76; United States *v.* Chicago, 7 How. (U. S.) 185; Fort Leavenworth R. Co. *v.* Lowe, 114 U. S. 525, s. c. 5 Sup. Ct. R. 995. See, also, Barrett *v.* Palmer, 135 N. Y. 336. But compare United States *v.* Railroad Bridge Co., 6 McLean 517.

[2] Indiana Cent. R. Co. *v.* State, 3 Ind. 421.

[3] St. Louis, etc., R. Co. *v.* Illinois Inst. for the Blind, 43 Ill. 303. See, also, Oregon R. Co. *v.* Portland, 9 Oreg. 231; State *v.* Cincinnati, etc., R. Co., 37 Ohio St. 157, s. c. 10 Am. & Eng. R. Co. 83; Seattle, etc., R. Co. *v.* State, 7 Wash. 150, s. c. 34 Pac. R. 551; Mayor of Atlanta *v.* Central R. Co,. 53 Ga. 120; Matter of Ninth Ave., 45 N. Y. 729.

[4] Stockton *v.* Baltimore, etc., R. Co., 32 Fed. R. 9.

government to dispossess the state of such control and use or appropriate the same to its own benefit, or the benefit, if any, of its corporations or grantees, without suitable compensation to the state."[1] A railroad company chartered by congress is not such a federal agency that its property can not be taken under the eminent domain of a state.[2]

§ 966. **Property devoted to another public use.**—It is a general rule that lands once taken for a public use, or dedicated to such a use by the owner can not, without an express grant of authority by the legislature for that purpose, be appropriated by proceedings *in invitum* to a different public use.[3] Authority to build a railroad across streets,[4] canals,[5] railroad tracks,[6]

[1] St. Louis *v.* Western Un. Tel., 148 U. S. 92, s. c. 13 Sup. Ct. R. 485.

[2] North Pac. R. Co. *v.* St. Paul, etc., R. Co., 3 Fed. Rep. 702; Union Pac. R. Co. *v.* Burlington, etc., Co., 1 McCrary (U. S. C. C.) 452; Union Pac. R. Co. *v.* Leavenworth, etc., R. Co., 29 Fed. R. 728.

[3] Baltimore, etc., R. Co. *v.* North, 103 Ind. 486; City of Ft. Wayne, etc., R. Co. *v.* Lake Shore, etc., R. Co., 132 Ind. 558, s. c. 32 N. E. R. 215; Little Miami, etc., R. Co. *v.* City of Dayton, 23 Ohio St. 210; Hickok *v.* Hine, 23 Ohio St. 523; Illinois Cent. R. Co. *v.* Chicago, etc., R. Co., 122 Ill. 473, s. c. 13 N. E. R. 140; Petition of Providence, etc., R. Co., 17 R. I. 324, s. c. 21 Atl. R. 965; *In re* Boston, etc., R. Co., 53 N. Y. 574; Prospect Park, etc., R. Co. *v.* Williamson, 91 N. Y. 552; St. Louis, etc., R. Co. *v.* Haller, 82 Ill. 208 (street); Matter of Boston & Albany R. Co., 53 N. Y. 574 (park); State *v.* Montclair, etc., R. Co., 35 N. J. L. 328 (city reservoir). In Lake Erie, etc., R. Co. *v.* Board of Commissioners, 57 Fed. R. 945, it was held that in Ohio the rule is well established that a second appropriation of lands formerly appropriated to public use can not be made when the second appropriation is inconsistent with the first, and tends to deprive the corporation first acquiring such public use of the full and free enjoyment thereof. So held in Pennsylvania R. Co.'s Appeal, 93 Pa. St. 150; and Lake Shore, etc., R. Co. *v.* Chicago., etc., R. Co., 100 Ill. 21. See, also, *ante*, § 964. Elliott on Roads and Streets, 169.

[4] Lewis *v.* Germantown, etc., R. Co., 16 Phila. (Pa.) 608; Elliott on Roads and Streets, 169, quoted in Lake Erie, etc., R. *v.* City of Kokomo, 130 Ind. 224, s. c. 29 N. E. R. 780.

[5] Morris Canal Co. *v.* State, 24 N. J. L. 62.

[6] Morris, etc., R. Co. *v.* Central R. Co., 31 N. J. L. 205; Grand Rapids, etc., R. Co. *v.* Grand Rapids, etc., R. Co., 35 Mich. 265; St. Louis, etc., R. Co. *v.* Springfield, etc., R. Co., 96 Ill. 274; Lake Shore, etc., R. Co. *v.* Chicago, etc., R. Co., 97 Ill. 506; East St. Louis, etc., R. Co. *v.* East St. Louis Union R. Co., 108 Ill. 265; Matter of Boston, etc., R. Co., 79 N. Y. 64 and 69; South Carolina R. Co. *v.* Columbia, etc., R. Co., 13 Rich. Eq. (S. Car.) 339; Lake Shore, etc., Railway Co. *v.* Cincinnati, etc., Railway Co.,

or street railway tracks,[1] lying between the *termini* of a proposed road is necessarily implied from a grant of authority to build a railroad between such *termini*.[2] The same is true as to navigable waters which must necessarily be crossed in order to build a line of road between the points named in the charter.[3] But authority to bridge a navigable stream will be strictly construed, and the authority conferred or necessarily implied can not be exceeded.[4] And a general authority to bridge a navigable stream does not authorize an interference with navigation which can reasonably be avoided by the construction of draws or otherwise.[5] Neither will authority to build a railroad longi-

30 Ohio St. 604; Fitchburg R. Co. *v.* New Haven, etc., R. Co., 134 Mass. 547; Massachusetts Central R. Co. *v.* Boston, etc., R. Co., 121 Mass. 125; Worcester, etc., R. Co. *v.* Railroad Commissioners, 118 Mass. 561; Inhabitants of Springfield *v.* Connecticut, etc., R. Co., 4 Cush. (Mass.) 63; New York, etc., R. Co. *v.* Boston, etc., R. Co., 36 Conn. 196; City of Bridgeport *v.* New York, etc., R. Co., 36 Conn. 255; Lehigh Valley R. Co. *v.* Dover, etc., R. Co., 43 N. J. L. 528; Baltimore, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 17 W. Va. 812; Union Pacific R. Co. *v.* Burlington, etc., R. Co., 1 McCrary (U. S.) 452.

[1] Lynn, etc., R. Co. *v.* Boston, etc., R. Co., 114 Mass. 88. See Market St. R. Co. *v.* Central R. Co., 51 Cal. 583.

[2] But such implication arises only when requisite to the enjoyment of the powers expressly granted, and can be extended no further than such necessity requires. Hickok *v.* Hine, 23 Ohio St. 523; Little Miami, etc., R. Co. *v.* City of Dayton, 23 Ohio St. 510. See Matter of City of Buffalo, 68 N. Y. 167, 175.

[3] Hughes *v.* Northern Pacific R. Co., 18 Fed. Rep. 106; Union Pacific R. Co. *v.* Hall, 91 U. S. 343; People *v.* Rensselaer, etc., R. Co., 15 Wend. (N. Y.) 114; City of Springfield *v.* Connecticut, etc., R. Co., 4 Cush. (Mass.) 63; Mohawk Bridge Co. *v.* Utica, etc., R. Co., 6 Paige (N. Y.) 554; People *v.* Potrero, etc., R. Co., 67 Cal. 166. See Smith *v.* Louisville, etc., R. Co., 62 Miss. 510; Brown *v.* Preston, 38 Conn. 219; Town of Weathersfield *v.* Humphy, 20 Conn. 218.

[4] Silver *v.* Missouri Pac. R. Co., 101 Mo. 79; Missouri River Packet Co. *v.* Hannibal, etc., R. Co., 79 Mo. 478; Inhabitants of Cape Elizabeth *v.* County Comrs., 64 Me. 456.

[5] Hickok *v.* Hine, 23 Ohio St. 523; Sweeney *v.* Chicago, etc., R. Co., 60 Wis. 60. A general authority to build a railroad between two points, the natural and convenient route of which would pass over several navigable streams, authorizes the corporation to construct bridges over such streams, in a manner that will not destroy the navigation of them. But the power must be exercised with a due regard to the privileges of others. Attorney-General *v.* Stevens, 1 N. J. Eq. 369. But the right of a railroad company to construct a bridge at any particular point on a navigable river lying in its course is subject to the judgment of the proper court as to whether it is being constructed with-

tudinally along a public highway[1] or the right of way of another railroad,[2] be implied from a general authority to build the road between certain points, unless it is absolutely necessary to give effect to the grant.[3] Where the power to condemn is conferred in general terms, the presumption is against the right to take property which is already devoted to a public use, unless both uses may stand together with a tolerable interference which may be compensated for by damages paid.[4] If such uses are not inconsistent and the second does not interfere with or impair the first, general authority for the second use may be sufficient,[5] but if they can not co-exist without

out unnecessary injury to the navigability of such water, upon the complaint of any one specially injured thereby, or likely to be so injured. Hughes *v.* Northern Pac. R. Co., 18 Fed. Rep. 106, 13 Am. & Eng. R. Cas. 157.

[1] Kaiser *v.* St. Paul, etc., R. Co, 22 Minn. 149; Inhabitants of Springfield *v.* Connecticut River R. Co., 4 Cush. (Mass.) 63; State *v.* Montclair R. Co., 35 N. J. Law 328; Savannah, etc., R. Co. *v.* Shiels, 33 Ga. 601; Elliott on Roads and Streets, 169.

[2] Housatonic, etc., R. Co. *v.* Lee, etc., R. Co., 118 Mass. 391; California Pac. R. Co. *v.* Central Pac. R. Co., 47 Cal. 549; Alexandria, etc., R. Co. *v.* Alexander, etc., R. Co., 75 Va. 780; Albany, etc., R. Co. *v.* Brownell, 24 N. Y. 345; Mayor of Atlanta *v.* Central R. Co., 53 Ga. 120; City of Hannibal *v.* Hannibal & St. Jo. R. Co., 49 Mo. 480; Northern Cent. R. Co. *v.* Baltimore, 46 Md. 425; Crossley *v.* O'Brien, 24 Ind. 325; City of Ft. Wayne *v.* Lake Shore, etc., R. Co., 132 Ind. 558, s. c. 32 Am. St. R. 277.

[3] Housatonic, etc., R. Co. *v.* Lee, etc., R. Co., 118 Mass. 391; Inhabitants of Springfield *v.* Connecticut River R. Co., 4 Cush. (Mass.) 63. Where land has been acquired by one company under the right of eminent domain, it can not, in the absence of express or necessarily implied statutory authority, be taken by another company, to whom it would be convenient, but not necessary. Barre R. Co. *v.* Montpelier & W. R. R. Co., 61 Vt. 1, s. c. 17 Atl. R. 923. The Alabama Declaration of Rights, which provides that the general assembly may authorize the granting of the right of way by one person or corporation over the lands of another, upon just compensation being made, does not permit the condemnation of land in the actual use of one railroad company for the benefit of another, unless it is reasonably essential to the construction of the second road to its proposed terminus by the only practicable route. But the taking is essential when, the public convenience being equally served, the financial interests of the second company will gain more thereby than the first company would probably be injured. Mobile & G. R. Co. *v.* Alabama Midland Ry. Co., 87 Ala. 501, s. c. 6 So. R. 404.

[4] Matter of City of Buffalo, 68 N. Y. 167; Chicago, etc., R. Co. *v*, Chicago, etc., R. Co., 112 Ill. 589. See, also, City of Seymour *v.* Jeffersonville, etc., R. Co., 126 Ind. 466, 467, citing Elliott on Roads and Streets, 167, 168.

[5] City of Boston *v.* Brookline, 156 Mass. 172, s. c. 30 N. E. R. 611.

materially impairing the first use, authority to take for the second use can not be implied from a general grant of authority to condemn.[1]

§ 967. **Franchises.**—In the absence of an enactment in express terms, a corporation will only be justified in condemning the franchise of another public or *quasi* public corporation, where it appears by necessary implication that the legislature intended to grant it the power to do so. It must appear from the statute that the legislature recognized the franchise as private property, and provision must be made for the payment of just and reasonable compensation to the owner, for a grant of authority to take private property without compensation is void. If the grant of power to take property rests only in implication, and the act which is claimed to confer such power contains no provisions as to compensating the owner whose rights are injuriously affected, the courts will presume that it was not the intent of the legislature to exercise the right of eminent domain, but simply to confer a right to do the act, or exercise the power given, on first obtaining the consent of those affected.[2] It is well settled, however, that corporate franchises although held and enjoyed under a charter which contains no reserved power of alteration or repeal,[3] may be taken under the power of eminent domain.[4] The only question

[1] Cincinnati, etc., R. Co. *v.* City of Anderson, 139 Ind. 490, and authorities there cited; Lake Erie, etc., R. Co. *v.* Town of Boswell, 137 Ind. 336; Prospect Park, etc., R. Co. *v.* Williamson, 91 N. Y. 552; Albany, etc., R. Co. *v.* Brownell, 24 N. Y. 345; Milwaukee, etc., R. Co. *v.* City of Faribault, 23 Minn. 167; St. Paul, etc., R. Ce. *v.* City of St. Paul, 30 Minn. 359; New Jersey, etc., R. Co. *v.* Long Branch Comrs., 39 N. J. L. 28; Hannibal, etc., R. Co. *v.* Muder, 49 Mo. 165; Winona, etc., R. Co. *v.* City of Watertown, 4 S. Dak. 323, 56 N. W. R. 1077. In most of these cases it was held that a street could not be extended through depot grounds and buildings under a mere general grant of power to condemn.

[2] Boston, etc., R. Co. *v.* Salem, etc., R. Co., 2 Gray (Mass.) 1; Matter of Hamilton Avenue, 14 Barb. (N. Y.) 405; Matter of Flatbush Avenue, 1 Barb. 286.

[3] West River Bridge Co. *v.* Dix, 6 How. (U. S.) 507, 532, affirming 16 Vt. 446; Central Bridge Co. *v.* Lowell, 4 Gray (Mass.) 474.

[4] Boston Water Power Co. *v.* Boston, etc., R. Co., 23 Pick. (Mass.) 360; Sunderland Bridge Case, 122 Mass. 459; Grand Rapids, etc., R. Co. *v.* Grand Rapids, etc., R. Co., 35 Mich. 265;

is as to the authority to exercise the power in the particular instance. It must be granted in express terms or by necessary implication.[1] The entire franchise may be appropriated if the public necessity requires;[2] but a part only may be taken if that is all that is required, and the corporation can not compel compensation to be paid to it for the entire franchise if part of it remains unimpaired.[3]

Lewis *v.* Germantown, etc., R. Co., 16 Phila. (Pa.) 621; White River Turnpike Co. *v.* Vermont Cent. R. Co., 21 Vt. 590; Dunlap *v.* Toledo, etc., R. Co., 50 Mich. 470, s. c. 15 N. W. R. 555; Armington *v.* Barnet, 15 Vt. 745; Brainard *v.* Missisquoi R. Co., 48 Vt. 107; Lafayette Plank R. Co. *v.* New Albany, etc., R. Co., 13 Ind. 90; Enfield Toll Bridge Co. *v.* Hartford, etc., R. Co., 17 Conn. 454; Matter of Petition of Ker, 42 Barb. (N. Y.) 119; Stockton *v.* Central R. Co., 50 N. J. Eq. 52; Crosby *v.* Hanover, 36 N. H. 404; James River, etc., Co. *v.* Thompson, 3 Gratt. (Va.) 270; Philadelphia, etc., Co.'s Appeal, 102 Pa. St. 123, s. c. 20 Am. & Eng. R. Cas. 1, and note; *In re* Towanda Bridge Co., 91 Pa. St. 216; Red River Bridge Co. *v.* Clarksville, 1 Sneed (Tenn.) 176; Lewis Em. Dom., § 274; Mills Em. Dom., § 42; Elliott on Roads and Streets, 164, 165, 166. *Ante*, § 922.

[1] Matter of Boston, etc., R, Co., 53 N. Y. 574; Central City, etc., R. Co. *v.* Fort Clark, etc., R. Co., 81 Ill. 523. "When a franchise is granted with power to take or acquire property for public use, it is a fair and just implication that, where large sums are invested in the enterprise, it shall not be destroyed by an another company armed with power to condemn for exactly the same use and to take away the same business already done by the older company. This is inherently unjust, and is bad policy, as tending to prevent solid and solvent enterprises in the state. Mobile & G. R. Co. *v.* Alabama Midland Ry. Co., 87 Ala. 501 and 520, 6 South. R. 404 and 407; City of Ft. Wayne *v.* Lake Shore & M. S. Ry. Co., 132 Ind. 558, 32 N. E. 215, s. c. 32 Am. St. R. 277; Illinois Cent. Ry. Co. *v.* Chicago, B. & N. R. Co., 122 Ill. 473, 13 N. E. 140; Postal Tel. Cable Co. *v.* Norfolk & W. R. Co., 88 Va. 920, 14 S. E. 803; Groff *v.* Bird-in-hand Turnpike Co., 144 Pa. St. 150, 22 Atl. 834; Davis *v.* East Tenn., etc., Railway Co., 87 Ga. 605, 13 S. E. 567; Appeal of Pittsburg Junction R. Co., 122 Pa. St. 511, 6 Atl. 564, 9 Am. St. R. 128; Appeal of Sharon Ry. Co., 122 Pa. St. 533, 17 Atl. 234, 9 Am. St. R. 133; Fidelity T. and S. V. Co. *v.* Mobile St. Ry. Co., 53 Fed. R. 687; Lake Erie & W. Co. *v.* Board of Com'rs. Seneca County, 57 Fed. R. 945; Minneapolis & St. L. Ry. Co. *v.* Minneapolis W. Ry. Co., (Minn.) 63 N. W. 1035; St. Louis, H. & K. C. Ry. Co. *v.* Hannibal U. D. Co., 125 Mo. 82, 28 S. W. 483; Lewis Em. Dom., § 276; Rand. Em. Dom., §§ 97, 98. Cases may be found apparently holding otherwise, but, where the result does not depend on special legislation, such cases are not sound in principle, and should not be followed." Chattanooga, etc., R. Co. *v.* Felton, 69 Fed. R. 273, 280.

[2] Crossley *v.* O'Brien, 24 Ind. 325. See, also, Monongahela Nav. Co. *v.* United States, 148 U. S. 312, s. c. 13 Sup. Ct. R. 622; Philadelphia, etc., R. Co.'s Appeal, 120 Pa. St. 90.

[3] Elliott on Roads and Streets, 166.

§ 968. **Exclusive grants and franchises.**—The fact that a right or privilege possessed by a corporation is exclusive,[1] and that the legislature has attempted to bind itself by contract to permit such exclusive right to be exercised for a certain period of time[2] only affects its value, and does not prevent it from being subject to the power of eminent domain, upon the payment of just compensation, like all other property.[3] The mere grant of a right to maintain a toll-bridge, ferry, turnpike, railroad, or the like, at a certain place or over a certain route, confers no exclusive franchise to conduct such business in the vicinity, and the mere diminution of business caused by the grant of a similar right to a competing or rival company is not a taking of the property or franchise of the former, so as to require compensation, nor does the latter grant impair the obligation of a contract.[4] But where an exclusive franchise or right to carry on such business within certain limits is

[1] Piscataqua Bridge Co. *v.* New Hampshire Bridge, 7 N. H. 35; New Orleans Gas Co. *v.* Louisiana, etc., Co., 115 U. S. 650, 683; Philadelphia, etc., R. Co.'s Appeal, 102 Pa. St. 123; Salem, etc., Co. *v.* Lyme, 18 Conn. 451; Grand Rapids Street R. Co. *v.* West Side Street R. Co., 48 Mich. 433; Metropolitan, etc., R. Co. *v.* Chicago, etc., R. Co., 87 Ill. 317; Village of Hyde Park *v.* Oakwood, etc., Ass., 119 Ill. 141; Baltimore, etc., Tel. Co. *v.* Morgan's Louisiana, etc., R. Co., 37 La. Ann. 883; New Orleans, etc., R. Co. *v.* Southern, etc., Co., 53 Ala. 211; Western Union Tel. Co. *v.* American Union Tel. Co., 65 Ga. 160.

[2] Eastern R. Co. *v.* Boston, etc., R. Co., 111 Mass. 125; Town of East Hartford *v.* Hartford Bridge Co., 17 Conn. 79; Piscataqua Bridge Co. *v.* New Hampshire Bridge Co., 7 N. H. 35.

[3] The state can not grant away its right to resume possession of property when it is needed for public use. Alabama, etc., R. Co. *v.* Kenney, 39 Ala. 307; Eastern R. Co. *v.* Boston, etc., R. Co., 111 Mass. 125.

[4] Turnpike Co. *v.* State, 3 Wall. (U. S.) 210; Charles River Bridge *v.* Warren Bridge, 11 Peters (U. S.) 420; State *v.* Noyes, 47 Me. 189; Lafayette, etc., Co. *v.* New Albany, etc., R. Co., 13 Ind. 90; Commonwealth *v.* Eastern R. Co., 103 Mass. 254; Thorpe *v.* Rutland, etc., R. Co., 27 Vt. 140; White River Turnp. Co. *v.* Vermont Cent. R. Co., 21 Vt. 590; Tuckahoe Canal Co. *v.* Tuckahoe, etc., R. Co., 11 Leigh (Va.) 42, s. c. 36 Am. Dec. 374; Illinois, etc., R. Canal Co. *v.* Chicago, etc., R. Co., 14 Ill. 314; Mohawk Bridge Co. *v.* Utica, etc., R. Co., 6 Paige (N. Y.) 554; New York, etc., R. Co. *v.* Forty-second St. R. Co., 50 Barb. (N. Y.) 285; President, etc., of Baltimore, etc., Turnp. *v.* Baltimore, etc., R. Co., 81 Md. 247, s. c. 31 Atl. Rep. 854; Trustees, etc., *v.* City of Atlanta, 93 Ga. 468, s. c. 21 S. E. R. 74. But there may, perhaps, be an exclusive grant or "physical monopoly," in such a case of the land act-

granted to one company, the grant of similar rights to another company to carry on a like business within those limits, without providing for compensation to the former, may impair the obligation of the contract between the state and the first grantee and amount to the taking of its property or franchise.[1] It is, otherwise, however, if, as is sometimes the case, it is found, upon a strict construction of the grant of the exclusive franchise that there is no impairment of it by the second grant and use, notwithstanding somewhat similar privileges may have been given to each company.[2]

§ 969. **Exempt property.**—Statutes sometimes prohibit the taking of particular kinds of property for railroad purposes, such as dwelling-houses,[3] or the yard, kitchen or garden ad-

ually used. See Citizen's Coach Co. *v.* Camden, etc., R. Co., 33 N. J. Eq. 267; Charles River Bridge *v.* Warren Bridge, 11 Pet. (U. S.) 420, 613; Matter of Union Ferry Co., 98 N. Y. 139; Indianapolis, etc., St. R. Co. *v.* Citizens' St. R. Co., 127 Ind. 369, 389; Elliott on Roads and Streets, 566 *et seq.* And property actually taken must be paid for. Pittsburgh, etc., R. Co., *v.* Jones, 111 Pa. St. 204; Baltimore, etc., Co. *v.* Union R. Co., 35 Md. 224; Fayette, etc., Co. *v.* New Albany, etc., R. Co., 13 Ind. 90, s. c. 74 Am. Dec. 246.

[1] Enfield Toll Bridge Co. *v.* Hartford, etc., R. Co., 17 Conn. 40, s. c. 42 Am. Dec. 716; St. Louis, etc., R. Co. *v.* Northwestern, etc., Railroad Co., 69 Mo. 65; Bridge Proprs. *v.* Hoboken Co., 1 Wall. (U.S.) 116; The Binghamton Bridge, 3 Wall. (U.S.) 51; St. Tammany Water Works *v.* New Orleans Water Works, 120 U. S. 64, s. c. 7 Sup. Ct. R. 405; California, etc., Tel. Co. *v.* Alta, etc., Tel. Co., 22 Cal. 398; Aikin *v.* Western R. Co., 20 N. Y. 370; Piscataqua Bridge *v.* New Hampshire Bridge, 7 N. H. 35; Raritan, etc., R. Co. *v.* Delaware, etc., Co., 18 N. J. Eq. 546; Reg. *v.* Cambrian R. Co., L. R., 6 Q. B. 422.

[2] Richmond, etc., R. Co. *v.* Louisa R. Co., 13 How. (U.S.) 71 (exclusive franchise to carry passengers not impaired by carrying freight); Bridge Proprs. *v.* Hoboken, 1 Wall. 116 (exclusive franchise for toll bridge not impaired by railroad bridge); Lake *v.* Virginia, etc., R. Co., 7 Nev. 294; Thompson *v.* New York. etc., R. Co., 3 Sandf. Ch. (N. Y.) 625; Philadelphia, etc., R. Co.'s Appeal, 102 Pa. St. 123.

[3] The Pennsylvania statute prohibiting the location of a railroad through any dwelling-house in the occupancy of the owner, without his consent, is not to be construed as prohibiting the occupation of grounds which are merely ornamental or pleasant as surroundings. Lyle *v.* McKeesport, etc., R. Co., 131 Pa. 437, 25 W. N. C. 228, 18 Atl. R. 1111. The right of a railway company to condemn buildings not exempted by statute and situated on real estate necessary for its use is an incident to the right to condemn the land. Forney *v.* Fremont, etc., R. Co., 23 Neb. 465, s. c. 36 N. W. R. 806; Wells *v.* Somerset, etc., R. Co., 47 Me. 345.

joining, or cemeteries or churches,[1] without the consent of the owners.[2] Proceedings in violation of such a statute are said to be void,[3] but the benefit of the statute may be waived by the owner to be affected by any acts which amount to an implied consent.[4] We have elsewhere considered the subject of this section in treating of the location of railroads, and it is sufficient, in this connection, to refer to what has already been written.[5]

§ 970. **Extent of taking.**—Where the statute giving a corporation the right to exercise the power of eminent domain prescribes the estate and exact quantity that shall be taken, no other estate or amount of land than that prescribed can be seized under such authority.[6] But where the statute does not definitely declare what estate or what quantity of property shall be taken, the general rule is that the corporation may take so much, and only so much, as is reasonably necessary for its corporate purposes.[7] Thus, where only part of a lot or parcel of land is needed for a railroad or a street, the entire lot or tract can not be taken for such purpose. In other words, no more can be taken than is needed for the road itself, or for

[1] In the absence of such a statute, the property of a church is subject to condemnation for railroad purposes. Macon, etc., R. Co. *v.* Riggs, 87 Ga. 158, s. c. 13 S. E. R. 312.

[2] In Louisiana a railroad can not take a dwelling-house or the yard, kitchen, or garden adjoining, unless the jury shall find that the line can not be diverted without great public loss and inconvenience. Rev. Laws 1884, La., § 705.

[3] *Ex parte* Clapper, 3 Hill (N. Y.) 458; Cuyler *v.* Rochester, 12 Wend. (N. Y.) 165; Extension of Second Street, 23 Pa. St. 346.

[4] Chesapeake, etc., R. Co. *v.* Pack, 6 W. Va. 397.

[5] See *ante*, § 924.

[6] Elliott on Roads and Streets, 176; De Camp *v.* Hibernia, etc., R. Co., 47 N. J. L. 43; Matter of Union Ferry Co., 98 N. Y. 139; Hingham, etc., Co. *v.* County of Norfolk, 6 Allen (Mass.) 353; Roanoke City *v.* Berkowitz, 80 Va. 616; Currier *v.* Marietta, etc., R. Co., 11 Ohio St. 228; Watson *v.* Acquackanonck Water Co., 36 N. J. L. 195; Miller *v.* Windsor Water Co., 148 Pa. St. 429; Hill *v.* Mohawk, etc., R. Co., 7 N. Y. 152. *Post*, § 972.

[7] Johnston *v.* Chicago, etc., R. Co., 58 Iowa 537; Lockie *v.* Mut. Un. Tel. Co., 103 Ill. 401; *In re* South Beach, etc., R. Co., 119 N. Y. 141, s. c. 23 N. E. R. 486; Forney *v.* Fremont, etc., R. Co., 23 Neb. 465, s. c. 36 N. W. R. 806; Oregon, etc., R. Co. *v.* Owsley, 3 Wash. Ter. 38; Tyler *v.* Hudson, 147 Mass. 609.

some purpose legitimately connected with its use and enjoyment by the public and within the scope of the statutory grant of authority to condemn.[1] In the absence of a statutory determination of the amount, no precise rule can be laid down for determining exactly what quantity of land may be taken, as the needs of the company in any particular case must necessarily depend very largely upon the peculiar facts and circumstances of that case.[2] It is said that the selection of the land and the amount to be taken usually rests in the discretion of the company, within statutory and constitutional limitations and this in general is true.[3] It is also said in general terms, that the legislature may leave the determination of the particular property and the amount needed "to the discretion of those upon whom the authority is conferred, with or without limitations."[4] But even if it be true that the legislature can make the determination of a company conclusive as to the amount of property necessary to be taken for its use, it is seldom that

[1] Chesapeake, etc., Co. *v.* Mason, 4 Cranch (U. S. C. C.) 123; Baltimore, etc., R. Co. *v.* Pittsburg, etc., R. Co., 17 W. Va. 812, s. c. 10 Am. & Eng. R. Cas. 444; Embury *v.* Conner, 3 N. Y. 511; Case *v.* Kelly, 133 U. S. 21, s. c. 10 Sup. Ct. R. 216; Georgia Pac. R. Co. *v.* Wilks, 86 Ala. 478, s. c. 6 So. R. 34.

[2] Nashville, etc., R. Co. *v.* Cowardin, 11 Humph. (Tenn.) 348; Virginia, etc., R. Co. *v.* Elliott, 5 Nev. 358; Chicago, etc., R. Co. *v.* People, 4 Ill. App. 468. Yet, in a general sense, the necessity which justifies the condemnation relates rather to the nature of the property and the uses to which it is to be applied, than to the circumstances of the particular case. Pierce on Railroads, 148.

[3] O'Hare *v.* Chicago, etc., R. Co., 139 Ill. 151, s. c. 28 N. E. R. 923; Lodge *v.* Philadelphia, etc., R. Co., 8 Phila. (Pa.) 345; Colorado, etc., R. Co. *v.* Union Pac. R. Co., 41 Fed. R. 293; Southern, etc., R. Co. *v.* Stoddard, 6 Minn. 150; Smith *v.* Chicago, etc., Railroad Co., 105 Ill. 511; Chicago, etc., Railroad Co. *v.* Wiltse, 116 Ill. 449, s. c. 6 N. E. R. 49; Deitrichs *v.* Lincoln, etc., R. Co., 13 Neb. 361, s. c. 13 N. W. R. 624; Eldridge *v.* Smith, 34 Vt. 484. But see Postal Tel. Cable Co. *v.* Louisville,etc.,Co., 43 La. Ann. 522, s. c. 9 So. R. 119.

[4] Lewis Em. Dom., § 286, citing Dewitt *v.* Duncan, 46 Cal. 342; Boston Water Power Co. *v.* Boston, etc., R. Co., 23 Pick. (Mass.) 360; Board of Supervisors *v.* Gorrell, 20 Gratt. (Va.) 484. See, also, to the same effect Worcester Gas Light, etc., Co. *v.* County Comr's, 138 Mass. 289; Randolph Em. Dom., § 202; Ford *v.* Chicago, etc., R. Co., 14 Wis. 609; Lynch *v.* Forbes, 161 Mass. 302, s. c. 42 Am. St. R. 402. But compare the authorities cited in the note in the last report above referred to.

any legislature has attempted to do so without limitation. It is usually provided that the question shall be tried and determined by appraisers, commissioners, or a jury, or some other tribunal.[1] The company may have a right to exercise its discretion in the first instance and its determination may be *prima facie* evidence that all the land taken or sought to be condemned is necessary for the use of the road, but it seems to us that the company should not have a right to act as final judge in its own case and conclusively determine the question, and that its discretion is subject both to such statutory and constitutional provisions as may be applicable and also to the jurisdiction and right of the courts to prevent its abuse.[2]

§ 971. **Taking additional property.**—The power of a railroad company to take lands by eminent domain is not exhausted by a single exercise, nor does it expire with the completion of the road so far as to put it in running order. But additional land may be taken from time to time, as may be required by the increased necessities of the company, due to growth of business, or demands for greater accommodation for the public.[3]

[1] Matter of Thompson, 57 Hun (N. Y.) 419; Illinois Cent. R. Co. *v.* Chicago, 138 Ill. 453; Rensselaer, etc., Co. *v.* Davis, 43 N. Y. 137; Comrs. Court *v.* Bowie, 34 Ala. 461; Baltimore, etc., R. Co. *v.* Pittsburg, etc., R. Co., 17 W. Va. 812, s. c. 10 Am. & Eng. R. Cas. 444; Lecoul *v.* Police Jury, 20 La. Ann. 308; Power's Appeal, 29 Mich. 504; Matter of New York Cent. R. Co., 66 N. Y. 407; New Central, etc., Co. *v.* George's, etc., Co., 37 Md. 537; Southern Pac. R. Co. *v.* Raymond, 53 Cal. 223; Carolina Cent. R. Co. *v.* Love, 81 N. Car. 434.

[2] O'Hare *v.* Chicago, etc., R. Co., 139 Ill. 151, s. c. 28 N. E. R. 923; Hays *v.* Risher, 32 Pa. St. 169; Southern Pac. Railroad Co. *v.* Raymond, 53 Cal. 223; New York, etc., R. Co. *v.* Metropolitan, etc., Co., 63 N. Y. 326; Tracy *v.* Elizabethtown Railroad Co., 80 Ky. 259; Baltimore, etc., R. Co. *v.* Pittsburg, etc., R. Co., 17 W. Va. 812, s. c. 10 Am. & Eng. R. Cas.. 444; Reed *v.* Louisville Bridge Co., 8 Bush. (Ky.) 69; South Carolina R. Co. *v.* Blake, 9 Rich. L. 228; Mills Em. Dom., § 49; Webb *v.* Manchester, etc., R. Co., 4 M. & Cr. 116; Coe. *v.* Aiken, 61 Fed. R. 24; Cooley's Const. Lim. (6th ed.) 664.

[3] Prather *v.* Jeffersonville, etc., R. Co., 52 Ind. 16; South Carolina, etc., R. Co. *v.* Blake, 9 Rich. L. (S. Car.) 228; Beck *v.* United N. J. R. Co., 39 N. J. L. 45; Toledo, etc., R. Co. *v.* Daniels, 16 Ohio St. 390; *In re* New York Cent., etc., R. Co., 67 Barb. (N. Y.) 426; Philadelphia, etc., R. Co. *v.* Williams. 54 Pa. St. 103; Fisher *v.* Chicago, etc., R. Co., 104 Ill. 323; Childs *v.* Central R., etc., Co., 33 N. J. Law 323. See *ante*, § 962.

Thus, where the necessities of the road required a terminal depot and turn-table at a certain point, it was held that the company could condemn land for a side track or branch line leading to the lot on which it had erected them.[1] The company may condemn land for the construction of additional side tracks,[2] or depots,[3] where the accommodation of the public demands them.[4] Land for additional shops for the repair of engines and cars used on the road may be condemned;[5] and where the right of way as originally acquired was not so wide as the company is permitted to hold for that purpose, its width may be increased, when necessary, by condemnation to the statutory limit.[6] The fact that the charter required the railroad to be "completed" by a certain time, does not limit its right to condemn additional necessary lands after expiration of that time.[7] Other phases of this subject have already been considered.[8]

§ 972. **Title or interest acquired.**—The legislature is the sole judge of the estate to be taken in lands required for the construction of a public work, and may authorize the taking of the fee,[9] or of any less interest. But where, as in the case of

[1] New Orleans, etc., R. Co. *v.* Second Municipality, 1 La. Ann. 128; Knight *v.* Carrollton R. Co., 9 La. Ann. 284. Terminal facilities may be condemned at any point which the needs of the road may dictate. Central Branch U. P. R. Co. *v.* Atchison, etc., R. Co., 26 Kan. 669.

[2] St. Louis, etc., R. Co. *v.* Petty, 57 Ark. 359; Philadelphia, etc., R. Co. *v.* Williams, 54 Pa. St. 103. See New Cent. Coal Co. *v.* George's Creek Coal Co., 37 Md. 537; Sherman *v.* Buick, 32 Cal. 241; Fisher *v.* Chicago, etc., R. Co., 104 Ill. 323.

[3] Deitrichs *v.* Lincoln, etc., R. Co., 13 Neb. 361.

[4] See Pittsburgh, etc., R. Co. *v.* Benwood Iron Works, 31 W. Va. 710, for a discussion of the question as to what is such a public necessity as will justify the exercise of this power.

[5] Chicago, etc., R. Co. *v.* Wilson, 17 Ill. 123.

[6] Childs *v.* Central R. Co., etc., 33 N. J. Law 323.

[7] Brown *v.* Philadelphia, etc., R. Co., 58 Md. 539; Philadelphia, etc., R. Co. *v.* Williams, 54 Pa. St. 103. But such a condition may be so worded as to enable the land-owner to take advantage of it. Peavey *v.* Calais R. Co., 30 Me. 498; Morris, etc., R. Co. *v.* Central R. Co., 31 N. J. L. 205.

[8] *Ante*, §§ 960, 961, 962.

[9] Water Works Co. *v.* Burkhart, 41 Ind. 364; City of Logansport *v.* Shirk, 88 Ind. 563; Sweet *v.* Buffalo, etc., R. Co., 79 N. Y. 293; Birdsall *v.* Cary, 66 How. (N. Y.) Pr. 358; Malone *v.* To-

railroads, an easement only is required, no greater estate can be taken unless the power to take the fee is expressly conferred.[1] Thus, where the act provided that the corporation should be "seized and possessed of the land" taken,[2] it was held that an easement only was acquired by condemnation. So, where it was provided that the title to the land taken should vest in the company,[3] and it has even been held that an act providing that a fee-simple title to its right of way should vest in a railroad company conferred upon the company only a base or terminable fee, and that the land would revert if the company ceased to use it for railroad purposes.[4] The general railroad laws of the several states usually provide that the railroad company shall have "the right to acquire title" to necessary lands by certain proceedings for that purpose.[5] Such a provision enables it to condemn merely an easement and not the fee.[6] But

ledo, 28 Ohio St. 643; Haldeman *v.* Pennsylvania R. Co., 50 Pa. St. 425; Page *v.* O'Toole, 144 Mass. 303; Mason *v.* Lake Erie, etc., R. Co., 9 Biss. (U. S.) 239; Roanoke City *v.* Berkowitz, 80 Va. 616; Fairchild *v.* St. Paul, 46 Minn. 540, s. c. 49 N. W. R. 325, citing Elliott Roads and Streets, 172. But see Matter of Albany Street, 11 Wend. (N. Y.) 149; New Orleans, etc., Co. *v.* Gay, 32 La. Ann. 471.

[1] Henry *v.* Dubuque, etc., R. Co., 2 Iowa 288; New Orleans R. Co. *v.* Guy, 32 La. Ann. 471; Fitch *v.* New York, etc., R. Co., 59 Conn. 414, s. c. 20 Atl. R. 345; Washington Cemetery Co. *v.* Prospect Park, etc., R. Co., 68 N. Y. 591; Clark *v.* Worcester, 125 Mass. 226; Pittsburg, etc., R. Co. *v.* Bruce, 102 Pa. St. 23; Corwin *v.* Cowan, 12 Ohio St. 629; McCombs *v.* Stewart, 40 Ohio St. 647; New Jersey, etc., Co. *v.* Morris, etc., Co., 44 N. J. Eq. 398; New York, etc., R. Co. *v.* Kip, 46 N. Y. 546; Jackson *v.* Rutland, etc., R. Co., 25 Vt. 150; Oregon, etc., R. Co. *v.* Oregon, etc., Co., 10 Ore. 444; Lyon *v.* McDonald, 78 Tex. 71, s. c. 14 S. W. R. 261. But see New Orleans, etc., R. Co. *v.* Gay, 31 La. Ann. 430.

[2] Quimby *v.* Vermont Central R. Co., 23 Vt. 387.

[3] Dunham *v.* Williams, 36 Barb. (N. Y.) 136. But see Page *v.* O'Toole, 144 Mass. 303; Brooklyn Park Comrs. *v.* Armstrong, 45 N. Y. 234; Barnett *v.* Johnson, 15 N. J. Eq. 481.

[4] Kellogg *v.* Malin, 50 Mo. 496. See Gurney *v.* Minneapolis, etc., Co. (Minn.), 65 N. W. R. 136; Scott *v.* St. Paul, etc., Railway Co., 21 Minn. 232.

[5] Stimson's Am. Stat. (1892) § 8740.

[6] Quick *v.* Taylor, 113 Ind. 540; Chicago, etc., R. Co. *v.* Huncheon, 130 Ind. 529, s. c. 30 N. E. R. 636; Kansas Central R. Co. *v.* Allen, 22 Kan. 285; Washington Cemetery *v.* Prospect Park, etc., R. Co., 68 N. Y. 591. See, also, East Tenn., etc., R. Co. *v.* Telford, 89 Tenn. 293, s. c. 14 S. W. R. 776; Pittsburgh, etc., R. Co. *v.* Bruce, 102 Pa. St. 23; Commissioners *v.* Mich. Cent. R. Co., 90 Mich. 385.

the easement usually acquired is in its nature perpetual,[1] and differs very materially from an ordinary easement.[2] It has been held, however, that where the state itself seizes land for a permanent public use it may more readily be presumed to have taken a fee, which may be transmitted by it to the corporation to which it grants the same.[3] A railroad can not condemn a less interest in land taken than that required and prescribed by the legislature. Thus, under a statute authorizing it to take land for a perpetual right of way it can not appropriate land for a temporary track, to be used while its main track is rebuilding,[4] or until the land-owners shall choose to mine the coal over which it runs.[5] But it need only take the surface of the land with sufficient underlying strata to support the road, and is not obliged to take the mines and minerals lying beneath the surface.[6]

[1] Chaplin *v.* Coms., 126 Ill. 264, s. c. 18 N. E. R. 765; Henry *v.* Dubuque, etc., R. Co., 2 Iowa 288; Pilcher *v.* Atchison, etc., R. Co., 38 Kan. 516, s. c. 16 Pac. R. 945; Beal *v.* New York, etc., R. Co., 3 How. Pr. N. S. (N. Y.) 329; Cummins *v.* Des Moines, etc., R. Co., 63 Iowa 397, s. c. 19 N. W. R. 268. And is generally exclusive. Fitch *v.* New York, etc., R. Co., 59 Conn. 414, s. c. 20 Atl. R. 345.

[2] Bemis *v.* Springfield, 122 Mass. 110; Pennsylvania, etc., R. Co. *v.* Reading Paper Mills, 149 Pa. St. 18; New York, etc., R. Co. *v.* Trimmer, 53 N. J. L. 1.

[3] Haldeman *v.* Pennsylvania R. Co., 50 Pa. St. 425; Wyoming, etc., Co. *v.* Price, 81 Pa. St. 156; Malone *v.* Toledo, 34 Ohio St. 541; Brookville, etc., Co. *v.* Butler, 91 Ind. 134; Water Works Co. *v.* Burkhard, 41 Ind. 364; Coster *v.* New Jersey, etc., Co., 23. N. J. L. 227; Dingley *v.* City of Boston, 100 Mass. 544; Rexford *v.* Knight, 11 N. Y. 308.

[4] Currier *v.* Marietta, etc., R. Co., 11 Ohio St. 228. In Heyneman *v.* Blake, 19 Cal. 579, it was held that authority to condemn private lands for use by a corporation includes the right to condemn any estate or interest therein for the same object. See, also, Charleston, etc., R. Co. *v.* Blake, 12 Rich. L. (S. Car.) 634; Sixth Ave. R. Co. *v.* Kerr, 72 N. Y. 330; Jerome *v.* Ross, 7 Johns. Ch. (N. Y.) 315, s. c. 11 Am. Dec. 484.

[5] De Camp *v.* Hibernia Underground R. Co., 47 N. J. L. 43; Hibernia Underground R. Co. *v.* De Camp, 47 N. J. L. 518; Matter of Hartford, etc., R. Co., 65 How. (N. Y.) Pr. 133; Wheelock *v.* Young, 4 Wend. (N. Y.) 647; Pinchin *v.* London, etc., R. Co., 24 L. J. N. S. Ch. 417.

[6] *In re* Corporation of Huddersfield and Jacomb, L. R. 10 Ch. 92. See, also, Robert *v.* Sadler, 104 N. Y. 229; *Re* Hartford, etc., R. Co., 65 How. Pr. (N. Y.) 133. An entry by eminent domain upon the surface is an entry upon subjacent strata, so far as they are necessary to support the surface for the purpose of the structure for which the land is taken. Penn Gas Coal Co. *v.* Versailles Fuel Gas Co., 131 Pa. 522, s.

§ 973. **Width taken for right of way.**—The legislature has authority to prescribe the width of the strip to be taken by a railroad for a right of way,[1] or it may confer a general power to take the necessary land for the purpose of the corporation.[2] The width of the strip which a railroad company is authorized to take for a right of way is usually fixed by statute, or by the charter,[3] and no land can be taken beyond the limits of that strip, except as specially authorized.[4] In many of the states additional land may be taken[5] when necessary for cuttings or embankments, depots and stations, or side tracks, or for procuring materials for use in the construction of the road. The enumerated reasons for which a railroad may be permitted to increase the width of its right of way are exclusive, and a railroad will not be permitted to increase the width of its roadway upon any other grounds.[6] Where the company seeks to take ground outside the limits of the right of way as defined by statute, the burden is upon it to establish the necessity of such taking.[7] It has also been held that even within the limits of

c. 19 Atl. R. 933; Evans *v.* Haefner, 29 Mo. 141. See, also, Platt *v.* Pennsylvania Co., 43 Ohio St. 228, s. c. 1 N. E. R. 420; Alabama, etc., R. Co. *v.* Gilbert, 71 Ga. 591; Lafferty *v.* Schuylkill, etc., R. Co., 124 Pa. St. 297, s. c. 16 Atl. R. 869; East Tennessee, etc., R. Co. *v.* Telford, 89 Tenn. 293, s. c. 14 S. W. R. 776; Olive *v.* Sabine, etc., R. Co. (Tex.), 33 S. W. R. 139; Hasson *v.* Oil Creek, etc., R. Co., 8 Phila. (Pa.) 556; Troy, etc., R. Co. *v.* Potter, 42 Vt. 265; Hurd *v.* Rutland, etc., R. Co., 25 Vt. 116; St. Louis, etc., R. Co. *v.* Clark, 121 Mo. 161, 195, s. c. 26 L. R. A. 751, as to how far the land-owner is precluded from using what is taken by the company.

[1] See Hingham, etc., Turnpike Corp. *v.* County of Norfolk, 6 Allen (Mass.) 353.

[2] Proceedings founded upon a petition by which the railroad company seeks to condemn a right of way of greater width than the maximum width allowed by statute have been held void and set aside *in toto*. State *v.* Hudson Terminal R. Co., 46 N. J. Law 289. See, also, Barnes *v.* Chicago, etc., R. Co., (Tex.) 33 S. W. R. 601.

[3] Stimson's Am. Sat., 1892, § 8742.

[4] Kemper *v.* Cincinnati, etc., R. Co., 11 Ohio 392; Johnston *v.* Chicago, etc., R. Co., 58 Iowa 537, s. c. 12 N. W. R. 576; State *v.* Hudson, etc., R. Co., 46 N. J. L. 289, s. c. 20 Am. & Eng. R. Cas. 294.

[5] Stimson's Am. Stat. (1892), § 8742.

[6] Brown *v.* Rome, etc., R. Co., 86 Ala. 206; Johnston *v.* Chicago, etc., R. Co., 58 Iowa 537.

[7] Jefferson, etc., R. Co. *v.* Hazeur, 7 La. Ann. 182; Wisconsin Central R. Co. *v.* Cornell University, 52 Wis. 537. It is held in Chicago, etc., R. Co. *v.* Dunbar, 100 Ill. 110, that the necessity need not be apparent before condemnation.

the maximum width prescribed for its right of way, a railroad can take only such lands as are reasonably necessary and convenient for its use.[1] If it be shown that the railroad company has made arrangement with other companies to share with them the land sought to be condemned, this, it has been held, should be taken as an admission on its part that its necessities do not require all of the land.[2] But where a petition was filed for the condemnation of a strip of land twenty feet wider than the railroad company could lawfully condemn, unless for necessary cutting and filling, and no question as to its right to condemn was made in the court below, the necessity was held to have been conceded.[3] The company may condemn a strip of the full statutory width, although it already owns the adjoining land.[4] Where no width is specified, the charter will be construed to authorize the taking of so much land as is reasonably necessary for the purposes of the company,[5] including, in some jurisdictions at least, a reasonable amount of land for the anticipated necessities of the company in the future.[6]

[1] Tracy *v.* Elizabethtown, etc., R. R. Co., 80 Ky. 259; Chicago, etc., R. Co. *v.* Dunbar, 100 Ill. 110. But where it is necessary to take land upon which buildings are situated, the buildings may be condemned with the ground and afterward removed and sold. Forney *v.* Fremont, etc., R. Co., 23 Neb. 465; Chicago, etc., R. Co. *v.* Knuffke, 36 Kan. 367.

[2] Swinney *v.* Fort Wayne, etc., R. Co., 59 Ind. 205.

[3] Booker *v.* Venice, etc., R. Co., 101 Ill. 333.

[4] Stark *v.* Sioux City, etc., R. Co., 43 Iowa, 501. See, also, Eel River, etc., R. Co. *v.* Field, 67 Cal. 429, s. c. 7 Pac. R. 814. In New Central Coal Co. *v.* George's Creek Coal, etc., Co., 37 Md. 537, it was held that a company could not take lands *in invitum* where it already owned lands equally useful for its purpose. Where the railroad company has procured a strip of land for a right of way by voluntary grant, it may condemn a sufficient amount of land to increase the right of way to the full statutory width. Childs *v.* Central R. Co., etc., 33 N. J. Law 323.

[5] Booker *v.* Venice, etc., R. Co., 101 Ill. 333; Lockie *v.* Mutual Union Tel. Co., 103 Ill. 401; Sadd *v.* Maldon R. Co., 6 Exch. 143. A voluntary conveyance of a right of way of undefined width to a railroad whose charter did not specify the width of its right of way was held to include so much land as was reasonably necessary. Day *v.* Railroad Co., 41 Ohio St. 392. A company has the same right to condemn land over which to swing a gate which it is compelled to maintain as it has to condemn land necessary for the construction of its track.

[6] Matter of Staten Island R. T. Co., 103 N. Y. 251, s. c. 8 N. E. R. 548; Lodge *v.* Philadelphia, etc., R. Co., 8

Where a particular method is pointed out for determining how much land is necessary, as by resolution of the directors,[1] or by the report of the commissioners to assess damages,[2] that method must be followed, and the company can acquire no right to land by condemnation until the necessity for such acquisition has been duly ascertained and declared.[3] In general, however, the company is permitted a reasonable discretion in determining how much land is necessary[4] subject to the right of the court to set aside an inquisition for a clear abuse of this discretion.[5] If the company is given a general authority to take the necessary lands for a right of way, the width taken may vary in different localities according to the necessities of the company.[6] It is not necessary that a railroad company should locate its tracks in the middle of its right of way, whether acquired by condemnation[7] or by purchase or voluntary grant.[8] Where the maximum width is prescribed, the presumption will be indulged that the full width allowed was taken unless the contrary affirmatively appears.[9]

Phila. (Pa.) 345; Pennsylvania R. Co. *v.* National Docks, etc., Co., (N. J.) 30 Atl. R. 183; State *v.* Propr.'s Morris Aqueduct, (N. J.) 33 Atl. R. 252; St. Louis, etc., R. Co. *v.* Foltz, 52 Fed. R. 627, 633.

[1] Stringham *v.* Oshkosh, etc., R. Co., 33 Wis. 471.

[2] Carolina Central R. Co. *v.* Love, 81 N. Car. 434.

[3] Johnston *v.* Chicago, etc., R. Co., 58 Iowa 537; Carolina Central R. Co. *v.* Love, 81 N. Car. 434; Kemp *v.* South Eastern R. Co., L. R. 7 Ch. 364. But see Chicago, etc., R. Co. *v.* Dunbar, 100 Ill. 110; National Docks R. Co. *v.* Central R. Co., 32 N. J. Eq. 755; State *v.* Stewart, 74 Wis. 620, s. c. 6 L. R. A. 394.

[4] Smith *v.* Chicago, etc., R. Co., 105 Ill. 511. As to the power of the railroad to judge of the necessity of taking land, see *In re* New York Central, etc., R. Co. *v.* Metropolitan, etc., Co., 63 N. Y. 326; *In re* Boston, etc., R. Co. *v.* Kip, 53 N. Y. 574; New Orleans, etc., R. Co. *v.* Gay, 32 La. Ann. 471. *Ante*, § 954.

[5] Chesapeake, etc., Canal Co. *v.* Mason, 4 Cranch (U. S. C. C.) 123; Webb *v.* Manchester, etc., R. Co., 4 M. & Cr. 116.

[6] Chicago, etc., R. Co. *v.* People, 4 Bradw. (Ill.) 468.

[7] Stark *v.* Sioux City, etc., R. Co., 43 Iowa 501; Dougherty *v.* Wabash, etc., R. Co. 19 Mo. App. 419.

[8] Munkers *v.* Kansas City, etc., R. Co., 60 Mo. 334.

[9] Prather *v.* Western Union Tel. Co., 89 Ind. 501; Jones *v.* Erie, etc., R. Co., 144 Pa. St. 629, s. c. 23 Atl. R. 251; Duck River Valley R. Co. *v.* Cochrane, 3 Lea (Tenn.) 478; Day *v.* Railroad Co., 41 Ohio St. 392. In an action for damages from fire set

§ 974. **Taking right of way of another road.**—Where the statute confers only a general authority to condemn property for railroad purposes land appropriated by a railroad company for public use can not afterwards be appropriated by another company for a similar use, except in case of a necessity so absolute that without such appropriation the grant to the latter company will be defeated, a necessity arising from the very nature of things, over which the company has no control, not one created by the company itself for the sake of convenience or economy.[1] As a general rule, under such authority, a corporation will not be permitted to condemn property already devoted to the public use for any purpose wholly inconsistent with such use. This rule seems particularly applicable where one company is seeking to condemn and take the right of way of another company longitudinally.[2] Thus, it has been held that one railroad company can not appropriate a portion of the right of way of another railroad company for the purpose of

by the company's engines, the width of the right of way as held and claimed by the company, not exceeding the full statutory width may be shown by parol evidence. Gram *v.* Northern Pac. R. Co., 1 N. Dak. 252, 45 Am. & Eng. R. Cas. 544.

[1] Appeal of Sharon Railway, 122 Pa. St. 533, s. c. 9 Am. St. R. 133; Pennsylvania R. Co.'s Appeal, 93 Penn. St. 150; Matter of Boston and Albany R. Co., 53 N. Y. 574; Housatonic R. Co. *v.* Lee and Hudson River R. Co., 118 Mass. 391; Evergreen Cemetery Asso'n *v.* New Haven, 43 Conn. 234; Boston, etc., R. Co. *v.* Lowell, etc., R. Co., 124 Mass. 368; Barre R. Co. *v.* Montpelier, etc., R. Co., 61 Vt. 1, s. c. 4 L. R. A. 785; Cincinnati, etc., R. Co. *v.* Belle Centre, 48 Ohio St. 273. "Necessity" for the condemnation of the right of way of one railroad company for the use of another does not mean an absolute or indispensable necessity, but that which is reasonably requisite and proper for the accomplishment of the end in view under the particular circumstances. Such condemnation is necessary when, the public convenience being equally served, the financial benefits to the latter exceed the probable injuries to the former. Mobile and G. R. Co. *v.* Alabama Midland R. Co., 87 Ala. 501, 6 So. 404, 39 Am. & Eng. R. Cas. 6. In the case first cited it was held that the construction of a branch road which is but an incident to the main object of the railroad, which is already constructed, merely for the purpose of carrying its own freight to and from certain furnaces, instead of receiving it from and turning it over to another company, is not a matter of such necessity as will authorize a condemnation therefor of land already acquired for railroad purposes by another company. Appeal of Sharon Railway, 122 Pa. St. 533.

[2] *Ante*, § 922, and authorities there cited.

building a parallel road.[1] Nor will one railroad company be permitted for any purpose to take such a part of the line of another road as to practically destroy such road.[2] Where a petition by a railroad company for the appointment of commissioners to condemn the "located route" of an existing railroad shows that it seeks to condemn a part of the route generally, and not merely for the purpose of crossing, an order made thereon will be set aside.[3] And where a railroad corporation is seeking to condemn a longitudinal section of the right of way of another company for its exclusive use, it may be restrained by injunction unless express authority to make such condemnation has been conferred.[4] But in Alabama, the probate court, in a proper proceeding and upon proper notice, has

[1] Illinois Cent. R. Co. *v.* Chicago, etc., R. Co., 122 Ill. 473. See Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 116 Ind. 578.

[2] Central City Horse Ry. *v.* Fort Clark Horse Ry., 81 Ill. 523. The right to take longitudinally is strictly construed, and can only be justified by peculiar circumstances. Boston, etc., R. Co. *v.* Lowell, etc., R. Co., 124 Mass. 368; Housatonic R. Co. *v.* Lee, etc., R. Co., 118 Mass. 391; Worcester, etc., R. Co. *v.* Railroad Commissioners, 118 Mass. 561; Cake *v.* Philadelphia, etc., R. Co., 87 Pa. St. 307; Cleveland, etc., R. Co. *v.* Speer, 56 Pa. St. 325; Commissioners *v.* Erie, etc., R. Co., 27 Pa. St. 339; Tennessee, etc., R. Co. *v.* Adams, 3 Head (Tenn.) 596; *In re* City of Buffalo, 68 N. Y. 167; Inhabitants of Greenwich Tp. *v.* Easton, etc., R. Co., 24 N. J. Eq. 217; Easton, etc., R. Co. *v.* Inhabitants, etc., 25 N. J. Eq. 565; Newark, etc., R. Co. *v.* Newark, 23 N. J. Eq. 515; Attorney-General *v.* Morris, etc., R. Co., 19 N. J. Eq. 386; State *v.* Easton, etc., R. Co., 36 N. J. L. 181; State *v.* Hoboken, 35 N. J. L. 205; Contra Costa R. Co. *v.* Moss, 23 Cal. 323; Attorney-General *v.* Ely, etc., R. Co., L. R. 4 Ch. App. 194, s. c. L. R. 9 Eq. Cas. 106; Pugh *v.* Golden Valley R. Co., L. R. 12 Ch. Div. 274; Reg. *v.* Wycombe R. R., L. R. 2 Q. B. 310.

[3] United N. J. R. and Canal Co. *v.* National Docks and N. J. J. C. R. Co., 52 N. J. L. 90, s. c. 18 Atl. R. 574. See Johnson *v.* Freeport, etc., R. Co., 116 Ill. 521; Brown *v.* Rome, etc., R. Co., 86 Ala. 206, s. c. 5 So. R. 195.

[4] Alexandria, etc., R. Co. *v.* Alexandria, etc., R. Co., 75 Va. 780. See, also, Hoke *v.* Georgia, etc., R. Co., 89 Ga. 215, s. c. 15 S. E. R. 124. But see Mobile, etc., R. Co. *v.* Alabama Midland R. Co., 87 Ala. 520. A company which is proceeding in good faith to acquire land and construct its road may enjoin another company from building a switch along and upon its proposed line upon land of which it has procured a lease maliciously and in bad faith and for the sole purpose of harassing and delaying the petition. Rochester, etc., R. Co. *v.* New York, etc., R. Co., 44 Hun (N. Y.) 206; Rochester, etc., R. Co. *v.* Babcock, 110 N. Y. 119, s. c. 17 N. E. R. 678.

jurisdiction to inquire of and condemn a part of a right of way, already acquired by one railroad corporation, for the use of another, if it can be done without destroying its usefulness as a franchise, or impairing the capacity of the easement so as to render it unsafe, but that court has no jurisdiction to condemn the road bed of one company for the use of another. To accomplish this, an express act of the legislature would be required.[1] It is said that if the proposed appropriation of the property of one railroad corporation by another would not destroy or greatly injure the franchise of such other company, or render it difficult to prosecute the object thereof, a general grant of authority is sufficient to justify the condemnation.[2] Thus it has been held that a small portion of the buttress of a bridge belonging to one railroad company and not necessary to the support of the bridge or the exercise of the company's franchises may be taken by another railroad company.[3] The legisla-

[1] Anniston, etc., R. Co. *v.* Jacksonville, etc., R. Co., 82 Ala. 297. If a second condemnation can be so carved out of a right of way previously granted to another railroad company as to leave the latter's tracks without such hindrance or obstruction as to render it unsafe, the court has jurisdiction to order the condemnation, and an injunction will not lie. Mobile & G. R. Co. *v.* Alabama Midland R. Co., 87 Ala. 520, 39 & Eng. R. Cas. 117, 6 So. 407.

[2] Baltimore, etc., R. Co. *v.* Pittsburg, etc., R. Co., 17 W. Va. 812; Enfield Toll Bridge Co. *v.* Hartford, etc., R. Co., 17 Conn. 40; Little Miami R. Co. *v.* Dayton, 23 Ohio St. 510; Tuckahoe Canal Co. *v.* Tuckahoe R. Co., 11 Leigh (Va.) 42.

[3] Baltimore, etc., R. Co. *v.* Pittsburg, etc., R. Co., 17 W. Va. 812. In this case, Johnson, J., speaking for the court, said: "There is nothing so sacred in the title of a railroad company to property that it can not be taken under the exercise of the right of eminent domain. I understand the law to be that property belonging to a railroad company and not in actual use, necessary to the proper exercise of the franchise thereof, may be taken for the purposes of another railroad under the general railroad law of the state. An express legislative enactment is generally required in order to take such property in use by a railroad company, except where the proposed appropriation would not destroy or greatly injure the franchise of the company, or render it difficult to prosecute the object thereof. If such consequence would not follow, a general grant is sufficient." Enfield Toll Bridge Co. *v.* Hartford & New Haven R. Co., 17 Conn. 40; Little Miami R. Co. *v.* Dayton, 23 Ohio St. 510; Tuckahoe Canal Co. *v.* Tuckahoe R. Co., 11 Leigh (Va.) 42. In Grand Rapids, etc., R. Co. *v.* Grand Rapids, etc., R. Co., 35 Mich. 265, it was held that one railroad has no right to appropriate, without compensation, the franchise or property

ture may, in cases where it is deemed necessary, provide for the condemnation by one railroad corporation of the right to use a portion of the right of way of the railroad of another corporation in common with the owner thereof.[1] And when such provision is made, the right of railway companies to use the "right of way" of another company, includes the right to use the tracks, switches, turn-outs, turn-tables, and other terminal facilities constructed on the right of way.[2]

of another for the construction of its road. The fact that property has been taken for a particular public use does not make it public property for all purposes; and the property rights of a railroad company in its right of way are protected by the same restrictions against appropriation by any other railroad company for railroad purposes or other public use, as is afforded by the constitution and laws in the case of the private property of an individual. Baltimore and Havre de Grace Transportation Co. *v.* Union R. Co., 35 Md. 224. It is insisted by counsel for plaintiff in error that where a corporation is authorized by its charter or a general law to take by condemnation the land required for its purposes, it can not, under such general authority, condemn property already appropriated to public use by another corporation; that to authorize it to do so, the power must be granted to it by express terms or by necessary implication. For this position they rely upon Boston & M. R. Co. *v.* Lowell & L. R. Co., 124 Mass. 368; Housatonic R. Co. *v.* Lee and Hudson River R. Co., 118 N. Y. 391; Evergreen Cemetery Association *v.* New Haven, 43 Conn. 234; Matter of Boston & A. R. R. Co., 53 N. Y. 574; Matter of City of Buffalo, 68 N. Y. 167. * * * It will be observed, that in these last cases the interference with the franchise was great, and much injury would have been sustained by the companies, if their property had been taken. But the taking of a portion of a buttress might inflict no injury at all upon the Baltimore and Ohio Railroad Co. The courts will take care to see that one railroad company is not materially injured for the benefit of another, and where no such material injury will result, the onward march of improvement demands that a great work of internal improvement shall not be impeded by imaginary injury to another corporation."

[1] Kinsman St. R. Co. *v.* Broadway, etc., R. Co., 36 Ohio St. 239; Cambridge R. Co. *v.* Charles River St. R. Co., 139 Mass. 454; Metropolitan R. Co. *v.* Highland St. Ry. Co., 118 Mass. 290; Providence, etc., R. Co. *v.* Norwich, etc., R. Co., 138 Mass. 277. See Boston Water Power Co. *v.* Boston, etc., R. Co., 23 Pick. (Mass.) 360; Inhabitants of Springfield *v.* Connecticut, etc., R. Co., 4 Cush. (Mass.) 63; City of Bridgeport *v.* New York, etc., R. Co., 36 Conn. 255.

[2] Joy *v.* City of St. Louis, 138 U. S. 1, s. c. 11 Sup. Ct. R. 243, affirming 29 Fed. R. 546. Laying tracks upon the location of a railroad, or using its rails for the running of trains, under authority of law has been held to be a taking within the meaning of the constitution for which compensation must be made. Worcester, etc., R. Co. *v.* Railroad Comrs., 118 Mass. 561; Jersey

§ 975. **Crossing another road.**—Although, as elsewhere shown, the crossing by a street railway of the tracks of a commercial or steam railroad company at a street intersection is not a taking or an additional burden,[1] the rule is somewhat different where one commercial railroad crosses another.[2] But, as we have seen, the right of one railroad to cross the tracks of another may be implied from a general grant of authority to locate and build the road between two points.[3] This entire subject, however, including the question as to what property may be taken,[4] the location of the crossing,[5] the number of crossings that may be made,[6] the measure of damages,[7] and the right to cross at grade,[8] is fully treated elsewhere.[9] But to what is there said, we may add that it is within the police power of the state to abolish dangerous grade crossings, and it has been held that an act requiring the railroad company to bear the entire expense of the change does not amount to a taking of property without due process of law, where the mode provided for ascertaining the result is suitable to the nature of the case.[10]

City, etc., R. Co. *v.* Jersey City, etc., Horse R. Co., 20 N. J. Eq. 61. See Lexington & W. C. R. Co. *v.* Fitchburg R. Co., 14 Gray (Mass.) 266; Sixth Avenue R. Co. *v.* Kerr, 45 Barb. (N. Y.) 138. See, also, as to whether this is an additional burden for which the land-owner is entitled to compensation, Miller *v.* Green Bay C. R. Co., (Minn.) 11 Lewis Am. R. & Corp. Rep. 246, and note. A municipality which has permitted a railroad company to construct and maintain a railroad track, depots, and appurtenances, within the municipal district, and extended to it other privileges in consideration of an agreement on the part of the company that it should permit any other company whose road terminated within the municipality to use the track and appurtenances and to enjoy the rights and privileges secured by the agreement, upon payment of a *pro rata* share of the cost of construction, may enforce the contract in such a manner as to give to the public the greatest convenience and enable it to reap the greatest results, and a company can not be excluded from participation in the use and enjoyment of the track on payment of its *pro rata* share of construction, where it appears its admission would not overburden the line, but it is in fact using it and paying tolls therefor. Louisville, etc., R. Co. *v.* Mississipi, etc., R. Co., 92 Tenn. 681.

[1] *Post*, § 977, note 6, p. 1407.

[2] *Post*, § 1126.

[3] *Ante*, § 922.

[4] *Post*, § 1121.

[5] *Post*, § 1120.

[6] *Post*, § 1124.

[7] *Post*, § 1127.

[8] *Post*, §§ 1122, 1123.

[9] *Post*, chapter XLIV.

[10] New York, etc., R. Co. *v.* Town of Bristol, 151 U. S. 556, s. c. 9 Lewis Am.

§ 976. **What constitutes a taking—Generally.**—As we have seen, the constitutions of the various states require that compensation must be made for all private property taken for public use under the power of eminent domain,[1] but there is great conflict in the authorities with regard to what constitutes a taking within the meaning of these constitutional provisions. Since property in land is not *land itself*, but the right to certain present or future privileges or advantages growing out of the land, so that a number of persons may have different estates in the same parcel of land, it would seem to follow, as a logical consequence that, as a general rule, whatever deprives a person of his rights in land and the use and enjoyment thereof constitutes a taking for which compensation should be made.[2] As was said by Chief Justice Shaw, of Massachusetts, in speaking of this subject: "The word 'property' in the tenth article of the bill of rights, which provides that 'whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor,' should have such liberal construction as to include every valuable interest which can be enjoyed as property and recognized as such."[3] Accordingly, it has been held that where a railroad, by cutting through a ridge near the plaintiff's farm, destroys the natural barrier

R. & Corp. R. 593, 14 Sup. Ct. R. 437; New York, etc., R. Co.'s Appeal, 58 Conn. 532, s. c. 20 Atl. R. 17.

[1] See *ante*, § 951.

[2] Chicago, etc., R. Co. *v.* Englewood Connecting R. Co., 115 Ill. 375, 385; City of Denver *v.* Bayer, 7 Colo. 113; Pumpelly *v.* Green Bay, etc., Co., 13 Wall. (U. S.) 166; Caro *v.* Metropolitan El. R. Co., 46 N. Y. Super. Ct. 138. See a full discussion of this subject with copious citations of authorities in Lewis Em. Dom., §§ 54, 55. See, also, Randolph Em. Dom., § 134 *et seq*; Elliott on Roads and Streets, 155; Taylor Corp., §§ 173, 473; Smith *v.* City of Rochester, 92 N. Y. 463; Cumberland Tel. Co. *v.* United Electric R. Co., 93 Tenn. 492, s. c. 29 S. W. R. 104, 10 Lewis Am. R. & Corp. R. 549; Abendroth *v.* Manhattan R. Co., 122 N. Y. 1, s. c. 19 Am. St. R. 461; East Penna. Co. *v.* Schollenberger, 54 Pa. St. 144; Walker *v.* Old Colony, etc., R.Co., 103 Mass. 10; Rumsey *v.* New York, etc., R. Co., 133 N. Y. 79, s. c. 6 Lewis Am. R.and Corp.R.67,and note; Pennsylvania R. Co. *v.* Angel, 41 N. J. Eq. 316, 329; note to Vanderlip *v.* City of Grand Rapids, 73 Mich. 522, 16 Am. St. R. 597, 610.

[3] Old Colony, etc., R. Co. *v.* County of Plymouth, 14 Gray (Mass.) 155, 161; Sedgwick Const. Law (2d ed.) 462; Lewis Em. Dom., § 57.

by which in times of freshet, the waters of an adjacent river were prevented from overflowing the plaintiff's land, and such waters, flowing through the cut, flood the land, bringing down and lodging upon it quantities of earth and stones and rendering it unfit for cultivation, the railroad is liable in damages, although no part of the plaintiff's land was actually taken.[1] This is upon the principle that property is taken when

[1] Eaton *v.* Boston, C. & M. R. Co., 51 N. H. 504, s. c. 12 Am. R. 147. In this, a leading case upon the subject, the court said: "The vital issue then is, whether the injuries complained of amount to a taking of the plaintiff's property, within the constitutional meaning of those terms. To constitute 'a taking of property' it seems to have sometimes been held necessary that there should be 'an exclusive appropriation,' 'a total assumption of possession,' 'a complete ouster,' an absolute or total conversion of the entire property, 'a taking the property altogether.' These views seem to us to be founded upon a misconception of the term 'property,' as used in the various state constitutions. In a strict legal sense, land is not 'property,' but the subject of property. The term property, although in common parlance frequently applied to a tract of land or a chattel, in its legal signification, 'means only the right of the owner in relation to it.' 'It denotes a right over a determinate thing.' 'Property is the right of any person to possess, use, enjoy and dispose of a thing.' Selden, J., in Wynehamer *v.* The People, 13 N. Y. 378, p. 433; 1 Blackstone Com. 138; 2 Austin Jurisprudence, 3d ed. 817, 818. If property in land consists in certain essential rights, and a physical interference with the land substantially subverts one of those rights, such interference 'takes,' *pro tanto*, the owner's 'property.' The right of indefinite user (or of using indefinitely) is an essential quality or attribute of absolute property, without which absolute property can have no legal existence. 'Use is the real side of property.' This right of user necessarily includes the right and power of excluding others from using the land. See 2 Austin on Jurisprudence, 3d ed., 836. Wells, J., in Walker *v.* Old Colony W. R. Co., 103 Mass. 10, p. 14. From the very nature of these rights of user and of exclusion, it is evident that they can not be materially abridged without, *ipso facto*, taking the owner's 'property.' If the right of indefinite user is an essential element of absolute property or complete ownership, whatever physical interference annuls this right takes 'property'—although the owner may still have left to him valuable rights (in the article) of a more limited and circumscribed nature. He has not the same property that he formerly had. Then, he had an unlimited right; now, he has only a limited right. His absolute ownership has been reduced to qualified ownership. Restricting A's unlimited right of using one hundred acres of land to a limited right of using the same land, may work a far greater injury to A than to take from him the title of fee-simple to one acre, leaving him the unrestricted right of using the remaining ninety-nine acres. Nobody doubts that the latter transaction would constitute a taking of 'property.' Why not the former? * * * A physical

those proprietary rights are taken of which property consists,[1] and that the plaintiff was damaged by the infringement of his right to the protection of the neighboring ridge of land, as clearly as he would have been had his right to occupy his farm been interfered with.[2] According to this rule, which we regard as the correct one, although some of the cases to which we have referred carry it very far in the application to particular facts, an actual physical seizure or manual possession of the land is not absolutely essential to constitute a taking for which compensation must be made.[3] On the other hand, however, it is held in many of the older authorities that to entitle the owner to protection under the clause of the constitution requiring compensation to be made for all property

interference with the land, which substantially abridges this right, takes the owner's 'property' to just so great an extent as he is thereby deprived of his right. 'To deprive one of the use of his land is depriving him of his land,' for, as Lord Coke says: 'What is the land but the profits thereof?' Sutherland, J., in People *v.* Kerr, 37 Barb. (N. Y.) 357, 399; Co. Litt. 4 b. The private injury is thereby as completely effected as if the land itself were 'physically taken away.' The principle must be the same, whether the owner is wholly deprived of the use of his land, or only partially deprived of it, although the amount or value of the property taken in the two instances may widely differ. If the railroad corporation take a strip four rods wide out of a farm to build their track upon, they can not escape paying for the strip by the plea that they have not taken the whole farm. So a partial, but substantial, restriction of the right of user may not annihilate all the owner's rights of property in the land, but it is none the less true that a part of his property is taken. * * * If the public can take part of a man's property without compensation, they can, by successive takings of the different parts, soon acquire the whole. Or, if it is held that the complete divestiture of the last scintilla of interest is a taking of the whole for which compensation must be made, it will be easy to leave the owner an interest in the land of infinitesimal value." See, also, Brown *v.* Cayuga, etc., R. Co., 12 N. Y. 486; Robinson *v.* New York, etc., R. Co., 27 Barb. (N. Y.) 512; Gulf, etc., R. Co. *v.* Jones, 63 Tex. 524; Attorney-Gen. *v.* Tomline, 12 L. R. Ch. Div. 214, affirmed 14 L. R. Ch. Div. 58.

[1] Arimond *v.* Green Bay, etc., Co., 31 Wis. 316, 335.

[2] Thompson *v.* The Androscoggin River Improvement Co., 54 N. H. 545, quoted at length in Lewis, Em. Dom., § 59.

[3] Arnold *v.* Hudson River R. Co., 55 N. Y. 661; Story *v.* New York El. R. Co., 90 N. Y. 122; Rigney *v.* City of Chicago, 102 Ill. 64; Hooker *v.* New Haven, etc., R. Co., 14 Conn. 146, s. c. 36 Am. Dec. 477; Forster *v.* Scott, 136 N. Y. 577, s. c. 32 N. E. R. 976, 977; King *v.* United States, 59 Fed. R. 9.

taken for public use, the property must be actually taken, in the physical sense of the word, and that the proprietor is not entitled to claim remuneration for indirect or consequential damage, no matter how serious or how clearly and unquestionably resulting from the exercise of the power of eminent domain.[1] Thus it was held that a land-owner, along the border of whose land a railway is built by which he is compelled to maintain the entire line of a fence of which he formerly maintained but half is not entitled to compensation, since no part of his land had been taken.[2] Also that a railroad company whose charter only required it to make compensation for lands which were taken for the corporate purposes, was not liable in damages to the owner of a house in front of which it had raised a high embankment, so that the owner could not pass and repass to and from the same, it being shown that the company had built its road in a prudent and reasonable manner. The court held that simply affecting land injuriously in the construction of a public work was not a taking of it for public use within the meaning of the constitution.[3] There is another

[1] Cushman *v.* Smith, 34 Me. 247; Bellinger *v.* New York Central R. Co., 23 N. Y. 42; Annold *v.* Hudson River R. Co., 49 Barb. (N. Y.) 108; O'Connor *v.* Pittsburgh, 18 Pa. St. 187; West Branch, etc., Canal Co. *v.* Mulliner, 68 Pa. St. 357; Kennett's Petition, 24 N. H. 139; Northern Transportation Co. *v.* Chicago, 99 U. S. 635; Estabrooks *v.* Peterborough, etc., R. Co., 12 Cush. (Mass.) 224; Curtis *v.* Eastern R. Co., 14 Allen (Mass.) 55, 98 Mass. 428; Boston, etc., R. Co. *v.* Old Colony R. Co., 12 Cush. (Mass.) 605; Hatch *v.* Vt. Central R. Co., 28 Vt. 142; Norris *v.* Vt. Central R. Co., 28 Vt. 99; Boothby *v.* Androscoggin, etc., R. Co., 51 Me. 318; Hotsman *v.* Covington, etc., R. Co., 18 B. Mon. (Ky.) 218; Garrett *v.* Lake Roland, etc., R. Co., 79 Md. 277, s. c. 29 Atl. R. 830, 10 Lewis' Am. R. & Corp. R. 39; Baltimore, etc., R. Co. *v.* Magruder, 34 Md. 79; Clark's Admx. *v.* Hannibal, etc., R. Co., 36 Mo. 202; Gould *v.* Hudson River R. Co., 6 N. Y. 522; Clarke *v.* Birmingham, etc., Bridge Co., 41 Pa. St. 147; Commissioners, etc., *v.* Withers, 29 Miss. 21; Selden *v.* City of Jacksonville, 28 Fla. 558, s. c. 29 Am. St. R. 278.

[2] Kennett's Petition, 24 N. H. 139. In the case of Eaton *v.* Boston, etc., R. Co., 51 N. H. 504, Smith, J., points out the fact that all that was really decided in this case was that the statute under which the petition was prosecuted made no provision for the payment of such damages. "The construction and not the constitutionality is the point for decision."

[3] Richardson *v.* Vermont Central R. Co., 25 Vt. 465; Hatch *v.* Vermont Central R. Co., 25 Vt. 49, 28 Vt. 142.

class of cases in which compensation has been sought for the taking or destruction of that which the plaintiff never owned, or in which he had merely the same right possessed by the public in general. In such cases the right of recovery is uniformly denied.[1] Thus where the plaintiff watered his cattle on the farm of another, across the highway from his own farm, but had, however, no right to the water, or of access thereto, that was not common to the public, it was held that, in estimating the damage arising from the taking of a strip of plaintiff's land for the construction of a railroad, interference with the plaintiff's access to the watering place was not an element of damages.[2] So, where the state authorized a railroad company to build a bridge across a navigable river belonging to the state, thereby obstructing navigation and rendering less valuable the lands of a riparian proprietor, no part of whose land, however, was taken or flooded, it was held that such proprietor could not maintain an action for damages. Since he held no title to the right of navigating the river, other than the right common to all the public, he was only "deprived of use of what was never his own."[3] Under this class of cases may be included those in which the act complained of constituted a public nuisance, the plaintiff's damage differing in degree only, not in kind, from that sustained by the rest of the community. In such cases it is held that the proper remedy is a public prosecution and not a private action for damages.[4]

[1] Davidson *v.* Boston, etc., R. Co., 3 Cush. (Mass.) 91, 106; Monongahela Bridge Co. *v.* Kirk, 46 Pa. St. 112; Clarke *v.* Birmingham, etc., Bridge Co., 41 Pa. St. 147; Shrunk *v.* Pres., etc., Schuylkill Nav. Co., 14 Serg. & R. (Pa.) 71; New York, etc., R. Co. *v.* Young, 33 Pa. St. 175; Gould *v.* Hudson River, etc., R. Co., 6 N. Y. 522, 12 Barb. 616; Lee *v.* Pembroke Iron Co., 57 Me. 481; Canal Appraisers, etc., *v.* People, *ex rel.*, 17 Wend. (N. Y.) 571.

[2] Gorgas *v.* Philadelphia, etc., R. Co., 144 Pa. St. 1.

[3] Gould *v.* Hudson River R. Co., 6 N. Y. 522, 12 Barb. 616. In Canal Appraisers, etc., *v.* People, 17 Wend. (N. Y.) 571, the majority disallowed the relator's claim to compensation for the destruction of the waterfall in the Mohawk river, upon the ground that the bed of that river belonged to the state, and an adjoining owner acquired no rights therein.

[4] Blood *v.* Nashua, etc., R. Co., 2 Gray (Mass.) 137; Boston, etc., R. Co. *v.* Old Colony R. Co., 12 Cush. (Mass.) 605; Hatch *v.* Vermont Central, etc., R. Co., 28 Vt. 142.

§ 977. **What constitutes a taking—Illustrative cases.**—A mere preliminary survey, when properly conducted, does not amount to a taking.[1] But where a railroad company diverted a stream into a new channel for a short distance, and the stream escaped from the new channel by percolation the company was held liable;[2] so, also, where the company took from a stream for the use of its locomotives, so much water as to perceptibly reduce the volume of water therein.[3] Permitting the waste water from a tank to run upon private property, where it caused damage by freezing and otherwise, has been held such an infringment of the property-owner's rights on the part of a railroad company as to render it liable in damages.[4] Where the construction of a bridge and the accompanying embankments by a railroad company changes the course,[5] or increases the current[6] of the stream crossed to the damage of private property, it has been held that compensa-

[1] *Ante*, § 925. Nor does the commencement of proceedings to condemn. Duluth, etc., R. Co. *v.* Northern Pac. R. Co., 51 Minn. 218, s. c. 53 N. W. R. 366; Morris *v.* Wisconsin, etc., R. R. Co., 82 Wis. 541, s. c. 52 N. W. R. 758. But the act of location is also an act of appropriation. Hagner *v.* Pennsylvania, etc., R. Co., 154 Pa. St, 475, s. c. 25 Atl. R. 1082.

[2] Cott *v.* Lewiston R. Co., 36 N. Y. 214.

[3] Garwood *v.* New York, etc., R. Co., 83 N. Y. 400; Earl of Sandwich *v.* Great Northern R. Co., L. R. 10 Ch. Div. 707; Lord *v.* Meadville, etc., Co., 135 Pa. St. 122, s. c. 2 Lewis Am. R. & Corp. Rep. 744, and note; Pennsylvania R. Co. *v.* Miller, 112 Pa. St. 34. But it has been held that a railroad company, being a riparian proprietor, may take a reasonable amount of water for the purpose of supplying its locomotives or the like. Elliot *v.* Fitchburg R. Co., 10 Cush. (Mass.) 191; Pennsylvania R. Co. *v.* Miller, 112 Pa. St. 34; Eral of Sandwich *v.* Great Northern R. Co., L. R. 10 Ch. Div. 707, See, also, Fay *v.* Salem, etc., Co., 111 Mass. 27.

[4] Chicago, etc., R. Co. *v.* Hoag, 90 Ill. 339.

[5] Union Pac. R. Co. *v.* Dyche, 31 Kan. 120; Robinson *v.* New York, etc., R. Co., 27 Barb. (N. Y.) 512; Estabrooks *v.* Peterborough, etc., R. Co., 12 Cush. (Mass.) 224; Dickson *v.* Chicago, etc., R. Co., 71 Mo. 575; Chicago, etc., R. Co, *v.* Moffitt, 75 Ill. 524.

[6] Evansville, etc., R. Co. *v.* Dick, 9 Ind. 433. But it has been held that the construction of a wall or an embankment along one side of a stream will not render the corporation liable for damage caused by forcing the water in times of flood to flow against and over property on the other side of the stream. Moyer *v.* New York Central, etc., R. Co., 88 N. Y. 351; Lawrence *v.* Great Northern R. Co., 16 Q. B. 643. But see Cairo, etc., R. Co. *v.* Brevoort, 62 Fed. R. 129, and authorities there cited. *Post*, p. 1405, note.

tion must be made.[1] And the fact that no part of the plaintiff's land was taken in the construction of the railroad does not affect his right to recover damages for an interference with the stream whereby rights are injuriously affected.[2] Where a railroad is built along the shore of public navigable waters, so as to shut off the riparian proprietor from access thereto, he is generally held entitled to compensation for the injury to his riparian rights, although no part of his land is taken,[3] and even though that part of his land adjoining high water mark has already been appropriated as a public highway.[4] Where a company builds tide water mills and other works below high water mark under an authority from the legislature, it has been held that they constitute property which can not be taken or damaged by a railroad company without compensation.[5] It

[1] Robinson *v.* New York, etc.,R.Co., 27 Barb. (N. Y.) 512. But see Henry *v.* Vermont Central R. Co., 30 Vt. 638; Norris *v.* Vermont Central R. Co., 28 Vt. 99.

[2] Estabrooks *v.* Peterborough, etc., R. Co., 12 Cush. (Mass.) 224; Evansville, etc., R. Co. *v.* Dick, 9 Ind. 433; Delaware, etc., Canal Co. *v.* Lee, 22 N. J. Law 243.

[3] Diedrich *v.* Northwestern U.R. Co., 42 Wis. 248; Delaplaine *v.* Chicago, etc., R. Co., 42 Wis. 214; Yates *v.* Milwaukee, 10 Wall. (U. S.) 497; Farist Steel Co. *v.* City of Bridgeport, 60 Conn. 278; Carli *v.* Stillwater Street R., etc., Co., 28 Minn. 373; Union Depot, etc., Co. *v.* Brunswick, 31 Minn. 297; Brisbine *v.* St. Paul, etc., R. Co., 23 Minn. 114; Baltimore, etc., R. Co. *v.* Chase, 43 Md. 23; State *v.* Illinois Central R. Co., 33 Fed. R. 730; Renwick *v.* Dubuque, etc., R. Co., 49 Iowa 664, 102 U. S. 180; Langdon *v.* Mayor, etc., of New York, 93 N. Y. 129; Rumsey *v.* New York, etc., R. Co., 133 N. Y. 79, s. c. 6 Lewis Am. R. & Corp. Rep. 67, and note, where the cases on both sides of the question are reviewed; Myers *v.* St. Louis, 82 Mo. 367; Wilson *v.* Welch, 12 Ore. 353; Lyon *v.* Fishmonger's Co., L. R., 1 App. Cas. 662. See, also, Drury *v.* Midland R. Co., 127 Mass. 571. *Contra* Stevens *v.* Paterson, etc., R. Co., 34 N. J. Law 532; Gould *v.* Hudson River R. Co., 6 N. Y, 522; State, *ex rel.* Columbia, etc., R. Co. *v.* Prosser, 4 Wash. 816, 30 Pac. R. 734; Tomlin *v.* Dubuque, etc., R. Co., 32 Iowa 106; Bowlby *v.* Shively, 22 Ore. 410, 30 Pac. R. 154; Thayer *v.* New Bedford, etc., R. Co., 125 Mass. 253; Henry *v.* City of Newburyport, 149 Mass. 582; McKeen *v.* Delaware Canal Co., 49 Pa. St. 424. See Lewis Em. Dom., §§ 77–84, where this subject is fully discussed and an opinion in accord with the text is expressed.

[4] Brisbine *v.* St. Paul, etc., R. Co., 23 Minn. 114; Chesapeake, etc., Canal Co. *v.* Union Bank, 5 Cranch (U. S.) C. C., 509.

[5] Boston Water Power Co. *v.* Boston, etc.. R. Co., 16 Pick. (Mass.) 512; Lee *v.* Pembroke Iron Co., 57 Me. 481, s. c. 2 Am. R. 59. But where the riparian proprietor had built his lot out into the lake past high water mark, it

has been held that where the right to erect a bridge has been purchased or condemned, no further damage can be recovered for injuries resulting from constructing the bridge in a reasonable and proper manner with a view both to the safety of passengers and the protection of the property-holder.[1] But damages may be recovered for injuries resulting from negligent or improper construction, whether there has been an assessment of damages or not.[2] The construction of works in a stream by which the waters are set back and made to overflow the lands of a proprietor above, constitutes a taking for which he must be compensated,[3] as does also, in many jurisdictions, the construction of an embankment or other obstruction by which surface water is prevented from flowing over the railroad company's right of way, and is made to accumulate upon private property,[4] or is collected into a channel and discharged

was held that he could not recover for the land taken by a railroad which located its line across the made land, though he might for an injury to his riparian rights. Diedrich *v.* Northwestern U. Ry. Co., 42 Wis. 248.

[1] Evansville, etc., R. Co. *v.* Dick, 9 Ind. 433; Norris *v.* Vermont Central R. Co., 28 Vt. 99; Terre Haute, etc., R. Co. *v.* McKinley, 33 Ind. 274.

[2] Fowle *v.* New Hampshire, etc., R. Co., 112 Mass. 334; International, etc.. R. Co. *v.* Klaus, 64 Tex. 293; Brink *v.* Kansas City, etc., R. Co., 17 Mo. App, 177; Spencer *v.* Hartford, etc., R. Co., 10 R. I. 14.

[3] Estabrooks *v.* Peterborough, etc., R. Co., 12 Cush. (Mass.) 224; Omaha, etc., R. Co. *v.* Standen, 22 Neb. 343; Mississippi Central R. Co. *v.* Mason, 51 Miss. 234; Delaware, etc., Canal Co. *v.* Lee, 22 N. J. Law 243; Grand Rapids, etc., Co. *v.* Jarvis, 30 Mich. 308; Barclay R., etc., Co. *v.* Ingham, 36 Pa. St. 194; Toledo, etc., R. Co. *v.* Morrison, 71 Ill. 616; Arimond *v.* Green Bay, etc., Canal Co., 31 Wis. 316; Gulf, etc., R. Co. *v.* Donahoo, 59 Tex. 128; Wabash, etc., Canal *v.* Spears, 16 Ind. 441; Sheehy *v.* Kansas City, etc., R. Co., 94 Mo. 574, 4 Am. St. R. 396, and note; Tinsman *v.* Belvidere Del. R. Co., 26 N. J. Law 148; *In re* Minnetonka Lake Improvement, 56 Minn. 513, s. c. 45 Am. St. R. 494. An occasional flooding is sufficient to give the right to compensation. Weaver *v.* Mississipi, etc., Boom Co., 28 Minn. 534. There is ordinarily no liability for flooding caused by ice gorges forming at a bridge. Gulf, etc., R. Co. *v.* Pomeroy, 67 Tex. 498; Bellinger *v.* New York Central R. Co., 23 N.Y. 42; Omaha, etc., R.Co. *v.* Brown, 14 Neb. 170. Unless the damage was caused by negligent and improper construction of the bridge. Abbott *v.* Kansas City, etc., R. Co., 83 Mo. 271.

[4] Owens *v.* Missouri Pacific R. Co., 67 Tex. 679; Drake *v.* Chicago, etc., R. Co., 63 Iowa, 302; Gillham *v.* Madison County R. Co., 49 Ill. 484; Illinois, etc., R. Co. *v.* Fehringer, 82 Ill. 129; Chicago, etc., R. Co. *v.* Carey, 90 Ill. 514; Raleigh, etc., R. Co. *v.* Wicker, 74 N. C. 220; Gulf, etc., R.

upon land where it is not accustomed to flow.[1] The question of the right of the owner of land on one side of a navigable river, which forms the boundary between two states, to con-

Co. *v.* Holliday, 65 Tex. 512; Sabine, etc., R. Co. *v.* Johnson, 65 Tex. 389; Gulf, etc., R. Co. *v.* Helsley, 62 Tex. 593; Bentonville R. Co. *v.* Baker, 45 Ark. 252; Payne *v.* Morgan's La., etc., R. Co., 38 La. Ann. 164; Lewis Em. Dom., §§ 88, 89. The opposite doctrine is held in many of the states. Greeley *v.* Maine Central R. Co., 53 Me. 200; Morrison *v.* Bucksport, etc., R. Co., 67 Me. 353; Luther *v.* Winnisimmet Co., 9 Cush. (Mass.) 171; Waters *v.* Bay View, 61 Wis. 642; Kansas City, etc., R. Co. *v.* Riley, 33 Kan. 374; Abbott *v.* Kansas City, etc., R. Co., 83 Mo. 271; Cairo, etc., R. Co. *v.* Stevens, 73 Ind. 278; Shelbyville, etc., Turnpike Co. *v.* Green, 99 Ind. 205; Jean *v.* Pennsylvania Co., 9 Ind. App. 56, 36 N. E. R. 159; Bellinger *v.* New York Central R. Co., 23 N. Y. 42; Sweet *v.* Clutts, 50 N. H. 439; Chatfield *v.* Wilson, 28 Vt. 49; Wakefield *v.* Newell, 12 R. I. 75; Adams *v.* Walker, 34 Conn. 466; Bowlsby *v.* Speer, 31 N. J. L. 351; Limerick & C. Turnpike Co.'s Appeal, 80 Pa. St. 425. Even in the states holding this latter doctrine, it is conceded that if the construction of a railroad lessens the value of adjoining property by reason of the detention, diversion, or accumulation of surface water, compensation for such injury may be included in the assessment of damages. Walker *v.* Old Colony, etc., R. Co., 103 Mass. 10; Eaton *v.* Boston, etc., R. Co., 51 N. H. 504; Morrison *v.* Bucksport R. Co., 67 Me. 353; Pflegar *v.* Hastings, etc., R. Co., 28 Minn. 510. In Cairo, etc., R. Co. *v.* Brevoort, 62 Fed. R. 129, the conflicting authorities as to what constitutes surface water are carefully reviewed and it is held that the waters of a river which, at times of ordinary flood, spread beyond its banks, but form one body of water flowing within its accustomed boundaries during such floods, are not surface waters within the rule announced in some jurisdictions, that they may be turned upon the land of others by one seeking to keep them off of his own land.

[1] Cairo, etc., R. Co. *v.* Stevens, 73 Ind. 278; Weis *v.* City of Madison, 75 Ind. 241; Fort Worth, etc., R. Co. *v.* Scott, 2 Tex. App. Civil Cas. 137; G. H. & Sat. R. Co. *v.* Tait, 63 Tex. 223; Jacksonville, R. Co. *v.* Cox, 91 Ill. 500; McCormick *v.* Kansas City, etc., R. Co., 70 Mo. 359; Chase *v.* New York Central R. Co., 24 Barb. (N. Y.) 273; Whalley *v.* Lancashire, etc., R. Co., L. R. 13 Q. B. Div. 131, affirmed 16 *Ibid* 227; Huddleston *v.* Borough of West Bellvue, 111 Pa. St. 110; Pye *v.* Mankato, 36 Minn. 373; Cubit *v.* O'Dett, 51 Mich. 347; City of Crawfordsville *v.* Bond, 96 Ind. 236. See Walker *v.* Old Colony, etc., R. Co., 103 Mass. 10; Ogburn *v.* Connor, 46 Cal. 346; Minor *v.* Wright, 16 La. Ann. 151; Tootle *v.* Clifton, 22 Ohio St. 247. "The reasoning which leads to the rule forbidding the owner of a field to overflow an adjoining field by obstructing a natural water course fed by remote springs applies with equal force to the destruction of a natural channel through which the surface waters derived from the rains or snow falling on such fields are wont to flow. What difference does it make in principle whether the water comes directly upon the field from the clouds above or has fallen upon remote hills and comes thence in a running stream upon the surface,

struct a levée and turn the waters upon land on the opposite side of the river is not a local question, but depends upon general principles of law, and the decisions of a state court in conflict with those principles are not binding upon the federal courts.[1] It is a vexed question as to whether any interference by a railroad company with the right of an adjoining landowner to lateral support constitutes a taking.[2] The weight of authority, however, in accordance with what seems to us the better reason, is to the effect that the destruction of such lateral support by excavating on the company's own land so near that of the adjoining owner as to cause his land to slide into the excavation is a taking for which he is entitled to compensation regardless of any question of negligence on the part of the railroad company.[3] A railroad company is not liable in damages, as a rule at least, for remote and indirect consequences of lawful acts done on its own land. Thus, where a railroad, by making excavations on its own land drained a spring on adjoining land, it was held not liable for the resulting damages.[4] But it has been held that such an injury to

or rises in a spring in the upper fields and flows upon the lowers." Lawrence, J., in Gormley *v.* Sandford, 52 Ill. 158. *Contra* Morrison *v.* Bucksport, etc., R. Co, 67 Me. 353; Atchison, etc., R. Co. *v.* Hammer, 22 Kan. 763; Abbott *v.* Kansas City, etc., R. Co., 83 Mo. 271. And see Raleigh, etc., R. Co. *v.* Wicker, 74 N. Car. 220.

[1] Cairo, etc., R. Co. *v.* Brevoort, 62 Fed. R. 129.

[2] Most of the authorities *pro* and *con* are cited in the principal and dissenting opinion in Parke *v.* Seattle, 5 Wash. 1, s. c. 20 L. R. A. 68.

[3] Nichols *v.* City of Duluth, 40 Minn. 389, s. c. 12 Am. St. R. 743; McCullough *v.* St. Paul, etc., R. Co., 52 Minn. 12, s. c. 53 N. W. R. 802; Dyer *v.* St. Paul, 27 Minn. 457; O'Brien *v.* St. Paul, 25 Minn. 331; Ludlow v. Hudson River R. Co., 6 Lans. (N. Y.) 128; Ryckman *v.* Gillis, 6 Lans. (N. Y.) 79; Keating *v.* Cincinnati, 38 Ohio St. 141, s. c. 43 Am. R. 421; Williams *v.* Natural Bridge, etc., Co., 21 Mo. 580; Richardson *v.* Vermont, etc., R. Co., 25 Vt. 465, s. c. 60 Am. Dec. 283; Eaton *v.* Boston, etc., R. Co., 51 N. H. 504, s. c. 12 Am. R. 147; Stearns *v.* Richmond, 88 Va. 992, s. c. 29 Am. St. R. 758 (damages, also, allowed for building, the weight of which did not contribute to the subsidence of the land); note to Larson *v.* Metropolitan St. Ry. Co., 33 Am. St. R. 439, 446, 467. *Contra* Boothby *v.* Androscoggin, etc., R. Co., 51 Me. 318; Hortsman *v.* Covington, etc., R. Co., 18 B. Mon. (Ky.) 218. See, also, 2 Dillon Munic. Corp., § 991; Northern Transportation Co. *v.* Chicago, 99 U. S. 635; Radcliff *v.* Mayor, etc., 4 N. Y. 195, s. c. 53 Am. Dec. 357.

[4] Hougan *v.* Milwaukee, etc., R. Co., 35 Iowa 558; Aldrich *v.* Cheshire R.

springs or wells on a tract of land would be a proper subject for consideration in assessing damages for the condemnation of a right of way across it.[1] The construction of a railroad upon land in which an easement for a turnpike,[2] or a canal[3] has been granted, entitles the owner of the fee to damages for the additional servitude.[4] This branch of our subject, however, will be fully treated when we come to consider railroads in highways.[5] Where, as in most jurisdictions, the use of a street by a street railway is regarded as a legitimate use thereof, and not an additional burden, the construction, of such a railway across the tracks of a commercial railroad where they intersect a street by a company which is authorized by the municipality to do so is not such a taking of the property of the railroad company as to entitle it to compensation.[6] So, it has been held that an electric railway may be operated in a street without compensation to a telegraph or telephone company which has a prior grant to use the street.[7] The construction

Co., 21 N. H. 359; Waffle *v.* New York Central R. Co., 58 Barb. (N. Y.) 413; Regina *v.* Metropolitan Board, 3 B. & S. 710. But see Lord *v.* Meadville, etc., Co., 135 Pa. St. 122, s. c. 19 Atl. R. 1007, 2 Lewis' Am. R. & Corp. R. 744.

[1] See Trobridge *v.* Brookline, 144 Mass. 139.

[2] Ellicottville, etc., Plank R. Co. *v.* Buffalo, etc., R. Co., 20 Barb. (N. Y.) 644; Mifflin *v.* Railroad Co., 16 Pa. St. 182; Mahon *v.* New York Central R. Co., 24 N. Y. 658; Brainard *v.* Missisquoi R. Co., 48 Vt. 107.

[3] LaFayette, etc., R. Co. *v.* Murdock, 68 Ind. 137; Hatch *v.* Cincinnati, etc., R. Co., 18 Ohio St. 92.

[4] If the railroad is not empowered to condemn the canal lands, a transfer by the canal company of its canal bed to a railroad corporation for railroad purposes amounts to such an abandonment that the land reverts to the owner of the fee, and the railroad company must pay him the full value of the land. Pittsburgh, etc., R. Co. *v.* Bruce, 102 Pa. St. 23.

[5] *Post*, Chapter XLII.

[6] Chicago, etc., R. Co. *v.* Whiting, etc., St. Ry. Co., 139 Ind. 297, s. c. 38 N. E. R. 604, 11 Lewis' Am. R. and Corp. R. 507; New York, etc., R. Co. *v.* Bridgeport Traction Co., 65 Conn. 410, s. c. 32 Atl. R. 953 (electric railway); Chicago, etc., R. Co. *v.* West Chicago, etc., Co., 156 Ill. 255, s. c. 29 L. R. A. 485.

[7] Cincinnati, etc., R. Co. *v.* City, etc., R. Co., 48 Ohio St. 390, s. c. 4 Lewis' Am. R. & Corp. R. 533, 27 N. E. R. 890; Cumberland Tel., etc., Co. *v.* United Electric R. Co., 93 Tenn. 492, s. c. 29 S. W. R. 104, 10 Lewis' Am. R. & Corp. R. 549, and note; see, also, Cumberland, Tel., etc., Co. *v.* United Electric R. Co., 42 Fed. R. 273; National Tel. Co. *v.* Baker, 62 L. J. Ch. 699. But it is held by Pickler, J., in the second case above cited injury to the telephone

of a telegraph line upon a railroad company's right of way is, however, a taking of its property for which it is entitled to compensation.[1] But it has been held that the railroad company may erect such a line on its right of way for its own use without additional compensation to the land-owner,[2] although the telegraph company can not do so.[3] The use of a public toll bridge by an electric railway, on payment of adequate toll, has been held in a recent case not to be a taking of property under the eminent domain,[4] and it has also been held in another recent case that a bridge company which had long permitted its bridge to be used by railroads and induced large expenditures of money by street railways, had dedicated its bridge as a highway for use by street railways as well as other travel, and that a street railway company had a right to use it upon paying a fair rate of toll.[5] A railroad company acquires its right of way for railroad purposes, in the manner and to the extent that rights of way are ordinarily used by railroad companies as the public interest may require. So, as it is customary for railroad companies to permit other companies to use its tracks in common with itself, especially in cities, for terminal purposes, and as the public interest requires that they should do so, the abutting land-owner is not entitled to additional compensation for such use as for the imposition of an additional burden.[6] But one company can not thus authorize a second company to construct and use additional tracks upon the right of way of the former company without additional compensation to the land-owner.[7]

plant by conduction amounts to a taking.

[1] Southwestern R. Co. *v.* Southern, etc., Tel. Co., 46 Ga. 43, s. c. 12 Am. R. 585; Western Un. Tel. Co. *v.* Rich, 19 Kan. 517, s. c. 27 Am. R. 159; Atlantic, etc., Tel. Co. *v.* Chicago, etc., R. Co., 6 Biss. (U. S. C. C.) 158, s. c. 1 Am. Elec. Cas. 111.

[2] Western Un. Tel. Co. *v.* Rich, 19 Kan. 517, s. c. 27 Am. R. 159; Prather *v.* Western Union Tel. Co., 89 Ind. 501.

[3] American Tel. Co. *v.* Pearce, 71 Md. 535.

[4] Pittsburgh, etc., R. Co. *v.* Point Bridge Co., 165 Pa. St. 37, s. c. 26 L. R. A. 323.

[5] Covington, etc., Bridge Co. *v.* South Covington, etc., St. R. Co., 93 Ky. 136, 15 L. R. A. 828.

[6] Miller *v.* Green Bay, etc., R. Co., 59 Minn. 169, s. c. 11 Lewis' Am. R. & Corp. R. 246.

[7] Blakely *v.* Chicago, etc., R. Co., 34 Neb. 284, s. c. 6 Lewis' Am. R. and

§ 978. **Property damaged or injured — Constitutional and statutory provisions.**—Because of the instances in which the infliction of injuries upon private property was held not to be a taking, all of those states which have adopted new constitutions within the past twenty-five years have added a provision that property shall not be *damaged* by the construction of public works without compensation.[1] Similar provisions have been made by statute in several of the states[2] and in England.[3] In several cases, it is said in general terms that such a provision includes all damage arising from the exercise of the right of eminent domain which causes a diminution in the value of private property.[4] This statement, however, seems a little too broad. There must be an interference with some right, either appurtenant to the property or which can be made use of in connection with it, as well as depreciation in value.[5] In England, where the statute requires compensation for property "injuriously affected," the following rule of construction has

Corp. R. 262; Fort Worth, etc., R. Co. *v.* Jennings, 76 Tex. 373, s. c. 2 Lewis' Am. R. and Corp. R. 121; Platt *v.* Pennsylvania Co., 43 Ohio St. 228. This is a different thing from laying additional tracks by a company upon its right of way for its own use, which may be done without additional compensation. East Tennessee, etc., R. Co. *v.* Telford, 89 Tenn. 293, s. c. 3 Lewis' Am. R. and Corp. R. 364; White *v.* Chicago, etc., R. Co., 122 Ind. 317, s. c. 2 Lewis' Am. R. & Corp. R. 138, 23 N. E. R. 782.

[1] Illinois Const. 1870, Art. II, § 13; West Virginia Const. 1872, Art. III, § 9; Arkansas Const. 1874, Art. II, § 22; Missouri Const. 1875, Art. I, § 20; Nebraska Const. 1875, Art. I, § 21; Colorado Const. 1876, Art. II, § 14; Texas Const. 1876, Art. I, § 17; Mississippi Const. 1890, Art. III, § 17. Shall not be *injured* or *destroyed*. Pennsylvania Const. 1873, Art. I, § 8; Alabama Const. 1875, Art. XII, § 7.

[2] Drady *v.* D. M. & Ft. D. R. Co., 57 Iowa 393; St. Louis, etc., R. Co. *v.* Capps, 67 Ill. 607, 72 Ill. 188; Bradley *v.* New York, etc., R. Co., 21 Conn. 294; Nicholson *v.* New York, etc., R. Co., 22 Conn. 74; Parker *v.* Boston, etc., R. Co., 3 Cush. (Mass.) 107; Gardiner *v.* Boston, etc., R. Co., 9 Cush. (Mass.) 1; Stimson's Am. Stat. (1892), § 8752.

[3] Knock *v.* Metropolitan R. Co., L. R. 4 C. P. 131. It is held under the English statute that no compensation can be claimed for any personal inconvenience or injury not connected with real property. Rickets *v.* Metropolitan R. Co., 34 L. J. Q. B. 257; Beckett *v.* Midland R. Co., L. R. 3 C. P. 82, 37 L. J. C. P. 11; Bird *v.* Great Eastern R. Co., 34 L. J. C. P. 366.

[4] Chicago, etc., R. Co. *v.* Hazels, 26 Neb. 364; City of Omaha *v.* Kramer, 25 Neb. 489. But see Gottschalk *v.* Chicago, etc., R. Co., 14 Neb. 550, 560.

[5] See note of Mr. Lewis in 3 Lewis' Am. R. & Corp. R. 275.

been adopted: "When by the construction of works there is a physical interference with any right, public or private, which the owners or occupiers of property are by law entitled to make use of, in connection with such property, and which right gives an additional market value to such property, apart from the uses to which any particular owner or occupier might put it, there is a title to compensation, if by reason of such interference, the property, as a property is lessened in value."[1] So, in a case which is now regarded as one of the leading cases upon the subject in this country, it is said that "it must appear that there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally."[2] As said by still another court, the object of the constitutional and statutory provisions to which we have referred "was to grant relief in cases where there was no direct injury to the real estate itself, but some physical disturbance of a right which the owner possesses in connection with his estate, by reason of which he sustains a special injury to such property in excess of that sustained by the public at large."[3] Where part of a tract is taken compensation should be made for damages to the entire tract, and where two lots were occupied by the buildings of a brewery, it was held that they constituted a single tract, although they were separated by an alley, under which connection was made between the several parts of the brewery establishment.[4] But the general rule is that where only part of a

[1] Metropolitan Board of Works *v.* McCarthy, L. R., 7 E. & I. App. 243, 253. Approved and followed in Gainesville, etc., R. Co. *v.* Hall, 78 Tex. 169, s. c. 22 Am. St. R. 42, 46.

[2] Rigney *v.* City of Chicago, 102 Ill. 64. The rule is stated in similar language in Peel *v.* City of Atlanta, 85 Ga. 138, s. c. 2 Lewis' Am. R. & Corp. R. 413, 8 L. R. A. 787, and in City of Chicago *v.* Taylor, 125 U. S. 161, s. c. 8 Sup. Ct. R. 820.

[3] Gottschalk *v.* Chicago, etc., R. Co., 14 Neb. 550, 560.

[4] Hannibal Bridge Co. *v.* Schaubacher, 57 Mo. 582. Where village lots were merely held for sale, the fact that they were separated by a street was held conclusive of the fact that they were separate tracts. Pitts-

tract of land is taken, the remainder is not damaged, within the meaning of the law, unless its value is thereby diminished.[1] It is not necessary, however, that any part of the land should be actually taken to bring the case within the meaning of provisions to which we have referred. Thus, depreciation in the value of property caused by noise, vibration, smoke and cinders from passing trains is a damage or injury to the owner's property for which he is entitled to compensation under such provisions, although none of his land is taken in the construction of the road.[2] Additional illustrations will be given when we come to consider the subject of railroads in streets, and it is sufficient at this place to refer to other authorities supporting and showing the application of the general rule without reviewing them at length.[3]

burgh, etc., R. Co. *v.* Reich, 101 Ill. 157.

[1] Metropolitan, etc., R. Co. *v.* Stickney, 150 Ill. 362, s. c. 37 N. E. R. 1098, 10 Lewis' Am. R. & Corp. R. 1. See, also, Somers *v.* Metropolitan, etc., R. Co., 129 N. Y. 576, s. c. 14 L. R. A. 344.

[2] Gainesville, etc., R. Co. *v.* Hall, 78 Tex. 169, s. c. 22 Am. St. R.42, 9 L. R. A. 298; Omaha, etc., R. Co. *v.* Janecek, 30 Neb. 276, s. c. 46 N. W. R. 478, 3 Lewis' Am. R. & Corp. R. 268, and note; Railway Co. *v.* Gardner, 45 Ohio St. 309, s. c. 13 N. E. R. 69; Lake Erie, etc., R. Co. *v.* Scott, 132 Ill. 429, s. c. 24 N. E. R. 78, 8 L. R. A. 330; Stone *v.* Fairbury, etc., R. Co., 68 Ill. 394; Turner *v.* Sheffield, etc., R. Co., 10 Mees. & W. 425; East, etc., R. Co. *v.* Gattke, 20 L. J. Ch. (N. S.) 217. See, also, Chicago, etc., R. Co. *v.* Loeb, 118 Ill. 203. Many cases in New York growing out of the construction and operation of elevated railroads are substantially to the same effect even in the absence of such a provision. *Contra* Pennsylvania R. Co. *v.* Lippincott, 116 Pa. St. 472, s. c. 2 Am. St. R. 618; Pennsylvania R. Co. *v.* Marchant, 119 Pa. St. 541, s. c. 4 Am. St. R. 659; Jones *v.* Erie, etc., R. Co., 151 Pa. St. 30. But compare Pennsylvania, etc., R. Co. *v.* Walsh, 124 Pa. St. 544.

[3] Chicago, etc., Railroad Co. *v.* Ayres, 106 Ill. 511; Sheehy *v.* Kansas City, etc., R. Co., 94 Mo. 574, s. c. 4 Am. St. R. 396, and note; City, etc., of Montgomery *v.* Townsend, 80 Ala. 489, 492; Johnson *v.* Parkersburg, 16 W. Va. 402; City of Chicago *v.* Taylor, 125 U. S. 161, s. c. 8. Sup. Ct. R. 820; Hot Springs R. Co. *v.* Williamson, 45 Ark. 429; City of Denver *v.* Bayer, 7 Col. 113; East St. Louis, etc., R. Co. *v.* Eisentraut, 134 Ill. 96; Hatch *v.* Tacoma, etc., R. Co., 6 Wash. 1; Gulf, etc., R. Co. *v.* Eddins, 60 Tex. 656; Omaha, etc., R. Co. *v.* Cable, etc., Co., 32 Fed. R. 727; Eachus *v.* Los Angeles, etc., R. Co., 103 Cal. 614, s. c. 42 Am. St. R. 149; Mayor of Albany *v.* Sikes, 94 Ga. 30, s. c. 20 S. E. R. 257; Caledonian R. Co. *v.* Waker's Trustees, L. R. 7 App. Cas. 259. In Kansas City, etc., R. Co. *v.* St. Joseph, etc., R. Co., 97 Mo. 457, s. c. 3 L. R. A. 240, it was held that a railroad company was not entitled to damages under such a provision for delay and inconvenience caused by another company crossing its tracks in a public street.

CHAPTER XXXIX.

COMPENSATION AND DAMAGES.

§ 979. Compensation—Constitutional right.
980. Provisions of the federal constitution—Federal powers.
981. Constitutional right to compensation does not extend to general damages.
982. Compensation must be made in money — Principle not violated by deducting special benefits.
983. The measure of compensation is a judicial question.
984. Right to compensation not lost by conditional grant.
985. Time at which compensation is computed.
986. Time of payment of compensation.
987. Benefits — General survey of the subject.
988. Benefits — The different lines of decision.
989. Benefits—General and special.
990. Benefits confined to parcel or tract actually taken.
991. Remote or conjectural damages can not be allowed.
992. Damages confined to particular tract.
993. Injuries to part of tract or parcel of land not actually taken.
994. Elements of value.
§ 995. Measure of damages—Illustrative cases.
996. Matters to be considered in estimating damages — Illustrative instances.
997. Improvements made by company under unauthorized entry—Views of the authors.
998. Improvements made by company under unauthorized entry—Illustrative cases.
999. Deviation from proposed line —Change of route.
1000. Owner, at time of possession, is entitled to damages—Vendor and vendee.
1001. Who is entitled to the compensation where the land is conveyed after appropriation proceedings are commenced—Vendor and vendee.
1002. Notice to purchaser by existence of railroad.
1003. To whom compensation should be paid.
1004. Effect of assessment of damages.
1005. Award of compensation does not cover negligent acts.
1006. Interest—Allowance of.
1007. Presumption of payment of compensation.
1008. Waiver—Estoppel.

§ 979. Compensation—Constitutional right.—The right of a citizen whose property is taken for a public use to compensa-

tion is, as we believe, fundamental. In our judgment there is a right to compensation in all cases where private property is seized under the power of eminent domain. We believe that the right exists even where there is no express constitutional provision forbidding the taking of private property without paying or tendering compensation. The right to compensation is part of the right of every freeman to hold, own and enjoy property, and he can only be deprived of his property even for a public use by due process of law and upon the payment of just compensation for whatever property may be taken from him.[1]

§ 980. **Provisions of the federal constitution—Federal power.** —Prior to the adoption of the fourteenth amendment it was held that the provisions of the federal constitution apply only to acts of the general government.[2] And it has been so held since the adoption of the fourteenth amendment.[3] It seems to us that there is reason for concluding that under that amendment there is not due process of law when property is taken without compensation where the constitution of the state re-

[1] In Sinnickson *v.* Johnson, 17 N. J. Law 129, 145, it was said, of the right of eminent domain that: "This power to take private property reaches back of all constitutional provisions, and it seems to be considered a settled principle of universal law that the right to compensation is an incident to the exercise of that power, that the one is so inseparably connected with the other that they may be said to exist not as separate and distinct principles, but as parts of one and the same principle." This statement of the law was approved in Pumpelly *v.* Green Bay Co., 13 Wall. 166, 178, and in Monongahela, etc., Co. *v.* United States, 148 U. S. 312, s. c. 13 Sup. Ct. R. 622. The general doctrine is asserted in Chattanooga, etc., R. Co. *v.* Felton, 69 Fed. R. 273, 278. See, also, Gardner *v.* Newburgh, 2 Johns. Ch. 162; Bristol *v.* New Chester, 3 N. H. 524; Harness *v.* Chesapeake, etc., 1 Md. Ch. 248; Bonaparte *v.* Camden, etc., R. Co., Bald. (U. S. C. C.) 205; Johnston *v.* Rankin, 70 N. C. 550; Staton *v.* Norfolk, R. Co., 111 N. C. 278; Martin, *ex parte*, 13 Ark 198; Randolph on Eminent Domain, §§ 225, 226; Elliott on Roads and Streets, 178, 179, 180; 2 Kent's Com. 339, n.; Pierce on Railroads, 161; Cooley Blackst. Book I, p. 137. But see, Boom Co. *v.* Patterson, 98 U. S. 403; United States *v.* Jones, 109 U. S. 513; Lindsay *v.* Commonwealth, 2 Bay (S. Car.) 38; State *v.* Dawson, 3 Hill (S. Car.) 100; United States *v.* Rauers, 70 Fed. R. 748.

[2] Barron *v.* Baltimore, 7 Pet. (U. S.) 243.

[3] Smith *v.* Bivens, 56 Fed. R. 352.

quires that compensation shall be paid or tendered.[1] We suppose that if a state statute should assume to permit some corporations to take without compensation and require others, under like circumstance, to pay or tender compensation, the statute would be void under the fourteenth amendment, for the reason that it denied the equal protection of the laws. The supreme court of the United States, in a recent case, carefully considered the question of the power of the general government in the exercise of the right of eminent domain, and laid down the general rules which govern the exercise of the right.[2] Congress may grant authority to a railroad company to condemn lands through one of the territories.[3] It is held that an act which provides that a property owner may apply to the court of claims for indemnity affords a remedy to him for the recovery of damages, but the court declined to pass upon the constitutionality of the act.[4] The provision of the federal constitution that private property shall not be taken "for public use without just compensation," does not require that compensation shall be actually paid in advance of the occupancy of the land to be taken, but the owner is entitled to reasonable,

[1] Scott *v.* City of Toledo, 36 Fed. R. 385. See Murdock *v.* City of Cincinnati, 44 Fed. R. 726, 729. We are inclined to believe that on principle it must be held that in all cases where there is no provision for compensation there is not due process of law. Davidson *v.* New Orleans, 96 U. S. 97, opinion of Bradley, J.

[2] Shoemaker *v.* United States, 147 U. S. 282, s. c. 13 Sup. Ct. R. 361. See Canal Co. *v.* Key, 3 Cranch (C. C.) 599; Chesapeake, etc., Co. *v.* Union Bank, 4 Cranch (C. C.) 75; Luxton *v.* North River Bridge Co., 147 U. S. 337, s. c. 13 Sup. Ct. R. 356. As to the measure of damages, see Kerr *v.* South Park Commissioners, 117 U. S. 379; Shoemaker *v.* United States, *supra*. See generally, *In Re* Rugheimer, 36 Fed. R. 369; United States *v.* Great Falls Manufacturing Co., 112 U. S. 645, s. c. 5 Sup. Ct. R. 306; United States *v.* Gettysburg, etc., R. Co., 160 U. S. 668, 16 Sup. Ct. R. 427; Chappell *v.* United States, 160 U. S. 499, s. c. 16 Sup. Ct. R. 397.

[3] Cherokee Nation *v.* Southern Kansas R. Co., 135 U. S. 641, s. c. 10 Sup. Ct. R. 965.

[4] Great Falls, etc., Co. *v.* Atty-Gen'l Garland, 124 U. S. 581, s. c. 8 Sup. Ct. R. 631; Great Falls Manufacturing Co. *v.* Garland, 25 Fed. R. 521. In the opinion in the first case cited it was said of the act of the party in submitting his claim to the court of claims that: "The plaintiff, by adopting that mode, has assented to the taking of his property by the goverment for public use, and has agreed to submit the determination of the question of compensation to the tribunal named by congress."

certain and adequate provision for obtaining compensation before his occupancy is disturbed.[1] It was also held in the case referred to that an offer to pay was not sufficient, but the money must be actually paid into court. It has been held that an act of congress, which provides that no compensation shall be paid for property seized, will not authorize the seizure of private property for a public use.[2] Congress may provide what proceedings shall be taken in cases of condemnation by the United States, or, it may provide that the proceedings shall be such as the state statute prescribes.[3] Where there is no statute prescribing the rule for measuring the compensation to be awarded, it must be determined upon the principle of the common law, and consequential damages can not be awarded.[4] It is held that private and not public property, is protected by the provisions of the federal constitution,[5] but we suppose that the term "public property," as used in this connection, must be held to mean such as belongs to the state or nation, and not

[1] Cherokee Nation *v.* Southern Kansas, etc., R. Co., 135 U. S. 641, s. c. 10 Sup. Ct. R. 965. In the case cited the court quoted from case of Kennedy *v.* Indianapolis, 103 U. S. 599, 604, the following: "On principle and authority, the rule is, under such a constitution as that of Indiana, that the right to enter and use the property is complete as soon as the property is actually appropriated under the authority of the law for a public use, but that the title does not pass from the owner without his consent, until just compensation has been made to him," and held that the rule applied to the provisions of the federal constitution. See Chattanooga, etc., R. Co. *v.* Felton, 69 Fed. R. 273; Payne *v.* Kansas City, etc., R. Co., 46 Fed. R. 546.

[2] *In Re* Manderson, 51 Fed. R. 501; *In Re* Montgomery, 48 Fed. R. 896.

[3] High Bridge, etc., Co. *v.* United States, 69 Fed R. 320; Kohl *v.* United States, 91 U. S. 367; United States *v.* Jones, 109 U. S. 513, s. c. 3 Sup. Ct. R. 346.

[4] High Bridge, etc., Co. *v.* United States, 69 Fed. R. 320, citing, as to the common law rule, Transportation Co. *v.* Chicago, 99 U. S. 635 (wherein Pumpelly *v.* Green Bay Co., 13 Wall. 166, is criticised), and Railroad Co. *v.* Bingham, 87 Tenn. 522, s. c. 11 S. W. R. 705; Smith *v.* Washington, 20 How. (U. S.) 135. It was also said that the decisions in Van Schoick *v.* Delaware, etc., Canal Co., 20 N. J. Law, 249, and Asher *v.* Louisville, etc., Railroad Co., 87 Ky. 391, s. c. 8 S. W. R. 854, were based upon statutes. As to the effect of an award where consequential damages are provided for by statute, the court cited, Ohio, etc., R. Co. *v.* Thillman, 143 Ill. 127, s. c. 32 N. E. R. 529. See, also, upon question of adopting state statutes, United States *v.* Engeman, 46 Fed. R. 898.

[5] Stockton *v.* Baltimore, etc., R. Co., 32 Fed R. 9.

property of a public nature, that is, property public in the sense that it is "affected with a public interest." It is doubtful whether the doctrine of the case referred to can be regarded as going to the extent of denying that such a provision as that contained in the national constitution protects property held by a state or one of its municipalities for a use in its nature private, as, for instance, for a school-house, a hospital for the insane or the like.[1] If it does we should be inclined to doubt its soundness.

§ 981. **Constitutional right to compensation does not extend to general damages.**—Where a property owner sustains no special injury but does sustain an injury in common with the public he can not, it is held, successfully invoke the protection of the constitutional provision giving compensation for private property taken for a public use. Injuries common in the community which result from the construction of a railroad, the construction of which is authorized by law, are general injuries and not special to the property owner, and the rule is that for such general injuries compensation can not be recovered in

[1] In the case under immediate mention, Stockton *v.* Baltimore, etc., R. Co., 32 Fed. R. 9, the court, after showing that the lands which were the subject of controversy, were "*publici juris*, that is, were held for the people at large," said: "Such being the character of the state's ownership of the land under water—an ownership held, not for the purpose of emolument, but for public use, especially the public use of navigation and commerce—the question arises whether it is a kind of property susceptible of pecuniary compensation, within the meaning of the constitution. The fifth amendment provides only that *private property* shall not be taken without compensation, making no reference to public property. But, if the phrase may have an application broad enough to include all property and ownership, the question would still arise whether the appropriation of a few square feet of the river bottom to the foundation of a bridge, which is to be used for the transportation of an extensive commerce in aid and relief of that afforded by the water way, is at all a diversion of the property from its original public use. It is not so considered when sea-walls, piers, wing-dams and other structures are erected for the purpose of aiding commerce by improving and preserving the navigation. Why should it be deemed such when (without injury to the navigation) erections are made for the purpose of aiding and enlarging commerce beyond the capacity of the navigable stream itself, and of all the navigable waters of the country? It is commerce, and not navigation, which is the great object of constitutional care."

the absence of a statute authorizing their recovery.[1] There is difficulty in giving practical application to the rule, and it seems to us that some of the cases carry it entirely too far. The general rule unquestionably is that there is a right in a street, distinct from that of the general public, which can not be taken from the abutting owner without compensation.[2] It is difficult to lay down general rules upon this subject for much depends upon the situation of the particular property and surrounding circumstances, but it will not do to broadly hold that there is no case where the vacation or closing of a street may not be such an injury as to entitle an adjoining owner to compensation.

§ 982. **Compensation must be made in money—Principle not violated by deducting special benefits.**—The inflexible rule is that compensation for property seized by virtue of the power of eminent domain must be made in money.[3] The rule that

[1] Dantzer *v.* Indianapolis Union R. Co., 141 Ind. 604, s. c. 39 N. E. R. 223; Grand Rapids, etc., R. Co. *v.* Heisel, 38 Mich. 62; City of Chicago *v.* Union, etc., Association, 102 Ill. 379; Rigney *v.* City of Chicago, 102 Ill. 64; Buhl *v.* Fort St., etc., Depot Co., 98 Mich. 596, 608, s. c. 57 N. W. R. 829.

[2] Grand Rapids, etc., R. Co. *v.* Heisel, 38 Mich. 62, opinion by Cooley, J.; Haynes *v.* Thomas, 7 Ind. 38; Fossison *v.* Landry, 123 Ind. 136; Ross *v.* Thompson, 78 Ind. 90; City of Indianapolis *v.* Kingsbury, 101 Ind. 200; Imlay *v.* Union Branch, etc., R. Co., 26 Conn. 249; Port Huron, etc., R. Co. *v.* Voorheis, 50 Mich. 506; Chicago, etc., R. Co. *v.* Hazels, 26 Neb. 364, s. c. 42 N. W. R. 93; Morgan *v.* Railroad Co., 96 U. S. 716; Mayor, etc., of Macon *v.* Franklin, 12 Ga. 239; City of Peoria *v.* Johnston, 56 Ill. 45; Central Branch, etc., R. Co. *v.* Andrews, 41 Kan. 370, s. c. 21 Pac. R. 276; Woolrych on Ways, 70, 55; 2 Dillon Munic. Corp. § 712; Tiedeman on Municipal Corp., § 311; Mills on Eminent Domain (2d ed.), § 206; Randolph on Eminent Domain, § 416; Lewis on Eminent Domain, § 100.

[3] Central Ohio R. Co. *v.* Holler, 7 Ohio St. 220; Butler *v.* Sewer Commissioners, 39 N. J. Law 665; Sanborn *v.* Belden, 51 Cal. 266; Fletcher *v.* Peck, 6 Cranch 87, 145; Commonwealth *v.* Peters, 2 Mass. 125; Hill *v.* Mohawk, etc., R. Co., 7 N. Y. 152; City of Memphis *v.* Bolton, 9 Heisk. 508; Henry *v.* Dubuque, etc., R., 2 Iowa 288; State *v.* Beackmo, 8 Blkf. 246; Winona, etc., R. Co. *v.* Waldron, 11 Minn. 515, 539; Brown *v.* Beatty, 34 Miss. 227, 241; Chesapeake, etc., R. Co. *v.* Patton, 6 W. Va. 147; Toledo, etc., R. Co. *v.* Munson, 57 Mich. 42, s. c. 23 N. W. 455, 20 Am. & Eng. R. Cas. 410; Burlington, etc., R. Co. *v.* Schweikart, 10 Colo. 178, s. c. 14 Pac. R. 329; St. Louis, etc., R. Co. *v.* Teters, 68 Ill. 144.

benefits may be deducted from the damages has been said to violate the principle that compensation must be made in money, but this, we venture to say, is a mistake. The legislature, it is true, has no power to prescribe that compensation shall be made in anything else than money,[1] but, if a land-owner suffers no loss he can not be said to be deprived of property, and if he receives benefits equal to the value of the land taken he suffers no loss. If the construction of a railroad enhances the value of lands not taken, then to the extent that such value is enhanced is the loss of the owner reduced. In allowing benefits to be considered the court simply ascertains the extent of the loss actually sustained by the land-owner and does not pay him compensation in benefits. It is obvious that on principle it is only special benefits that can be deducted since it is only such benefits that the land-owner secures as an individual, for a general benefit does not move to him in his character of an individual property owner.

§ 983. **The measure of compensation is a judicial question.** —The legislative department of government has no power to determine what shall be the measure of compensation. The legislature possesses no judicial power and hence can not decide what compensation shall be paid a property owner whose property has been seized under the right of eminent domain. "The legislature may determine what private property is needed for public purposes; that is a question of a political and

[1] Dillon Municipal Corp., § 477; Elliott's Roads and Streets, 185; Isom *v.* Mississippi, etc., R. Co., 36 Miss. 300; Commonwealth *v.* Pittsburgh, etc., R. Co., 58 Pa. St. 26; Pennsylvania R. Co. *v.* Baltimore, etc., R. Co., 60 Md. 263; Woodfolk *v.* Nashville, etc., R. Co., 2 Swan. (Tenn.) 421. It is not within the power of a court to substitute the performance of some act as, for instance, the opening of a new highway, the grant of special privileges or the like for money. Chicago, etc., R. *v.* McGrew, 104 Mo. 282, s. c. 15 S. W. R. 931; Burlington, etc., R. Co. *v.* Schweikart, 10 Colo. 178, s. c. 14 Pac. R. 329. See Thompson *v.* Grand Gulf, etc., R. Co., 4 Miss. 240; Toledo, etc., R. Co. *v.* Munson, 57 Mich. 42; Bloodgood *v.* Mohawk, etc., R. Co., 18 Wend. 9; Pennsylvania R. Co. *v.* Reichert, 58 Md. 261; Railroad Co. *v.* Halstead, 7 W. Va. 301; Hewett *v.* Commissioners, 85 Me. 308, s. c. 27 Atl. R. 179; McArthur *v.* Kelly, 5 Ohio 139; New Orleans, etc., R. Co. *v.* Murrell, 34 La Ann. 536.

legislative character. But when the taking has been ordered, then the question of compensation is judicial.'"[1] What the legislature can not do directly it can not do by indirection; thus, it can not effectively declare that in assessing compensation certain elements which give value to the property seized shall be excluded from consideration.[2] While it is not competent for the legislature to determine the measure of compensation, it is, nevertheless, competent for it to limit the aggregate amount that shall be expended.[3]

§ 984. **Right to compensation not lost by conditional grant.** —There can, of course, be no doubt that where there is an unconditional grant of a right of way the owner can not afterwards successfully prosecute proceedings to recover compensation or maintain an action for damages, but a different rule applies where there is a conditional grant and the conditions of the grant are not performed. Thus, where the grant is upon the express condition that the road shall be constructed within a designated time, and the condition is not performed and the road is built after the expiration of the time limited in the grant, the owner is entitled to compensation.[4] It was also held in the case cited in the note that a recital of payment of damages did not take away the grantor's right to compensation

[1] Monongahela, etc,, Co. *v.* United States, 148 U. S. 312, s. c. 13 Sup. Ct. R. 622; Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 571; Commonwealth *v.* Pittsburgh, etc., R. Co., 58 Pa. St. 26, 50; Pennsylvania R. Co. *v.* Baltimore, etc., R. Co., 60 Md. 263; Isom *v.* Mississippi, etc., R. Co., 36 Miss. 300; Tripp *v.* Overocker, 7 Colo. 72; Vanhorne Lessee *v.* Dorrance, 2 Dall. 304; Rich *v.* Chicago, 59 Ill. 286; Paul *v.* City of Detroit, 32 Mich. 108; Lebanon School Dist. *v.* Lebanon, etc., Seminary, (Pa.) 12 Atl. R. 857. See, generally, Hughes *v.* Todd, 2 Duv. 188; People *v.* McDonald, 69 N. Y. 362; County Court *v.* Griswold, 58 Mo. 175; Cunningham *v.* Campbell, 33 Ga. 625; City of Kansas *v.* Baird, 98 Mo. 215.

[2] Monongahela, etc., Co. *v.* United States, 148 U. S. 312, s. c. 13 Sup. Ct. R. 622. But see City of Cambridge *v.* County Commissioners, 117 Mass. 79.

[3] Shoemaker *v.* United States, 147 U. S. 282, s. c. 13 Sup. Ct. R. 361.

[4] Bredin *v.* Pittsburgh, etc., R. Co., 165 Pa. St. 262, s. c. 31 Atl. R. 39. A conveyance of part of a lot for railway purposes does not operate to release the railway company from damages for injury to another lot caused by the construction of an embankment. Atchison, etc., R. Co. *v.* Pratt, 53 Ill. App. 263.

for taking the land after the time limited for the construction of the road had expired.

§985. **Time at which compensation is computed.**—The general rule is that the land-owner is entitled to compensation for the value of his land at the date of the taking, and the fact that he has made improvements with knowledge of the fact that it is proposed to build a railroad does not preclude him from claiming pay for such improvements.[1] But the authorities differ as to when the taking is complete, the question depending in a great measure upon the peculiarities of different state laws authorizing the condemnation of property for railroad purposes. In states where the payment of compensation is required to precede the taking, the date of the award of appraisers by which is determined the value to be paid before entry,[2] or the date of approval of this award by the court,

[1] Driver *v.* Western Union R. Co., 32 Wis. 569; Sherwood *v.* St. Paul, etc., R. Co., 21 Minn. 122; *In re* Wall Street, 17 Barb. (N. Y.) 617; State *v.* Carragan, 36 N. J. L. 52. In Driver *v.* Western Union R. Co. *supra*, it appeared that "plaintiff was notified by defendants that part of certain lands bought by him to erect buildings on would be taken by defendants for their railroad, and proceedings were commenced therefor; plaintiff, notwithstanding, erected his buildings, and defendants afterward took the land. The court said: "Upon the commissioners making and filing their report, and payment or legal tender of the appraisement to the owner, or upon the payment of the amount to the clerk of the court to which the appeal has been taken, title vests in the company. Now, the 7th of May (after the buildings were erected) was the time the commissioners made and filed their award, and when the company, by depositing the amount thereof with the clerk, acquired, under the charter, the right to lot seven, this, then, was the actual taking of the property for the use of the road, and the time to fix its value, not only within the intent of the charter, but upon general principles applicable to these cases." But in Shick *v.* Pennsylvania R. Co., 1 Pears. (Pa.) 264, s. c. 1 Legal Gazette 61, it was held that an improvement, erected by the owner, on the property, in order to prevent its being taken for public use was not a proper subject for compensation where the company began proceedings, filed a bond, and obtained an appraisement in good faith, and afterwards all the proceedings were set aside by the court, except the bond. See, to the same effect, Cobb *v.* Boston, 109 Mass. 438.

[2] Lafayette, etc., R. Co. *v.* Murdock. 68 Ind. 137; Logansport, etc., R. Co. *v.* Buchanan, 52 Ind. 163; Morin *v.* St. Paul, etc., R. Co., 30 Minn. 100; County of Blue Earth *v.* St. Paul, etc., R. Co., 28 Minn. 503; Jones *v.* New Orleans, etc., R. Co., 70 Ala. 227;

where such approval is necessary to its validity,[1] is generally held to be the time to which the assessment of damages must relate. Since there can be no constitutional taking of property until after an assessment of the damages to be paid or tendered, this holding seems correct upon principle,[2] though there are cases in apparent conflict with it.[3] But in states where the compensation does not necessarily precede the taking, it has been held that the time of filing the location and map of the proposed route,[4] or the time of bringing the action for condemnation by filing a petition for the assessment of damages,[5] is the time when the property is taken. In cases

Stafford *v.* Providence, 10 R. I. 567; Hampden, etc., Co. *v.* Springfield, etc., R. Co., 124 Mass. 118; West *v.* Milwaukee, etc., R. Co., 56 Wis. 318; Lyon *v.* Green Bay, etc., R. Co., 42 Wis. 538; Driver *v.* Western Union R. Co., 32 Wis. 569; Pennsylvania R. Co. *v.* First German Lutheran Congregation, 53 Pa. St. 445. And the fact that the case is retried *de novo* on appeal does not extend the time, but damages, must, in such a case, be assessed as of the date of the original award. Lafayette, etc., R. Co. *v.* Murdock, 68 Ind. 137; Logansport, etc., R. Co. *v.* Buchanan, 52 Ind. 163. In Arnold *v.* Covington, etc., Bridge Co., 1 Duvall (Ky.) 372, the court held that the assessment should be as of the date of the trial on appeal, but where, as is usually the case, the railroad company is entitled to take the land upon payment or tender of the original award, the date when it was made would clearly be the date of the taking.

[1] Hudson River R. Co. *v.* Outwater, 3 Sand. (N. Y.) 689; Beale *v.* Pennsylvania R. Co., 86 Pa. St. 509; Neal *v.* Pittsburgh, etc., R. Co., 31 Pa. St. 19; St. Joseph, etc., R. Co. *v.* Orr, 8 Kan. 419.

[2] The value, according to the constitutional requirement, must be ascertained at the time of making the assessment, for, up to the moment of making the assessment the land, or its equivalent value, belongs to the owner, and it is not subject to be taken for public use until the compensation has been first made; the owner is, therefore, entitled to receive its market value at that time. California S. R. Co. *v.* Colton, etc., Co., (Cal.) 14 Am. & Eng. R. Cas. 194, affirmed on authority of California S. R. Co. *v.* Kimball, 61 Cal. 90. See 65 Cal. xix; Bensley *v.* Mountain Lake Water Co., 13 Cal. 306.

[3] Oregon, etc., R. Co. *v.* Barlow, 3 Ore. 311. See Logansport, etc., R. Co. *v.* Buchanan, 52 Ind. 163; Lafayette, etc., R. Co. *v.* Murdock, 68 Ind. 137. In the case first cited the court held that the time of beginning proceedings to condemn was the time for which the assessment of damages should be made.

[4] Charlestown Branch R. Co. *v.* County Commissioners, 7 Metc. (Mass.) 78; Hazen *v.* Boston, etc., R. Co., 2 Gray (Mass.) 574; Whitman *v.* Boston, etc., R. Co., 7 Allen (Mass.) 313; Old Colony R. Co. *v.* Miller, 125 Mass. 1; Morris, etc., R. Co. *v.* Blair, 9 N. J. Eq. 635.

[5] Northeastern Nebraska R. Co. *v.*

where the road has been constructed under a parol agreement with the owner, or under proceedings instituted in good faith, but afterward held invalid, the time of the actual entry upon the land for the purpose of building the road has been held to be the time to which an assessment of the land-owner's damages must relate.[1]

§ 986. **Time of payment of compensation.**—Where the question is not controlled by statute the rule seems to be that the payment of compensation must precede the actual occupancy of the land.[2] It is well settled that a preliminary survey may be

Frazier, 25 Neb. 53; Missouri Pac. R. Co. *v.* Hays, 15 Neb. 224; South Park Comrs. *v.* Dunlevy, 91 Ill. 49. In Missouri Pac. R. Co. *v.* Hays, *supra*, the court says: "On the part of the plaintiff it was contended on the trial, and is here, that the assessment should be made as of the time when the proceedings to condemn the property are instituted; in other words, when the petition for the appointment of commissioners to assess the damages is filed with the county judge. The court below, however, held that the jury should make the assessment as of the date of the filing of the commissioners' report, which was something over two months later. There was evidence tending to show that during this time the market value of the land had materially advanced in consequence of the location of the road. The authorities seem to agree pretty generally that the damages in such cases must be assessed as of the time of taking; also that the increased value given to the property by the location of the road should be excluded in making the estimate. The point of chief difficulty, however, seems to be found in determining as to just what constitutes a 'taking' within the meaning of the law." After reviewing the cases of Charlestown Branch R. Co. *v.* County Commissioners, 7 Metc. (Mass.) 78; Logansport, etc., R. Co. *v.* Buchanan, 52 Ind. 163; Lafayette, etc., R. Co. *v.* Murdock, 68 Ind. 137, and South Park Commissioners *v.* Dunlevy, 91 Ill. 49, the opinion continues: "The principle of these decisions, which requires compensation for property taken for public use to be estimated with special reference to its value at the time of the appropriation or taking, is manifestly just to all concerned. By no other rule, in cases of condemnations for uses of great public interest and local benefit, could the valuation of property in the assessment of damages be so successfully guarded against the influence of enhanced values resulting specially from the enterprise."

[1] New York, etc., R. Co. *v.* Stanley, 35 N. J. Eq. 283; Indiana Central R. Co. *v.* Hunter, 8 Ind. 74; Logansport, etc., R. Co. *v.* Buchanan, 52 Ind. 163. See *post*, § 997.

[2] Cherokee Nation *v.* Southern Kansas, etc., R. Co., 135 U. S. 641, s. c. 10 Sup. Ct. R. 965; Schreiber *v.* Chicago, etc., R. Co., 115 Ill. 340; Chicago, etc., R. Co. *v.* Gates, 120 Ill. 86; Covington, etc., R. Co. *v.* Piel, 87 Ky. 267; Redman *v.* Philadelphia, etc., R. Co., 33 N. J. Eq. 165. See Memphis, etc., R. Co. *v.* Payne, 37 Miss. 700; Presby-

made before payment of compensation, and, indeed, without compensation, for a preliminary survey is not regarded as a taking,[1] but if injury is wrongfully inflicted in making such survey an action will lie. Possession may be taken, in some instances, before compensation is actually paid, as, for instance, where money is paid into court in appropriation proceedings under a statute authorizing such a procedure, but while possession may be taken the title does not pass until payment of the compensation awarded by the court.[2]

§ 987. **Benefits—General survey of the subject.**—It is obvious that there must be a difference in respect to benefits in cases where land is taken for streets or highways and cases where land is taken for a railroad, since the owner of the fee of land taken for a street or highway retains a beneficial interest in the use and enjoyment of the public way,[3] whereas, in the case of the appropriation of land for railroad purposes, the right to the use and possession of the land acquired by the railroad company is generally exclusive.[4] The exclusive right acquired by a rail-

terian Society *v.* Auburn, etc., R. Co., 3 Hill (N. Y.) 567; Williams *v.* New York, etc., R. Co., 16 N. Y. 97; Oregonian R. Co. *v.* Hill, 9 Ore. 377; Henry *v.* Dubuque, etc., R. Co., 10 Iowa 540; Walther *v.* Warner, 25 Mo. 277. See, generally, Martin *v.* Tyler, 4 N. Dak. 278, s. c. 60 N. W. R. 392, 25 L. R. A. 838; Orr *v.* Quimly, 54 N. H. 590; Johnson *v.* Baltimore, etc., R. Co., 45 N. J. Eq. 454, s. c. 17 Atl. R. 574, 39 Am. & Eng. R. Cas. 101. Where payment is made into court the company is generally entitled to possession. State *v.* McHatton, 15 Mont. 159, s. c. 38 Pac. R. 711. But see Pennsylvania R. Co. *v.* National, etc., Co., (N. J.) 32 Atl. R. 220.

[1] *Ante*, §§ 925, 977; Chambers *v.* Cincinnati, etc., R. Co., 69 Ga. 320, s. c. 10 Am. & Eng. R. Cas. 376; Republican, etc., R. Co. v. Fink, 18 Neb. 82; Ask *v.* Cummings, 50 N. H. 591; Lyon *v.* Green Bay, etc., Co., 42 Wis. 538; Orr *v.* Quimly, 54 N. H. 590; Burrow *v.* Terre Haute, etc., R. Co., 107 Ind. 432; Nichols *v.* Somerset, etc., R. Co., 43 Me. 356; California, etc., R. Co. *v.* Central, etc., R. Co., 47 Cal. 528; Chicago, etc., R Co. *v.* Watkins, 43 Kan. 50.

[2] Lake Erie, etc., R. Co. *v.* Kinsey, 87 Ind. 514, s. c. 14 Am. & Eng. R. Cas. 309; Blackshire *v.* Atchison, etc., R. Co., 13 Kan. 514; Harness *v.* Chesapeake, etc., R. Co., 1 Md. Ch. 248; Evans *v.* Missouri, etc., R. Co., 64 Mo. 453. But see Davis *v.* Russell, 47 Me. 443.

[3] Elliott on Roads and Streets, 519, 538.

[4] Cairo, etc., R. Co. *v.* Brevoort, 62 Fed. R. 129, 136; Hayden *v.* Skillings, 78 Me. 413, s. c. 6 Atl. R. 830; Brain-

road company to the land appropriated excludes the use of it by the owner for the purposes of traveling thereon, whereas an urban street or rural highway affords facilities for travel. But while there is a difference in the nature of the easement acquired, the authorities lay down much the same general rules in regard to the consideration of benefits for both classes of cases. Where there is no statute to the contrary the doctrine supported by the weight of authority is that special benefits resulting from the construction and operation of the railroad may be taken into consideration in estimating compensation,[1] but there is conflict of authority on this point.[2] In many of the states the constitution or the statute excludes benefits from consideration, and, of course, in those states benefits can not be considered, although they may be special and substantial.[3]

ard *v.* Clapp, 10 Cush. 6; Hazen *v.* Boston, etc., Railroad Co., 2 Gray 574; Proprietors, etc., *v.* Nashua, etc., R. Co., 104 Mass. 1; Jackson *v.* Rutland, etc., Railroad Co., 25 Vt. 150; Connecticut, etc., Railroad Co. *v.* Holton, 32 Vt. 43; Atlantic, etc., Co. *v.* Chicago, etc., R. Co., 6 Biss. 158, s. c. Fed. Cas. No. 632.

[1] Wyandotte, etc., Co. *v.* Waldo, 70 Mo. 629; Ragan *v.* Kansas City, etc., R. Co., 111 Mo. 456, 20 S. W. R. 234; Symonds *v.* Cincinnati, etc., R. Co., 14 Ohio 147; Neilson *v.* Chicago, etc., R. Co., 58 Wis. 516, s. c. 17 N. W. R. 310; Whiteman *v.* Wilmington, etc., R. Co., 2 Harr. (Del.) 514; Indiana Central R. Co. *v.* Hunter, 8 Ind. 74; Holton *v.* Milwaukee, etc., R. Co., 31 Wis. 27; New Orleans, etc., R. Co. *v.* Lagarde, 10 La. Ann. 150; San Francisco, etc., Co. *v.* Caldwell, 31 Cal. 367; Moran *v.* Ross, 79 Cal. 549, s. c. 21 Pac. R. 958; Mayor of Atlanta *v.* Central, etc., R. Co., 53 Ga. 120; Alton, etc., R. Co. *v.* Carpenter, 14 Ill. 190; Todd *v.* Kankakee, etc., R. Co., 78 Ill. 530; Winona, etc., R. Co. *v.* Waldron, 11 Minn. 515; Kramer *v.* Cleveland, etc., R. Co., 5 Ohio St. 140; Columbus, etc., R. Co. *v.* Simpson, 5 Ohio St. 251; Pennsylvania R. Co. *v.* Heister, 8 Pa. St. 445; Vicksburg, etc., R. Co. *v.* Calderwood, 15 La. Ann. 481; Meacham *v.* Fitchburg, etc., R. Co., 4 Cush. 291; Fremont, etc., R. Co. *v.* Whalen, 11 Neb. 585, s. c. 10 N. W. R. 491. *In re* Kings Co. R. Co., 12 N. Y. Supp. 198, 58 Hun 608; Haislip *v.* Wilmington, etc., R. Co., 102 N. C. 376, s. c. 8 S. E. R. 926; Delaware, etc., Co. *v.* Burson, 61 Pa. St. 369; Long *v.* Harrisburgh, etc., Co., 126 Pa. St. 143, 19 Atl. R. 39.

[2] Alabama, etc., R. Co. *v.* Burkett, 42 Ala. 83; St. Louis, etc., R. Co. *v.* Anderson, 39 Ark. 167, s. c. 17 Am. & Eng. R. Cas. 97; Koestenbader *v.* Peirce, 41 Iowa 204; Asher *v.* Louisville, etc., R. Co., 87 Ky. 391, s. c. 8 S. W. R. 854; Brown *v.* Beatty, 34 Miss. 227; New Orleans, etc., R. Co. *v.* Moye, 39 Miss. 374; Virginia, etc., R. Co. *v.* Lovejoy, 8 Nev. 100; Packard *v.* Bergen, etc., R. Co., 54 N. J. Law 229, s. c. 23 Atl. R. 722.

[3] Atchison, etc., R. Co. *v.* Blackshire, 10 Kan. 477; St. Joseph, etc., R. Co. *v.* Orr, 8 Kan. 419; Reisner *v.* Atchison, etc., R. Co., 27 Kan. 382;

Some of the state constitutions use the term "just compensation," and there is great diversity of opinion as to the meaning and effect to be assigned to the term. Some of the cases affirm that it excludes benefits from consideration, others assert a contrary doctrine, and still others that it excludes the consideration of benefits as a deduction from the value of the land actually appropriated, but not as to damages for land injured but not actually taken.[1] We can see no sufficient reason for holding that the term "just" adds such force as to exclude the consideration of special or peculiar benefits, for if the land-owner's property is enhanced in value to that extent there is just compensation. It seems to us that all that is required under any law, except one directly excluding a consideration of benefits, is that the land-owner shall receive fair and reasonable compensation for the injury he sustains, and that in ascertaining the extent of his injury, special but not general benefits should be taken into consideration.[2]

§ 988. **Benefits—Different lines of decision.**—It will be found

Britton v. Des Moines, etc., R. Co., 59 Iowa 540; Ham *v.* Wisconsin, etc., R. Co., 61 Iowa 716; Little Miami, etc., R. Co. *v.* Collett, 6 Ohio St. 182; Giesy *v.* Cincinnati, etc., R. Co., 4 Ohio St. 308; Cincinnati, etc., R. Co. *v.* Longworth, 30 Ohio St. 108; Bowen *v.* Atlantic, etc., R. Co., 17 S. Car. 574. See Grand Rapids, etc., R. Co. *v.* Horn, 41 Ind. 479; White Water Valley R. Co. *v.* McClure, 29 Ind. 536; McMahon *v.* Cincinnati, etc., R. Co., 5 Ind. 413; Bevier *v.* Dillingham, 18 Wis. 529; Swayze *v.* New Jersey Midland R. Co., 36 N. J. L., 295; Crater *v.* Fritts, 44 N. J. Law 374; Brown *v.* Beatty, 34 Miss. 227, 241; Isom *v.* Mississippi, etc., R. Co., 36 Miss. 300; New Orleans, etc., R. Co. *v.* Moye, 39 Miss. 374; Board of Levee Commissioners *v.* Harkleroads, 62 Miss. 807. But see Balfour *v.* Louisville, etc., R. Co., 62 Miss. 508.

[1] Shipley *v.* Baltimore, etc., R Co., 34 Md. 336; City of Paris *v.* Mason, 37 Tex. 447; Milwaukee, etc., R. Co. *v.* Eble, 4 Chand. (Wis.) 72; Oregon, etc., R. Co. *v.* Wait, 3 Ore. 91; Elizabethtown, etc., R. *v.* Helm, 8 Bush. 681; Louisville, etc., R. Co. *v.* Thompson, 18 B. Monr. 735; Brown *v.* Beatty, 34 Miss. 227; Isom *v.* Mississippi, etc., R. Co., 36 Miss. 300; Bangor, etc., R. Co. *v.* McComb, 60 Me. 290; Newman *v.* Metropolitan, etc., R. Co., 118 N. Y. 618; Dolores, etc., Co. *v.* Hartman, 17 Colo. 138; Mayor of Savannah *v.* Hartridge, 37 Ga. 113; Paducah, etc., R. Co. Stovall, 12 Heisk. (Tenn.) 1; Laflin *v.* Chicago, etc., R. Co., 33 Fed. R. 415; Munkwitz *v.* Chicago, etc., R. Co., 64 Wis. 403, s. c. 22 Am. & Eng. R. Cas. 151; Washburn *v.* Milwaukee, etc., R. Co., 59 Wis. 364, s. c. 18 N. W. R. 328.

[2] Monongahela, etc., Co. *v.* United States, 148 U. S. 312; Pittsburgh, etc., R. Co. *v.* Rose, 74 Pa. St. 362.

upon a study of the authorities that where the subject is not controlled by peculiar constitutional or statutory provisions there are four general lines of cases.[1] (1) Those holding that benefits can not in any case be set off against the damages.[2] (2) Those holding that special benefits may not be set off against the value of the land actually seized, but may be set off against incidental injuries sustained by the land-owner.[3] (3) Those holding that special benefits may be set off against the value of the land taken as well as against incidental injuries.[4] (4) Those holding that all benefits both general and special may be set off against the damages. Our opinion is that special, but not general benefits may be deducted from the damages.[5]

[1] Elliott's Roads and Streets,188. We use the term incidental injuries in this immediate connection as meaning injuries to the property not actually taken.

[2] Texas, etc., R. Co. *v.* Matthews, 60 Tex. 215; Buffalo Bayou, etc., R. Co. *v.* Ferris, 26 Tex. 588; New Orleans, Pac. R. Co. *v.* Murrell, 36 La. Ann. 344; Vicksburgh, etc., R. Co. *v.* Dillard, 35 La. Ann. 1045, changed as to railroads, Rev. Laws, 1884, 701; Elizabethtown, etc., R. Co. *v.* Helm's Heirs, 8 Bush. (Ky.) 681; Louisville, etc., R. Co. *v.* Thompson, 18 B. Mon. (Ky.) 735; Sutton's Heirs *v.* Louisville, 5 Dana (Ky.) 28; Selma, etc., R. Co. *v.* Keith 53 Ga. 178; Jones *v.* Wills Valley R. Co., 30 Ga. 43.

[3] New Orleans, etc., R. Co. *v.* Maye, 39 Miss. 374; Mayor Savannah *v.* Hartridge, 37 Ga. 113; Alabama, etc., Co. *v.* Burket, 42 Ala. 83; Woodfolk *v.* Nashville, etc., R. Co., 2 Swan 422; Isom *v.* Mississippi R. Co., 36 Miss. 300; City of Memphis *v.* Bolton, 9 Heisk. 508; Israel *v.* Jewett, 29 Iowa 475; Elliott's Roads and Streets, 188.

[4] McIntire *v.* State, 5 Blckf. 384; Putnam *v.* Douglass County, 6 Ore. 328, s. c. 25 Am. R. 527; Hornstein *v.* Atlantic, etc., R. Co., 51 Pa. St. 87; Roots' Case, 77 Pa. St. 276; Symonds *v.* City of Cincinnati, 14 Ohio 147, s. c. 45 Am. Dec. 529; San Francisco, etc., R. Co. *v.* Caldwell, 31 Cal. 367; Greenville, etc., R. Co. *v.* Partlow, 5 Rich. 428; Wyandotte, etc., R. Co. *v.* Waldo, 70 Mo. 629; Peirce on Railroads, 221, 224; Woods on Railroads, 1076. See, also, Mississppi, etc., R. Co. *v.* McDonald, 12 Heisk. (Tenn.) 54; East Tennessee, etc., R. Co. *v.* Love, 3 Head (Tenn.) 63; Washburn *v.* Milwaukee, etc., R. Co., 59 Wis. 364; Driver *v.* Western Union R. Co., 32 Wis. 569; Robbins *v.* Milwaukee, etc., R. Co., 6 Wis. 636; Fremont, etc., R. Co. *v.* Whalen, 11 Neb. 585; Railroad Co. *v.* Foreman, 24 W. Va. 662; Railroad Company *v.* Tyree, 7 W. Va. 693; James River, etc., Co. *v.* Turner, 9 Leigh (Va.) 313; Shipley *v.* Baltimore, etc., R. Co., 34 Md. 336; Tide Water Canal Co. *v.* Archer, 9 Gill & J. (Md.) 479; Keithsburg, etc., R. Co. *v.* Henry, 79 Ill. 290; St. Louis, etc., R. Co. *v.* Kirby, 104 Ill. 345.

[5] Chicago, etc., R. Co. *v.* Blake, 116 Ill. 163, s. c. 23 Am. & Eng. Cas. 97; Pittsburgh, etc., R. Co. *v.* McCloskey, 110 Pa. St. 436, s. c. 23 Am. & Eng. R. Cas. 86; Little Miami, etc., R. Co. *v.* Collett, 6 Ohio St. 182; Pueblo, etc., R.

§ 989. **Benefits—General and special.**—As indicated in the preceding section there is much conflict of opinion upon the subject of allowing a deduction of benefits, and there are cases which deny that there is a distinction between general and special benefits. We think there is a clear distinction between the two kinds of benefits and that the distinction rests upon an essential difference in the two classes of cases. Where the construction of a railroad adds increased value to the land of an individual different in its nature from the benefit to the general community he receives a special benefit which lessens his injury or loss, so that he really sustains no injury or loss except that which is above and beyond the amount of the peculiar benefit which the construction of the railroad confers upon him by enhancing the value of that part of his land which is not appropriated. But where the land-owner reaps no advantage peculiar to himself but only such as is shared by the community at large, there is reason for excluding the benefits from consideration. Special benefits may be said to be such as are direct and peculiar to the land. General benefits such as are bestowed upon other lands of similar character and situation in the same vicinity.[1]

Co. *v.* Rudd, 5 Colo. 270, s. c. 10 Am. & Eng. R. Cas. 404; Grafton, etc., R. Co. *v.* Foreman, 24 W. Va. 662, s. c. 20 Am. & Eng. R. Cas. 215; Morin *v.* St. Paul, etc., R. Cas., 30 Minn. 100; St. Louis, etc., Co. *v.* Richardson, 45 Mo. 466; Pacific, etc., R. Co. *v.* Chrystal, 25 Mo. 544; Lipes *v.* Hand, 104 Ind. 503; Laflin *v.* Chicago, etc., R. Co., 33 Fed. R. 415; Anbrush *v.* Town of Oakdale, 28 Minn. 61; Missouri, etc., R. Co. *v.* Hays, 15 Neb. 224; Minnesota, etc., R. Co. *v.* Doran, 17 Minn. 188; Donovan *v.* Springfield, 125 Mass. 371; Forsyth *v.* Wilcox, 143 Ind. 144, s. c. 41 N. E. R. 371; Burk *v.* Simonson, 104 Ind. 173, s. c. 3 N. E. R. 826; Cooley Const. Lim. (6th ed.) 701; 2 Dillon Municipal Corp., § 624; Elliott's Roads and Streets, 186; 3 Sutherland Damages, 452, 454, 462; Mills on Eminent Domain, § 152; Lewis on Eminent Domain, § 471, p. 606.

[1] 2 Dillon's Municipal Corp. (4th ed.) § 624; Lewis on Eminent Domain, § 476; Elliott's Roads and Streets, 186; Mills on Eminent Domain, § 150, 153; Randolph on Eminent Domain, § 270, 271; Whiteman *v.* Boston, etc., R. Co., 3 Allen 133; Lipes *v.* Hand, 104 Ind. 503; Comrs. of Pottawatomie County *v.* O'Sullivan, 17 Kan. 58; Roberts *v.* Commissioners, 21 Kan. 247; Stattuck *v.* Stoneham, etc., R. Co., 6 Allen 115; Minnesota, etc., R. Co. *v.* McNamara, 13 Minn. 508; Pittsburgh, etc., Co. *v.* Robinson, 95 Pa. St. 426; Washburn *v.* Milwaukee, etc., R. Co., 59 Wis. 364; Childs *v.* New Haven, etc., R. Co., 133 Mass. 253. See, generally,

§ 990. Benefits confined to parcel or tract actually taken.—As we have elsewhere shown damages are confined to the parcel or tract of which part is taken,[1] and upon the same principle benefits must be confined to the tract or parcel of which part is actually appropriated. That benefit to separate and distinct lots, parcels or tracts can not be considered in estimating the benefits is well settled, but what shall be considered part of the tract or parcel seized, it is sometimes difficult to determine. We suppose, however, that no general rule can be laid down which will justly apply to all cases, but that in most instances the question is one of fact to be determined from the evidence in the particular case.

§ 991. Remote or conjectural damages can not be allowed.—Remote and fanciful injuries, which rest wholly in conjecture, and do not admit of an estimate in damages, can not be proven as elements of damage for which compensation is to be made. Thus an interference with the quiet and privacy of the plaintiff's premises by the construction of a railroad overlooking them,[2] or by bringing crowds of visitors into his neighborhood,[3] is not an injury for which he can claim compensation. Neither is an injury to the plaintiff's business resulting

Donovan *v.* Springfield, 125 Mass. 371; Brown *v.* Providence, etc., R. Co., 5 Gray 35; Hayes *v.* Ottawa, etc., R. Co., 54 Ill. 373.

[1] *Post*, § 992; Ham *v.* Wisconsin, etc., R. Co., 61 Iowa 716; New York, etc., R. Co. *v.* LeFevre, 27 Hun 537; Kansas City, etc., R. Co. *v.* Merrill, 25 Kan. 421; Welch *v.* Milwaukee, etc., R. Co., 27 Wis. 108; Paducah, etc., R. Co. *v.* Stovall, 12 Heisk. (Tenn.) 1; Meacham *v.* Fitchburg R. Co., 4 Cush. (Mass.) 291; Philadelphia, etc., R. Co. *v.* Gilson, 8 Watts (Pa.) 243; Mayor of City of Lexington *v.* Long, 31 Mo. 369; St. Louis, etc., R. Co. *v.* Brown, 58 Ill. 61; Buffalo Bayou, etc., R. Co. *v.* Ferris, 26 Tex. 588. A personal benefit to the owner, such as his profits from the sale of materials to the company is not to be deducted from the damages to the land. Minnesota, etc., R. Co. *v.* Doran, 17 Minn. 188.

[2] *In re* Penny, 7 El. & Bl. 660. An award of damages for the possible exercise by the company of a right to cut down trees on either side of the road can not be sustained. Such right should be considered only so far as it affects the present market value of the land. *In re* Ontario, etc., R. Co., 6 Ont. R. 338. See Pittsburgh, etc., R. Co. *v.* McCloskey, 110 Pa. St. 436.

[3] First Parish of Woburn *v.* County of Middlesex, 7 Gray (Mass.) 106; Patten *v.* Northern Central R. Co., 33 Pa. St. 426.

from competition induced by the improvement,[1] nor the liability of horses used on plaintiff's farm to take fright from passing trains,[2] and the increased risk of orchards through which a railroad is built by reason of leaving them more free to access of thieves is so remote and speculative an element of damages as not to be entitled to consideration by the jury.[3]

§ 992. **Damages confined to particular tract.**—The compensation is awarded only for damages to the particular tract of land of which a part is taken[4] or to land which is used in connection with and as a part of that tract.[5] Thus, the owner of a mill, no part of which is taken, can not recover for damages inflicted upon it by the construction of a railroad, in a proceeding by the railroad to condemn another and distinct tract of land at some distance from the mill.[6] And where

[1] Petition of Mount Washington Road Co., 35 N. H. 134; Adden *v.* White Mts. R. Co., 55 N. H. 413; Harvey *v.* Lackawanna, etc., R. Co., 47 Pa. St. 428.

[2] Atchison, etc., R. Co. *v.* Lyon, 24 Kan. 745. In Wooster *v.* Sugar River, etc., R. Co., 57 Wis. 311, the court held that a witness could properly testify as to the effect upon the market value of the property due to the probability or possibility that horses might be frightened or fire communicated by passing locomotives and trains. Snyder *v.* Western Union R. Co., 25 Wis. 60; Hutchinson *v.* Chicago, etc., R. Co., 37 Wis. 582, 41 Wis. 541.

[3] Kansas City, etc., R. Co. *v.* Kregelo, 32 Kan. 608.

[4] St. Louis, etc., R. Co. *v.* Brown, 58 Ill. 61; Bangor, etc., R. Co. *v.* McComb, 60 Me. 290; Fleming *v.* Chicago, etc., R. Co., 34 Iowa 353; Sherwood *v.* St. Paul, etc., R. Co., 21 Minn. 127; St. Paul, etc., R. Co. *v.* Murphy, 19 Minn. 500; Minnesota Valley R. Co. *v.* Doran, 15 Minn. 230; Matter of New York Cent., etc., R. Co., 6 Hun (N. Y.) 149; Fleming *v.* Chicago, etc., R. Co., 34 Iowa 353; Meacham *v.* Fitchburg, R. Co., 4 Cush. (Mass.) 291; Paducah, etc., R. Co. *v.* Stovall, 12 Heisk. (Tenn.) 1; Mayor of Lexington *v.* Long, 31 Mo. 369.

[5] Renwick *v.* Davenport, etc., R. Co., 49 Iowa 664, affirmed, 102 U. S. 180; Driver *v.* Western Union R. Co., 32 Wis. 569; Robbins *v.* Milwaukee, etc., R. Co., 6 Wis. 636. The fact that the land is divided by a highway or otherwise into two or more lots, does not prevent the award of damages for injuries to it as an entirety, if the several parts are still used together for a common purpose. Keithsburg, etc., R. Co. *v.* Henry, 79 Ill. 290. Where land within a village, and adjoining farm land are owned by the same person, but held as distinct tracts and for separate uses, compensation can not be claimed for injuries to the farm because of its separation from a part of the village property by the line of a railroad. Haines *v.* St. Louis, etc., R. Co., 65 Iowa 216.

[6] Selma, etc., R. Co. *v.* Camp, 45 Ga. 180. But where the property is used together for a common purpose

several village lots are merely held for sale or use as building lots,[1] or are permitted to lie entirely idle and unoccupied,[2] injuries to the lots not taken can not be considered in assessing damages. So, if a man owns two adjoining farms, one of which he occupies while he rents the other, the assessment of damages must be confined to the farm of which part is taken.[3] But all the land owned and used as one farm must be considered as a single tract, although it is divided by a highway,[4] or canal,[5] or lies in two or more counties.[6] Where the separate owners of three quarter sections of land operated them jointly as a single stock farm under a contract by which water for the whole farm was furnished by the owner of the quarter section on which water was found, it was held that in an assessment of damages for the location of a highway across the farm, such owner was entitled to damages for the interference with his rights under the contract.[7] Where two or more contiguous

the fact that different parts lie some distance from each other will not prevent them from being considered as forming a single property. Thus the owners of an ore mine and a railroad four or five miles long connecting the mine with a railroad are entitled, upon condemnation of a part of their line of road for railroad purposes, to damages to the whole property, including the ore mine. Matter of Poughkeepsie, etc., R. Co., 63 Barb. (N. Y.) 151.

[1] Pittsburgh, etc., R. Co. *v.* Reich, 101 Ill. 157.

[2] Wilcox *v.* St. Paul, etc., R. Co.. 35 Minn. 439.

[3] Minnesota Valley R. Co. *v.* Doran, 15 Minn. 230. But the jury are entitled to pass upon the question whether two tracts of land constitute a single farm, even though they are separated by a public highway, and one has been rented for two years preceding the condemnation. St. Paul, etc., R. Co. *v.* Murphy, 19 Minn. 500. Where a man owned two tracts of land as designated on the government survey, both of which constituted one farm, and released the right of way through one tract, it was held that he could not afterward recover for damages done to that tract by condemning a right of way across the remainder of the farm. St. Louis, etc., R. Co. *v.* Brown, 58 Ill. 61. But it is difficult to see why a man's willingness to have a railroad built across one part of his farm should prevent him from recovering damages for the road where he did not want it built.

[4] Ham *v.* Wisconsin, etc., R. Co., 61 Iowa 716; Matter of New York, etc., R. Co. *v.* Le Fevre, 27 Hun (N. Y.) 537; Welch *v.* Milwaukee, etc., R. Co., 27 Wis. 108; Kansas City, etc., R. Co. *v.* Merrill, 25 Kan. 421.

[5] Matter of Boston, etc., R. Co., 31 Hun. (N. Y.) 461.

[6] Atchison, etc., R. Co. *v.* Gough, 29 Kan. 94.

[7] Board of Commissioners *v.* Labore, 37 Kan. 480. Numerous cases have held that a single farm may consist of

village lots are used together for a common purpose, they may be held to form a single tract. Thus, where land was subdivided into blocks or lots, but the lots were not sold and the land continued to be used for agricultural purposes, it was held that damages to the entire piece of land could be recovered when but a part of the lots were taken.[1]

§ 993. **Injuries to part of tract or parcel of land not actually taken.**—Injuries to part of a tract of land not actually taken may be caused by the construction of a railroad, and where there are such injuries the general rule is that the property-owner is entitled to compensation.[2] It is so held where a farm is divided by the line of the railroad, or where cuts, ditches or embankments are made upon the right of way where it crosses the land.[3] But it is to be observed that for remote or speculative injuries no compensation can be awarded.

several subdivisions as laid out in the government survey. Wyandotte, etc., R. Co. *v.* Waldo, 70 Mo. 629; Cedar Rapids, etc., R. Co. *v.* Ryan, 37 Minn. 38; Wilmes *v.* Minneapolis, etc., R. Co., 29 Minn. 242; Ham *v.* Wisconsin, etc., R. Co., 61 Iowa 716; Kansas City, etc., R. Co. *v.* Merrill, 25 Kan. 421.

[1] Sheldon *v.* Minneapolis, etc., R. Co., 29 Minn. 318; Welch *v.* Milwaukee, etc., R. Co., 27 Wis. 108.

[2] White *v.* Metropolitan, etc., Co., 154 Ill. 620, s. c. 39 N. E. R. 270; Tucker *v.* Massachusetts, etc., R. Co., 118 Mass. 546; McReynolds *v.* Burlington, etc., R. Co., 106 Ill. 152. In this latter case, it was held that the fact that evidence as to the inconvenience occasioned by a railroad track which divides a farm is largely conjectural and not capable of definite ascertainment, was not a reason for excluding such evidence from the jury. The jury are entitled to know how the line of the road divides the farm, in case of farm lands, as to the location of water, pasturage, improvements, etc., and also, the dangers and inconveniences in the perpetual use of the track for the movement of trains. Rockford, etc., R. Co. *v.* McKinley, 64 Ill. 338. Inconvenience in opening gates and bars to cross the railroad may be considered by the jury. Minnesota, etc., R. Co. *v.* Doran, 17 Minn. 188. So may the inconvenience and danger of frequently crossing the track (in this case as often as one hundred times a day) in hauling clay from one part of the plaintiff's brickyard to another part that has been cut off by the railroad. Sherwood *v.* St. Paul, etc., R. Co., 21 Minn. 127. See Winona R. Co. *v.* Waldron, 11 Minn. 515.

[3] Missouri, Pacific R. Co. *v.* Hays, 15 Neb. 224; Wilmington, etc., R. Co. *v.* Stauffer, 60 Pa. St. 374; Pittsburgh, etc., R. Co. *v.* Rose, 74 Pa. St. 362; Atchison, etc., R. Co. *v.* Blackshire, 10 Kan. 477; St. Louis, etc., R. Co. *v.* Anderson, 39 Ark. 167.

§ 994. **Elements of value.**—The general rule is that a single assessment should be made covering all the various items of damage, and it is held that the amount of this assessment should just equal the difference between the market value of the property, after the improvement is made, and the market value of like property to which no injury has been done.[1] If the property has a special value because of its adaptation for railroad purposes,[2] or for some other use for which the business needs of the neighborhood create a demand,[3] or if the owner has adapted the land to use in connection with other property, by which it has acquired a special and peculiar value, such value must be taken as the basis in assessing damages,[4] but, as

[1] Henry *v.* Dubuque, etc,, R. Co., 2 Iowa 288; Chicago, etc., R. Co. *v.* Carey, 90 Ill. 514. "The inconvenience arising from a division of the property, or from increased difficulty of access; the burden of increased fencing, the ordinary danger from accidental fires to the fences, fields or farm buildings,not resulting from negligence, and generally all such matters as, owing to the particular location of the road, may affect the convenient use and future enjoyment of the property, are proper matters for consideration, but they are to be considered in comparison with the advantages, only as they affect the market value of the land. The jury can not include in the verdict a fund to cover the costs of fencing, or to provide an indemnity against losses by fire, or casualties to the cattle and stock upon the farm. Such an assessment must necessarily be purely speculative, as the matters, thus sought to be provided against, are in their nature altogether ideal and fanciful. A rearrangement of the farm may obviate the necessity for any increased fencing; its future occupancy may be such as to require none; casualties, by fire or otherwise, may never occur; and, therefore, the injury from these causes can only be computed as they affect the market value of the land." Pittsburgh, etc., R. Co. *v.* McCloskey, 110 Pa. St. 436. The cost of erecting such buildings as are upon the land taken is not an element of damage unless it is shown that they would actually increase the value of the premises to that extent. Jacksonville, etc., R. Co. *v.* Walsh, 106 Ill. 253.

[2] Johnson *v.* Freeport, etc., R. Co., 111 Ill. 413; Little Rock, etc., R. Co. *v.* Woodruff. 49 Ark. 381. But see *In re* Boston,etc.,R. Co., 22 Hun (N. Y.)176. In Union Depot St.R.,etc.,Co.*v.*Brunswick, 31 Minn. 297, the court says: "Suppose a railroad was intended to be built through some canyon or mountain pass, the soil of which was of little or no practical value, would it be competent to permit the owner to show that it furnished the only possible route for the road? We apprehend not. These are extreme cases, but not different in principle from the one under consideration." Stinson *v.* Chicago, etc., R. Co., 27 Minn. 284; Virginia, etc., R. Co. *v.* Elliott, 5 Nev. 358.

[3] Boom Co. *v.* Patterson, 98 U. S. 403.

[4] Chicago, etc., R. Co. *v.* Chicago,

elsewhere suggested, the special value must be real and substantial, not fanciful or fictitious. The use that was made by the owner of the property taken may, of course, be shown, as bearing on the question of his damages; and the better opinion is that its adaptability for any valuable use to which a reasonably prudent man might be expected to devote it should also be considered, so far as this affects the market price.[1] The existing business and wants of the community, and such as may reasonably be expected in the immediate future, should be taken into account, together with the adaptability of the property to meet those wants.[2] But there must be substantial grounds on which to rest an expectation of future advancement in the value of the property, and conjecture is not a basis for an award of damages. Where it was shown that the land lay in the edge of the city of St. Paul, and near certain public institutions, it was held proper to prove its market value as enhanced by its

etc., R. Co., 112 Ill. 589 (landing used by a railroad company); King *v.* Minneapolis Union R. Co., 32 Minn. 224; St. Louis, etc., R. Co. *v.* Kirby, 104 Ill. 345 (training track for horses on a stock farm); Beckett *v.* Midland R. Co., L. R., 3 C. P. 82. "The value of land consists in its fitness for use, present or future, and before it can be taken for public use the owner must have just compensation. If he has adopted a peculiar mode of using that land by which he derives profit, and he is to be deprived of that use, justice requires he should be compensated for the loss. That loss is the loss to himself. It is the value which he has, and of which he is deprived, which must be made good by compensation." St. Louis, etc., R. Co. *v.* Kirby, 104 Ill. 345. Where a person owned a piece of ground used as a stock ranch and the railroad was so constructed as to run diagonally through one quarter section, so as to cut off the water, timber, house and corrals from the main body of the land, the owner was held entitled to recover for the injury done to the property, considered as a whole, and not for that only done to the quarter section over which the road was built. Kansas City, etc., R. Co. *v.* Merrill, 25 Kan. 421.

[1] *In re* Furman Street, 17 Wend. (N. Y.) 551, 670; *In re* New York Central, etc., R. Co., 6 Hun (N. Y.) 149; Drury *v.* Midland R. Co., 127 Mass. 571; Eastern R. Co. *v.* Boston, etc., R. Co., 111 Mass. 125; First Parish *v.* Middlesex, 7 Gray (Mass.) 106; Young *v.* Harrison, 17 Ga. 30; Goodin *v.* Cincinnati, etc., Canal Co., 18 Ohio St. 169; Cincinnati, etc., R. Co. *v.* Longworth, 30 Ohio St. 108; Somerville, etc., R. Co. *v.* Doughty, 22 N. J. L., 495; Harlam *v.* Galena, etc., R. Co., 64 Ill. 353; Colvill *v.* St. Paul, etc., R. Co., 19 Minn. 283; Regina *v.* Brown, L. R., 2 Q. B. 630.

[2] Boom Co. *v.* Patterson, 98 U. S. 403; Gardner *v.* Brookline, 127 Mass. 358; Low *v.* Concord, etc., R. Co., 63 N. H. 557; Munkwitz *v.* Chicago, etc., R. Co., 64 Wis. 403.

adaptability for suburban residences.[1] So, where the land was shown to have a mine under its surface, it was held that that fact might be considered if the mine added to the market value of the land, even though such mine had never been used.[2] But the intentions of the owner as to the future use of his property can not be proved,[3] nor can evidence be offered of the probable advantages from all possible uses to which the property might be put,[4] nor of any elements of damage which lie wholly in conjecture.[5] Evidence as to the value of a reversion in the railway

[1] Sherman *v.* St. Paul, etc., R. Co., 30 Minn. 227. In Washburn *v.* Milwaukee, etc., R. Co., 59 Wis. 364, it was held that if the present value of the lands taken was enhanced by reason of the fact that it might be platted and sold as city lots, such increased present value was the proper basis of assessment.

[2] Haslam *v.* Galena, etc., R. Co. 64 Ill. 353.

[3] Sherwood *v.* St. Paul, etc., R. Co., 21 Minn. 127; Fairbanks *v.* Fitchburg, 110 Mass. 224. See Scott *v.* Indianapolis, etc., R. Co., 10 Am. & Eng. R. Cas. 189. In Welch *v.* Milwaukee, etc., R. Co., 27 Wis. 108, Chief-Justice Dixon said in his opinion: "And while speculative damages can not be allowed, yet actual damages, its value to the owner, his use being considered, must always be. * * * The actual use and intention of the proprietor, together with all surrounding circumstances, must be considered."

[4] Fleming *v.* Chicago, etc., R. Co., 34 Iowa 353; Powers *v.* Hazelton, etc., R. Co., 33 Ohio St. 429; Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 30 Ohio St. 604; Dorlan *v.* East Brandywine, etc., R. Co., 46 Pa. St, 520; Searle *v.* Lackawanna, etc., R. Co., 33 Pa. St. 57; Selma, etc., R. Co. *v.* Keith, 53 Ga. 178; Gardner *v.* Brookline, 127 Mass. 358; Worcester *v.* Great Falls, etc., Co., 41 Me. 159. The fact that the lands taken would be rendered more valuable by the construction of a canal along the south side of the tract, which might or might not be built at some time in the future by the public authorities, and that the railroad, as built, would cut off access to the canal from a large part of the owner's land, was held to be too remote and speculative an element of damages to sustain an assessment. Munkwitz *v.* Chicago, etc., R. Co., 64 Wis. 403. In Watson *v.* Milwaukee, etc., R. Co., 57 Wis. 332, an instruction was approved which laid down the rule for assessing damages, as follows: "In determining the value of the land actually taken, you are to be governed by the fair market value [at the time of taking]—what was the fair market value of the land at that time, for any purpose for which it might reasonably be used in the immediate future—not what would lots sell for in the distant future if a street were opened and lots offered for sale. Nor, indeed, is the price per lot a measure of value, either in the near or the distant future." Munkwitz *v.* Chicago, etc., R. Co., 64 Wis. 403.

[5] Central Pacific R. Co. *v.* Pearson, 35 Cal. 247; Elizabethtown, etc., R. Co. *v.* Helm, 8 Bush. (Ky.) 681; Troy, etc., R. Co. *v.* Northern Turnp. Co., 16 Barb. (N. Y.) 100.

location will not be received, where it is impossible to know when the existing easement will terminate, or whether it will ever terminate.[1]

§ 995. **Measure of damages—Illustrative cases.**—The general rule is that where the entire tract is taken, the measure of damages is its market value,[2] taking into consideration its surroundings, improvements, and capabilities for valuable uses of any kind.[3] And where part only of a tract of land is taken, but the part taken bears such a relation to the residue of the tract, or is to be devoted to such a use (as by cuts, embankments, switch-yards, or the like) that the value of such residue is depreciated, the land-owner is entitled to damages, not only for the value of the land actually taken, but for the injury to the part not taken. Such damages must be given whether the statute specially mentions them or not.[4] While

[1] Boston, etc., R. Co. *v.* Old Colony, etc., R. Co., 3 Allen (Mass.) 142.

[2] Bangor, etc., R. Co. *v.* McComb, 60 Me. 290; Baltimore, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 17 W. Va. 812; Dearborn *v.* Boston, etc., R. Co., 24 N. H. 179; Petition of Mt. Washington, R. Co., 35 N. H. 134; Virginia, etc., R. Co. *v.* Henry, 8 Nev. 165; Albany, etc., R. Co. *v.* Dayton, 10 Abb. (N. Y.) Pr. N. S. 182. But in determining what the market value is, it is proper to take into consideration matters which give the property appropriated a special value. Mere matters of fancy, conjecture, or the like, should, however, be excluded from consideration. Kerr *v.* South Park Commissioners, 117 U. S. 379, s. c. 6 Sup. Ct. R. 801; Shoemaker *v.* United States, 147 U. S. 282, s. c. 13 Sup. Ct. R. 361.

[3] Central Branch U. P. R. Co, *v.* Andrews, 26 Kan. 702; Little Rock Junction R. Co. *v.* Woodruff, 49 Ark. 381; Low *v.* Railroad Co., 63 N. H. 557; Pittsburgh, etc., R. Co. *v.* Vance. 115 Pa. St. 325; Louisville, etc., R. Co. *v.* Ryan, 64 Miss. 399; Haslam *v.* Galena, etc., R. Co., 64 Ill. 353; Weyer *v.* Chicago, etc., R. Co., 68 Wis. 180. As to rights of owners of mines under the English Railway act of 1845, see *In re* Lord Gerard and London, etc., L. R (1894) 2 Q. B. 915, and Chamber, etc., Co. *v.* Rochdale Canal, L. R., (1894) 2 Q. B. 632.

[4] Chapman *v.* Oshkosh, etc., R. Co., 33 Wis. 629; Parks *v.* Wisconsin Central, etc., Co., 33 Wis. 413; Fremont, etc., R. Co. *v.* Lamb, 11 Neb. 592; Baltimore, etc,, R. Co. *v.* Pittsburgh, etc., R. Co., 17 W. Va. 812; Wyandotte, etc., R. Co. *v.* Waldo, 70 Mo. 629; Watson *v.* Pittsburgh, etc., R. Co., 37 Pa. St. 469; St. Louis, etc., R. Co. *v.* Anderson, 39 Ark. 167; Wilmes *v.* Minneapolis, etc., R. Co., 29 Minn. 242; Cleveland, etc., R. Co. *v.* Ball, 5 Ohio St. 568; Walker *v.* Old Colony R. Co., 103 Mass. 10; Raleigh, etc., R. Co. *v.* Wicker, 74 N. Car. 220; Richmond, etc., Turnp. R. Co. *v.* Rogers, 1 Duv. (Ky. 135; Virginia, etc., R. Co. *v.* Henry, 8 Nev. 165; Dearborn *v.*

damages for such incidental injuries may be awarded, the general rule, according to the weight of authority, is that purely consequential damages can not be awarded. The rule generally enforced is that the owner is entitled to the difference between the market value of the whole lot or tract before the taking, and the market value of what remains to him after such taking, uninfluenced by any general rise in values of property due to the improvement.[1] This seems to us

Boston, etc., R. Co., 4 Fost. (N. H.) 179; Selma, etc., R. Co. *v.* Redwine, 51 Ga. 470; Atchison, etc., R. Co. *v.* Gough, 29 Kan. 94; Kucheman *v.* Chicago, C. & D. R. Co., 46 Iowa 366; Baltimore, etc., R. Co. *v.* Lansing, 52 Ind. 229; Peoria, etc., R. Co. *v.* Sawyer, 71 Ill. 361.

[1] Little Rock, etc., R. Co. *v.* Allen, 41 Ark. 431; Grand Rapids, etc., R. Co. *v.* Heisel, 47 Mich. 393; Petition of Mount Washington Road Co., 35 N. H. 134; Pittsburgh, etc., R. Co. *v.* Bentley, 88 Pa. St. 178; Pennsylvania, etc., R. Co. *v.* Bunnell, 81 Pa. St. 414; East Brandywine, etc., R. Co. *v.* Ranck, 78 Pa. St. 454; Hornstein *v.* Atlantic, etc., R. Co., 51 Pa. St. 87; Harvey *v.* Lackawanna, etc., R. Co., 47 Pa. St. 428; Searle *v.* Lackawanna, etc., R. Co., 33 Pa. St. 57; Baltimore, etc., R. Co. *v.* Lansing, 52 Ind. 229; Grand Rapids, etc., R. Co. *v.* Horn, 41 Ind. 479; White Water Valley R. Co. *v.* McClure, 29 Ind. 536; Chicago, etc., R. Co. *v.* Hall, 90 Ill. 42; Wilson *v.* Rockford, etc., R. Co., 59 Ill. 273; Presbrey *v.* Old Colony, etc., R. Co., 103 Mass. 1; Meacham *v.* Fitchburg, R. Co., 4 Cush. (Mass.) 291, 299; Brooks *v.* Davenport, etc., R. Co., 37 Iowa 99; Fleming *v.* Chicago, etc., R. Co., 34 Iowa 353; Sater *v.* Burlington, etc., R. Co., 1 Iowa 386; Robb *v.* Maysville, etc., R. Co., 3 Met. (Ky.) 117; Henderson, etc., R. Co. *v.* Dickerson, 17 B. Mon. (Ky.) 173; Quincy, etc., R. Co. *v.* Ridge, 57 Mo. 599; Powers *v.* Hazelton, etc., R. Co., 33 Ohio St. 429; Cincinnati, etc., R. Co. *v.* Longworth, 30 Ohio St. 108; Scott *v.* St. Paul, etc., R. Co., 21 Minn. 322; Lake Superior, etc., R. Co. *v.* Greve, 17 Minn. 322; Winona, etc., R. Co. *v.* Waldron, 11 Minn. 515; Charleston, etc., R. Co. *v.* Blake, 12 Rich. L. (S. Car.) 634; Greenville, etc., R. Co. *v.* Partlow, 5 Rich. L. (S. Car.) 428; Bangor, etc., R. Co. *v.* McComb, 60 Me. 290; Atchison, etc., R. Co. *v.* Blackshire, 10 Kan. 477; Woodfolk *v.* Nashville, etc., R. Co., 2 Swan (Tenn.) 422; Imlay *v.* Union Branch R. Co., 26 Conn. 249; Driver *v.* Western Union R. Co., 32 Wis. 569; Robbins *v.* Milwaukee, etc., R. Co., 6 Wis. 636; *In re* Poughkeepsie, etc., R. Co., 63 Barb. (N. Y.) 151; Troy, etc., R. Co. *v.* Lee, 13 Barb. (N. Y.) 169; *In re* Prospect, etc., R. Co., 13 Hun. (N. Y.) 345, 16 Hun 261; Henderson *v.* New York Central R. Co,, 78 N. Y. 423, 17 Hun 344. "What was the fair market value of the whole property, and then what would be the fair marketable value of the property not taken? The difference would be the true amount of compensation to be awarded." Canandaigua, etc., R. Co. *v.* Payne, 16 Barb. (N. Y.) 273; Pittsburgh, etc., R. Co. *v.* Rose, 74 Pa. St. St. 362; Delaware, etc., R. Co. *v.* Burson, 61 Pa. St. 369; Chicago, etc., R. Co. *v.* Francis, 70 Ill. 238. The fact that the land-owner obtained a rever-

to be the sound general doctrine.[1] By the market value, as the cases generally hold, is meant the price for which the property could be sold, not at a forced sale, but at a sale conducted by the owner with due regard to his own interest.[2] The estimate which the owner puts upon his property, so far as it is influenced by a fondness for the particular premises, is not to be taken as the true measure of damages.[3] The inquiry is as to the fair market value at a sale made in ordinary course of business, taking into consideration advantages of location and like circumstances. The necessity of the company is not to be considered as enhancing the value of the land,[4] nor, on the other hand, can the value be ascertained by considering what the property would bring at a forced sale. In arriving at the probable difference between the market value of the property

sion in the property taken does not lessen the amount of his damages, but they must be assessed by reference to the full market value of the property. Hollingsworth *v.* Des Moines, etc., R. Co., 63 Iowa 443.

[1] See New Orleans, etc., R. Co. *v.* Lagarde, 10 La. Ann. 150; Carli *v.* Stillwater, etc., R. Co., 16 Minn. 260; Elizabethtown, etc., R. Co. *v.* Helm, 8 Bush. (Ky.) 681; Sater *v.* Burlington, etc., Plank R. Co., 1 Iowa 386.

[2] Little Rock, etc., R. Co. *v.* McGehee, 41 Ark. 202; Low *v.* Concord R. Co., 63 N. H. 557; Dupuis *v.* Chicago, etc., R. Co., 115 Ill 97; Everett *v.* Union Pacific R. Co., 59 Iowa 243; Virginia, etc., R. Co. *v.* Elliott, 5 Nev. 358; Somerville, etc., R. Co. *v.* Doughty, 22 N. J. L. 495; Searle *v.* Lackawanna, etc., R. Co., 33 Pa. St. 57; Elizabethtown, etc., R. Co. *v.* Helm, 8 Bush. (Ky.) 681; Woodfolk *v.* Nashville, etc., R. Co., 2 Swan (Tenn.) 422; Giesy *v.* Cincinnati, etc., R. Co., 4 Ohio St. 308, 331; Tufts *v.* Charlestown, 4 Gray (Mass.) 537. The price which the owner gave may be put in evidence, and the owner may show under what circumstances he purchased it, and the value of the improvements he put upon it. Swan *v.* County of Middlesex, 101 Mass. 177. Where the land has been fitted by the owner for use in connection with other property, and has no market value apart from such use, its value must be determined by the uses to which it is applied. Lake Shore, etc., R. Co. *v.* Chicago, etc., R. Co., 100 Ill. 21; Chicago, etc., R. Co. *v.* Jacobs, 110 Ill. 414; Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 112 Ill. 589.

[3] Matter of Furman Street, 17 Wend. (N. Y.) 649. But in Robb *v.* Maysville, etc., 3 Met. (Ky.) 117, the peculiar value of the land to the owner was taken as the measure of damages.

[4] Virginia, etc., R. Co. *v.* Elliott, 5 Nev. 358; Henderson, etc., R. Co. *v.* Dickerson, 17 B. Mon. (Ky.) 173; Henry *v.* Dubuque, etc., R. Co., 2 Iowa 288; Union Depot St. R., etc., Co. *v.* Brunswick, 31 Minn. 297.

before and after the construction of the railroad or other public work, the influence upon that value exercised by different causes is a proper subject for consideration by the jury. But neither annoyances of a kind which affect the whole public,[1] nor benefits that are shared by the community in general,[2] can be proven as affecting the question of damages. So, a mere general and public benefit or increase of value received by the plaintiff's land, in common with other lands in the neighborhood, is not to be taken into consideration.[3] Where the personal property is destroyed by the taking of land for a railroad right of way, its value is a proper element of damage. This rule is applied in cases where growing crops are destroyed in building the road,[4] and where the rights of a lessee of land are condemned.[5] There are cases holding that where the railroad has been actually constructed at the time the assessment is made, the jury in assessing damages may take into consideration the manner in which it was actually built[6] and may, where such right exists, consider the right of the company to change its grade and manner of construction without making additional compensation.[7] Some of the cases hold that where no part of

[1] Gulf, etc., R. Co. *v.* Fuller, 63 Tex. 467; Chicago, etc., R. Co. *v.* Ritter, (Tex. 1883), 10 Am. & Eng. R. Cas. 202; Ham *v.* Wisconsin, etc., R. Co., 61 Iowa 716; St. Louis, etc., R. Co. *v.* Haller, 82 Ill. 208; First Parish *v.* County of Middlesex, 73 Mass. (7 Gray), 106; Presbrey *v.* Old Colony, etc., R. Co., 103 Mass. 1; Walker *v.* Old Colony, etc., R. Co., 103 Mass. 10. See Hatch *v.* Vermont Central R. Co., 28 Vt. 142; Lansing *v.* Smith, 8 Cow. (N. Y.) 151.

[2] Chicago, etc., R. Co. *v.* Hall, 90 Ill. 42; Keithsburg, etc., R. Co. *v.* Henry, 79 Ill. 290; St. Louis, etc., R. Co. *v.* Richardson, 45 Mo. 466; Tobie *v.* Comrs. of Brown Co., 20 Kan. 14; Winona, etc., R. Co. *v.* Waldron, 11 Minn. 515; Putnam *v.* Douglas Co., 6 Ore. 328; Sexton *v.* North Bridgewater, 116 Mass. 200.

[3] Page *v.* Chicago, etc., R. Co., 70 Ill. 324; Mix *v.* Lafayette, etc., R. Co., 67 Ill. 319; Adden *v.* White Mountains, R. Co., 55 N. H. 413; Bangor, etc., R. Co. *v.* McComb, 60 Me. 290.

[4] Lance *v.* Chicago, etc., R. Co., 57 Iowa 636.

[5] Booker *v.* Venice, etc., R. Co., 101 Ill. 333.

[6] Thompson *v.* Milwaukee, etc., R. Co., 27 Wis. 93; Cummins *v.* Des Moines, etc., R. Co., 63 Iowa 397; Union Railroad, etc., Co. *v.* Moore, 80 Ind. 458. See Hayes *v.* Ottawa, etc., R. Co., 54 Ill. 373.

[7] March *v.* Portsmouth, etc., R. Co., 19 N. H. 372. But it seems to us that some of the cases go entirely too far, at all events the doctrine is to be carefully limited and cautiously applied. It is doubtless true that the right to make ordinary changes should be

the plaintiff's land is taken, he is not entitled to damages for annoyance caused by throwing smoke, dust and soot upon his premises, unless some peculiar constitutional or statutory provision gives damages for such injuries.[1] But it is doubtful whether the doctrine of these cases can be reconciled with that declared by the later decisions.[2]

§ 996. **Matters to be considered in estimating damages—Illustrative Instances.**—If the construction of private or farm crossings is made necessary, the probable cost of making them must be considered by the jury in assessing damages,[3] unless the road is bound to build and maintain such crossings, in which case that fact must be considered.[4] Where the construction of the road makes necessary the removal of buildings,[5] or the erection of structures of any kind in order that the property not taken may be restored to a condition for use, the cost of such removals or erections may be considered by the jury in assessing damages.[6] But a reasonable expense only can be

taken into consideration as well as the ordinary inconveniences resulting from the operation of the railroad in a reasonably careful mode.

[1] Hatch *v.* Vermont Central R. Co., 25 Vt. 49; Cogswell *v.* New York, etc., R. Co., 48 N. Y. Super. Ct. 31, reversed 103 N. Y. 10; Walker *v.* Old Colony, etc., R. Co., 103 Mass. 10; Dimmick *v.* Council Bluffs, etc., R. Co., 62 Iowa 409.

[2] *Ante*, § 978; Chicago, etc., R. Co. *v.* Leah, 152 Ill. 249, s. c. 38 N. E. R. 556; Matter of Seaside El. R. Co., 83 Hun 143; Ft. Worth, etc., Co. *v.* Daniels (Tex. Civ. App.), 29 S. W. R. 695; Springer *v.* City of Chicago, 135 Ill. 552, s. c. 26 N. E. R. 514; Lake Erie, etc., Railroad Co. *v.* Scott, 132 Ill. 429, s. c. 24 N. E. R. 78.

[3] Cedar Rapids, etc., R. Co. *v.* Raymond, 37 Minn. 204; Atchison, etc., R. Co. *v.* Gough, 29 Kan. 94. See, also, cases cited in notes to preceding section.

[4] Kansas City, etc., R. Co. *v.* Kregelo, 32 Kan. 608. Under the Minnesota statute, the land-owner has no right to private crossings except as reserved and defined by the condemnation proceedings, and the assessment should be made accordingly. Cedar Rapids, etc., R. Co. *v.* Raymond, 37 Minn. 204.

[5] Oregon, etc., R. Co. *v.* Barlow, 3 Ore. 311. The jury may take the cost of removing an obstruction to the enjoyment of his property as the basis for calculating his damages. Chicago, etc., R. Co. *v.* Carey, 90 Ill. 514. Interference with access to rooms through a hall which was torn down in the construction of the road, was held such a damage as to lessen their rental value and entitle the lessees to compensation. Ford *v.* Metropolitan, etc., R. Co., L. R. 17 Q. B. Div. 12, 25 Am. & Eng. R. Cas. 182.

[6] Easterbrook *v.* Erie R. Co., 51 Barb. (N. Y.) 95; St. Louis, etc. R. Co. *v.*

incurred for this cause, and the owner will not be permitted to collect as damages the cost of improvements by which his property is rendered more valuable than it was before any part of it was taken. So, where the construction of the road compels the land-owner to build additional fences, their cost is a proper element of damages, for which compensation must be made,[1] except where the duty of building such fences is by law imposed upon the railroad company.[2] But it is held that the

Mollet, 59 Ill. 235; Commonwealth *v.* Boston, etc., R. Co., 3 Cush. (Mass.) 25; Presbrey *v.* Old Colony, etc., R. Co., 103 Mass. 1; Chase *v.* Worcester, 108 Mass. 60; Bemis *v.* Springfield, 122 Mass. 110; Price *v.* Milwaukee, etc., R. Co., 27 Wis. 98. In Terre Haute, etc., R. Co. *v.* Crawford, 100 Ind. 550, the court approved an instruction by which the jury were permitted to consider the cost of filling the remaining land from two to five feet, the entire length of the line appropriated, as an element of his damages.

[1] Raleigh, etc., R. Co. *v.* Wicker, 74 N. Car. 220; St. Louis, etc., R. Co. *v.* Anderson, 39 Ark. 167; Leavenworth, etc., R. Co. *v.* Paul, 28 Kan. 816; Sacramento, etc., R. Co. *v.* Moffatt, 6 Cal. 74; California, etc., R. Co. *v.* Southern Pac. R. Co., 67 Cal. 59; Winona, etc., R. Co. *v.* Waldron, 11 Minn. 515; New York, etc., R. Co. *v.* Stanley, 35 N. J. Eq. 283; Pennsylvania, etc., R. Co. *v.* Bunnell, 81 Pa. St. 414; Vandegrift *v.* Delaware, etc., R. Co., 2 Houst. (Del.) 287; Crowell *v.* New Orleans, etc., R. Co., 61 Miss. 631; St. Louis, etc., R. Co. *v.* Mitchell, 47 Ill. 165; St. Louis, etc., R. Co. *v.* Kirby, 104 Ill. 345; Greenville, etc., R. Co. *v.* Partlow, 5 Rich. (S. Car.) Law 428. *In re* Rensselaer, etc., R. Co., 4 Paige (N. Y.) Ch. 553. Where damages were assessed for the cost of fencing along the right of way, it was held that the land-owner, his heirs and assigns became legally bound to maintain fences. St. Louis, etc., R. Co. *v.* Mitchell, 47 Ill. 165. In Northeastern R. Co. *v.* Sineath, 8 Rich. (S. Car.) Law 185, it was held that where the road passed through uncleared and uncultivated land, for which no fences would be required, that no damages for the increased cost of fencing could be awarded. But it would seem that the jury should have considered the increased cost of adapting the land to cultivation (including the construction of fences) as an element of damages. See Raleigh, etc., R. Co. *v.* Wicker, 74 N. Car. 220; Montgomery Gravel Road Co. *v.* Stockton, 43 Ind. 328.

[2] Winona, etc., R. Co. *v.* Waldron, 11 Minn. 515. Where the company was held bound to maintain one-half of the fence, it was held that the cost of the other half, which would fall on the land-owner, was properly included in the assessment of damages. *In re* Rensselaer, etc., R. Co., 4 Paige (N. Y.) 553; Henry *v.* Dubuque, etc., R. Co., 2 Iowa 288, 305. In Baltimore, etc., R. Co. *v.* Lansing, 52 Ind. 229, the court approved the following instruction given by the court below: "You may also consider as damages any additional amount of fencing necessary to a safe and proper use of the defendant's improved farm, or fields already enclosed, as the law does not impose on the company any

expense of fencing should only be considered to the extent that it depreciates the market value of the remaining land.[1] Any interference with the flow of water upon or across the land is an element of damages where the farm is thereby depreciated in value.[2] Some of the courts hold that damages to adjoining property from the vibrations occasioned by passing trains,[3] and from the annoyance due to the noise and confusion which they occasion[4] may be recovered by the property-

obligation to fence their right of way, except so far as they may choose to do so for the protection of their own interests, the law simply imposing on them the obligation to pay for animals killed by them on their track, where it is not, but might be, securely fenced." The decisions on this point vary greatly with the fence laws of the several states. Where the company is only required to fence within six months, the jury may consider the consequences of keeping the land thrown open that long. St. Louis, etc., R. Co. *v.* Kirby, 104 Ill. 345. In Raleigh, etc., R. Co. *v.* Wicker, 74 N. Car. 220, the court held that the cost of fencing uncleared and uncultivated land, which the law did not require the owner to fence, could not be included in the damages awarded, basing its opinion partly upon the fact that the legislature had not deemed it necessary to require railroads to fence their roads, and that the assessment of damages for fences where none were required by law, and none would, in all probability, be built, would impose upon them the burden which the legislature had failed to impose without securing the benefits arising from requiring the road to be fenced.

[1] Pennsylvania, etc., R. Co. *v.* Bunnell, 81 Pa. St. 414; Delaware, etc., R. Co. *v.* Burson, 61 Pa. St. 369. Where the law requires a railroad to erect and maintain suitable cattle guards and wing fences at the points of entrance upon land through which it has obtained a right of way, the landowner may recover the value of crops destroyed by reason of its neglect to perform this duty. Houston, etc., R. Co. *v.* Adams, 63 Tex. 200.

[2] Pflegar *v.* Hastings, etc., R. Co., 28 Minn. 510.

[3] *In re* New York Central, etc., R. Co., 15 Hun (N. Y.) 63; Henderson *v.* New York Central R. Co., 17 Hun (N. Y.) 344; Croft *v.* London, etc., R. Co., 113 Eng. C. L. (3 B. & S.) 435. *In re* Penny, 90 Eng. C. L. 660; Cohen *v.* City of Cleveland, 43 Ohio St. 190.

[4] Chicago, etc., R. Co. *v.* Nix, 137 Ill. 141; Mix *v.* Lafayette, etc., R. Co., 67 Ill. 319; White *v.* Charlotte, etc., R. Co., 6 Rich. (S. Car.) Law, 47; County of Blue Earth *v.* St. Paul, etc., R. Co., 28 Minn. 503; Gainesville, R. Co. *v.* Hall, 78 Tex. 169; Gulf, etc., R. Co. *v.* Eddins, 60 Tex. 656; Wilson *v.* Des Moines, etc., R. Co., 67 Iowa 509; Little Rock, etc., R. Co. *v.* Allen, 41 Ark. 431; Bangor, etc., R. Co. *v.* McComb, 60 Me. 290; Ode *v.* Manhattan, etc., R. Co., 56 Hun (N. Y.) 199; Duyckinck *v.* New York El. R. Co., 125 N. Y. 710. *Contra* New Orleans, etc., R. Co. *v.* Barton, 43 La. Ann. 171; Republican Valley, etc., R. Co. *v.* Linn, 15 Neb. 234; Hammersmith, etc., R. Co. *v.* Brand, L. R. 4 H. L. Cas. 171; City of Glasgow U. R. Co. *v.* Hunter, L. R. 2 H. L. Sc.

holder.[1] The increased danger from fire emitted from the locomotives,[2] the increased cost of insuring buildings and their con-

78. See St. Louis, etc., R. Co. *v.* Haller, 82 Ill. 208. The lawful construction and operation of a horse railway in the streets of a city does not entitle the owner of property which is damaged thereby to compensation unless special damage is alleged and shown; and for this purpose evidence is admissible to prove that the damage was caused by noise, smoke, dust and the like, but these must have resulted in actual damage, and not merely in annoyance or inconvenience. Campbell *v.* Metropolitan St. R. Co., 82 Ga. 320. Inconvenience of a permanent nature, such as rattle of train, noise of whistle, smoke, etc., are elements of damage. Bowen *v.* Atlantic, etc., R. Co., 17 S. Car. 574.

[1] But while injuries of this class are admitted as an element for consideration in estimating the depreciation in value of the residue of property, part of which has been taken, many authorities refuse to allow compensation therefor, when unaccompanied by any physical injury or taking. Bordentown, etc., Turnp. Co. *v.* Camden, etc., R. Co., 17 N. J. L., 314; Hammersmith, etc., R. Co. *v.* Brand, L. R. 4 H. L. 171, L. R. 2 Q. B. 223, L. R. 1 Q. B. 130; Duke of Buccleuch *v.* Metropolitan Board of Works, L. R. 5 Exch. 221. Under the Texas constitutional provision that "no person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made," one can recover for diminution in the value of his property arising from the noise, smoke, and vibration produced by the operation of a railroad near the property, though not along a public highway. Gainesville, H. & W. R. Co. *v.* Hall, 78 Tex. 169, 14 S. W. 259.

[2] Swinney *v.* Fort Wayne, etc., R. Co., 59 Ind. 205; Lafayette, etc., R. Co. *v.* Murdock, 68 Ind. 137; Adden *v.* White Mountains, etc., R. Co., 55 N. H. 413; St. Louis, etc., R. Co. *v.* Springfield, etc., R. Co., 96 Ill. 274; Wilmington, etc., R. Co. *v.* Stauffer, 60 Pa. St. 374; Oregon, etc., R. Co. *v.* Barlow, 3 Ore. 311; Colvill *v.* St. Paul, etc., R. Co., 19 Minn. 283; Kansas City, etc., R. Co. *v.* Kregelo, 32 Kan. 608; Pierce *v.* Worcester, etc., R. Co., 105 Mass. 199; *In re* Utica, etc., R. Co., 56 Barb. (N. Y.) 456. In *In re* Ontario, etc., R. Co. and Taylor, 6 Ont. Rep. 338, 17 Am. & Eng. R. Cas. 100, it was held that the greater liability to injury by fire by reason of the working of the railway, are too remote contingencies to be taken into consideration in estimating the value of the land taken where there are no buildings to be endangered. In Lance *v.* Chicago, etc., R. Co., 57 Iowa 636, the court held that it was error to admit evidence of the value of a grove through which the road was laid out, and of a dwelling-house standing on the opposite side of the grove, to which it was claimed that fire could run upon the dry leaves of the grove. The court said: "The compensation allowed for right of way should be direct and proximate, and not remote and contingent upon circumstances which may or may not transpire. * * * * It is plain that no estimate can be made in the way of compensation for the value of the property which may be destroyed by fire and without the fault of the railroad company. The most that can be claimed is that it is competent to take into consideration the risk of fire set out by the defendant without its

tents,[1] injuries to business carried on in the property taken,[2]

fault, and by reason of the operation of the road through the premises. But this risk or hazard or exposure of the property is an entirely different question from that involved in its destruction by fire without fault of the company. In the one case, while the risk may somewhat decrease the value of the property, and is a legitimate consideration for what it may be worth, in fixing the compensation to the owner, in the other case the destruction of buildings, groves, or the like, by fires, is a field of inquiry so remote and contingent as to be without and beyond any range of damages known to the law. Of course, it will be understood that we are treating of such risks and hazard from fire as result from the operation of the road in such a manner that if fire should escape there would be no liability against the railroad company. For its negligence it would be liable to the owner, and this element should not be taken into account in estimating the compensation." For other cases in which prospective damages from fires were held not a proper element for consideration by the jury see Wilmington, etc., R. Co. *v.* Stauffer, 60 Pa. St. 374; Patten *v.* Northern Central R. Co., 33 Pa. St. 426; Lehigh Valley R. Co. *v.* Lazarus, 28 Pa. St. 203; *In re* Union Village, etc., R. Co., 53 Barb. (N. Y.) 457; Rodemacher *v.* Milwaukee, etc., R. Co., 41 Iowa 297. Where the buildings on a tract of land are at such a distance that there is no real imminent danger from fire such danger can not be considered. Jones *v.* Chicago, etc., R. Co., 68 Ill. 380; Hatch *v.* Cincinnati, etc., R. Co., 18 Ohio St. 92; Proprietors of Locks and Canals *v.* Nashua, etc., R. Co., 10 Cush. (Mass.) 385. The fact that the railroad is responsible for all damages, whether resulting from negligence or not, may properly be taken into consideration by the jury in estimating the amount of compensation. Bangor, etc., R. Co. *v.* McComb, 60 Me. 290. But even where the railroad is so liable, depreciation in the value of property resulting from apprehension of fire is a proper element of damages. Keithsburg R. Co. *v.* Henry, 79 Ill. 290; Adden *v.* White Mountains R. Co., 55 N. H. 413; Pierce *v.* Worcester R. Co., 105 Mass. 199; Sommerville R. Co. *v.* Doughty, 22 N. J. L. 495; Bangor R. Co. *v.* McComb, 60 Me. 290.

[1] Wooster *v.* Sugar Run V. R. Co., 57 Wis. 311; Lafayette, etc., R. Co. *v.* Murdock, 68 Ind. 137; Webber *v.* Eastern R. Co., 2 Metc. (Mass.) 147.

[2] South Carolina R. Co. *v.* Steiner, 44 Ga. 546; Driver *v.* Western Union R. Co., 32 Wis. 569; St. Louis, etc., R. Co. *v.* Capps, 67 Ill. 607, 72 Ill. 188; Western Pennsylvania R. Co. *v.* Hill, 56 Pa. St. 460; Boston, etc., R. Co. *v.* Old Colony R. Co., 12 Cush. (Mass.) 605, s. c. 3 Allen 142; Edmands *v.* Boston, 108 Mass. 535; Lafayette, etc., R. Co. *v.* Murdock, 68 Ind. 137; Cameron *v.* Charing Cross R. Co., 16 C. B. N. S. 430; Wood *v.* Stourbridge R. Co., 16 C. B. N. S. 222. In Jacksonville, etc., R. Co. *v.* Walsh, 106 Ill. 253, the court said: "The purposes for which [the property] was used and designed, its location and advantages as to situation were proper matters of consideration by the jury; but the profits of the business of the past and conjectural profits for the future were too speculative and uncertain upon which to ascertain the market or cash value of the property."

and the decreased rental value of buildings,[1] occasioned by the construction of a railroad, have all been held proper subjects for compensation in damages. The use to which the land taken is to be put, as for the running of railway trains, with its probable effect upon the plaintiff's property, is also to be considered by the jury in assessing his damages.[2]

§ 997. Improvements made by company under unauthorized entry—Views of the authors.—Some of the courts carry the rule

Speculative opinions as to the amount of business that might be carried on in the property, and the probable profits therefrom have been held, in many cases, incompetent as evidence from which the jury could assess damages. *In re* Mount Washington Road Co., 35 N. H. 134; Cobb *v.* Boston, 109 Mass. 438; Eddings *v.* Seabrook, 12 Rich. L. (S. Car.) 504; Ricket *v.* Metropolitan R. Co., 5 Best & S. 149, 117 Eng. C. L. 149; Matter of Union Village, etc., R. Co., 53 Barb. 457. The rule is laid down by the Lord Chancellor in Metropolitan Board of Works *v.* McCarthy, L. R. 7 Eng. & I. App. Cas. 243, 253, as follows: "That where by the construction of works there is a physical interference with any right, public or private, which the owners or occupiers of property are by law entitled to make use of, in connection with such property, and which right gives an additional market value to such property, *apart from the uses to which any particular owner or occupier might put it*, there is a title to compensation, if, by reason of such interference, the property, as a property, is lessened in value." Evidence as to the amount of business that was or could be done upon the property taken, or of the profits gained from past business, or that could probably be made in the future is inadmissible. Jacksonville, etc., R. Co. *v.* Walsh, 106 Ill. 253. Under the constitution and laws of Kentucky, the jury may consider as an element of damage, the inconvenience and loss resulting to the owner of property condemned from being deprived of his home and established place of business. Covington, etc., R. Co. *v.* Piel, 87 Ky. 267. The increased cost of working a mine by tunnelling under the track is a proper element of damages. Midland R. Co. *v.* Miles, L. R. 30 Chan. Div. 634.

[1] Lafayette, etc., R. Co. *v.* Murdock, 68 Ind. 137. So, also, the loss of rents occasioned by the construction of the work. Henderson *v.* New York, etc., Cent. R. Co., 17 Hun 344, 78 N. Y. 423; Pittsburgh, etc., R. Co. *v.* Rose, 74 Pa. St. 362. The fact that the plaintiff continues to occupy the property is no defense to a claim for a decrease in its rental value due to the railroad. Scott *v.* Indianapolis, etc., R. Co. (Marion Sup. Ct. Ind.) 10 Am. & Eng. R. Cas. 189.

[2] Pacific R. Co. *v.* Chrystal, 25 Mo. 544; Cleveland, etc., R. Co. *v.* Ball, 5 Ohio St. 568; Kucheman *v.* Chicago, C. & D. R. Co., 46 Iowa 366; Bangor, etc., R. Co. *v.* McComb, 60 Me. 290; Atchison, etc., R. Co. *v.* Blackshire, 10 Kan. 477; Matter of Utica, etc., R. Co., 56 Barb. (N. Y.) 456. *Contra*, Matter of Prospect Park, etc., R. Co., 13 Hun (N. Y.) 345; Black River, etc., R. Co.

against railroad companies which enter on land without authority very far and vest in the land-owner all right and title to improvements made by the company. Some of the cases, as we believe, go entirely too far, for they lose sight altogether of the doctrine of estoppel, as well as the doctrine of leave and license. Where a company enters and makes improvements under claim and color of right, even though the claim be not well founded we think that the land-owner ought not to be allowed to recover the value of such improvements, but it may perhaps be otherwise where the entry is over the objection of the owner and is a mere naked trespass. In our judgment the value of such improvements should not be included in the computation of damages where the statute permits appropriation proceedings after entry and such proceedings are taken pursuant to the statute.

§ 998. **Improvements made by company under unauthorized entry—Illustrative cases.**—Where the company has entered upon land with the consent of the owner and constructed its road,[1] the value of rails, ties and the like can not be considered in estimating compensation in subsequent appropriation proceedings. And even where the entry of the company amounted to a technical trespass because of its failure to pursue with strictness the appropriate proceedings to condemn, if it has acted in good faith it can afterward proceed to condemn the land upon payment of its value, not including the value of improvements which it has made.[2] Where the railroad company

v. Barnard, 9 Hun (N. Y.) 104; Albany Northern R. Co. *v.* Lansing, 16 Barb. (N. Y.) 68.

[1] California Southern R. Co. *v.* Southern Pac. R. Co., 67 Cal. 59, s. c. 20 Am. & Eng. R. Cas. 309; California, etc., R. Co. *v.* Armstrong, 46 Cal. 85. See North Hudson County R. Co. *v.* Booraem, 28 N. J. Eq. 450; Mitchell *v.* Illinois, etc., R. Co., 85 Ill. 566; Emerson *v.* Western Union R. Co., 75 Ill. 176. The consent of one in possession of the land under voidable tax deeds is sufficient to relieve the railroad company of the character of a trespasser. Cohen *v.* St. Louis, etc., R. Co., 34 Kan. 158. The railroad company can enter and remove rails laid by it upon the land of another under a parol license. Northern Central R. Co. *v.* Canton Co., 30 Md. 347; Dietrich *v.* Murdock, 42 Mo. 279.

[2] Jones *v.* New Orleans, etc., R. Co., 70 Ala. 227; Hays *v.* Texas, etc., R. Co., 62 Tex. 397; Morgan *v.* Chicago, etc., R. Co., 39 Mich. 675; Cohen *v.*

entered under a void charter, so that it had no authority at all for the entry, it was held in a subsequent proceeding to condemn brought by the same company operating under a new charter, that the land-owner could only claim a fair, just, and equitable compensation for his land, and that justice and equity did not require that the value added to the land by the road-bed, ties, rails, and the like placed upon it by the company, should be included in the assessment.[1] This we think is the true doctrine.[2] It has been held, however, that if a railroad company enters upon the land of another without any color or claim of right or privilege whatever, and constructs a railroad track on such land, such railroad track becomes the property of the land-owner,[3] but some of the broad statements in the opinions

St. Louis, etc., R. Co., 34 Kan. 158; Toledo, etc., R. Co. *v.* Dunlap, 47 Mich. 456; Daniels *v.* Chicago, etc., R. Co., 41 Iowa 52; Lyon *v.* Green Bay, etc., R. Co., 42 Wis. 538. It has been held that a land-owner can recover damages, but such as were agreed upon when the railroad was built, although the license under which the road was constructed was given by parol. Buchanan *v.* Logansport, etc., R. Co., 71 Ind. 265. But on this point there is conflict of authority.

[1] Greve *v.* First Div. St. Paul, etc., R. Co., 26 Minn. 66.

[2] Toledo, etc., R. Co. *v.* Dunlap, 47 Mich. 456, s. c. 5 Am. & Eng. R. Cas. 378; Morgan's Appeal, 39 Mich. 675. In the Toledo, etc., Co. *v.* Dunlap, *supra*, Campbell, J., in delivering the opinion of the court, said: "The railroad company, whether rightfully or wrongfully, laid this track while in possession and for purposes entirely distinct from any use of the land as an isolated parcel. It would be absurd to apply to land so used, and to a railway track laid on it, the technical rules which apply in some other cases to structures inseparably attached to the freehold. Whatever rule might apply in case of abandonment, it is clear that this superstructure was never designed to be incorporated with the soil except for purposes attending the possession; and in a proceeding to obtain a legal and permanent right to occupy the land for this very purpose there would be no sense in compelling them to buy their own property. Whatever right of redress, if any, Dunlop may have for the tortious occupancy previous to these proceedings, or whatever right of property he might have in case the company abandoned the road entirely and left the track intrenched, we think that so long as it is in possession and legal measures are proceeding to secure a right to retain it there, this structure belongs to the company, whether intruders or not."

[3] Graham *v.* Connersville, etc., R. Co., 36 Ind. 463; *In re* Long Island R. Co., 6 T. & C. (N. Y.) 298; Hunt *v.* Missouri Pac. R. Co., 75 Mo. 252; Price *v.* Weehawken Ferry Co., 31 N. J. Eq. 31; Morin *v.* St. Paul, etc., R. Co., 30 Minn. 100; County of Blue Earth *v.* St. Paul, etc., R. Co., 28 Minn. 503; United States *v.* Land in Monterey County, 47 Cal. 515; Kim-

in the cases cited we regard as clearly wrong. It has also been held that where the state constitution requires that compensation shall precede the taking of private property, the entry upon lands by a railroad company without the consent of the land-owner, and without an assessment and tender of the damages, confers upon it no right whatever of which it may take advantage in a subsequent proceeding to condemn the land.[1] Of the opinion in the case cited we feel bound to say that in much of the reasoning there is manifest error. Other cases hold that where there is color or claim of right, the owner can recover damages only as of the date of the original taking or entry.[2] The presumption is that rails and similar structures placed by a railroad company upon land taken by it for a right of way are affixed to the land with a manifest intention to use them in the operation of the railroad, and hence, are not to be regarded as fixtures forming part of the real estate.[3] A land-owner who knows that a railroad company is constructing a railroad upon his land for its own use can not assume that the structures placed on it are for his benefit, but, on the contrary, the assumption should be that the company placed them there as its own. If the land-owner in such a case obtains the full value of his land in the condition it was in at the time of the entry, he secures all that he is entitled to receive. In one case a railroad company which had purchased a right of way one hundred feet wide across a tract of land, went upon the adjoining land and built a section house without the consent of the

ball *v.* Adams, 52 Wis. 554. It has been held that the railroad company can not enter to remove rails laid upon the land of another when it has failed to file a location and to make compensation as required by law. Meriam *v.* Brown, 128 Mass. 391.

[1] Graham *v.* Connersville, etc., R. Co., 36 Ind. 463, 468.

[2] Central Branch U. P. R. Co. *v.* Andrews, 26 Kan. 702; Cohen *v.* St. Louis, etc., R. Co., 34 Kan. 158.

[3] Northern Cent. R. Co. *v.* Canton Co., 30 Md. 347; Wagner *v.* Cleveland, etc., R. Co., 22 Ohio St. 563, s. c. 10 Am. R. 770; Hays *v.* Texas, etc., R. Co., 62 Tex. 397. The act of a railroad in entering upon land under irregular proceedings does not amount to a dedication by it to the land-owner of the property placed upon the land. Justice *v.* Nesquehoning Valley R. Co., 87 Pa. St. 28. But see Price *v.* Weehawken Ferry Co., 4 Stewart (N. J.) 31.

land-owner, and with knowledge that it was building outside the limits of its right of way. Afterward, the land-owner instituted an action to recover the land, whereupon the railroad company began proceedings to condemn, and the court held that the house, being capable of use in connection with the land upon which it stood, without being detached and converted into personalty, was not governed by the rule applying to ties and rails, but that it became a part of the freehold, and that the owner was entitled to have its value included in an assessment of his damages upon condemnation.[1]

§ 999. **Deviation from proposed line—Change of route.**—It is laid down in some of the cases that a railroad company is liable for injuries caused by a deviation from the line upon which it proposed to construct its road.[2] We do not believe that the mere fact that there is a deviation from the line proposed will entitle the property-owner to damages. We suppose, however, that if an assessment is made upon a designated line, which is afterwards substantially changed, and the change causes additional injury to the property-owner, he is entitled to compensation to the extent of the injury caused by the change. Where there is a radical and unusual change in the line of the road, and the change is of such a character as to inflict additional injury upon the property-owner, then, as we believe, the rule that damages are assessed once for all can not apply. But if the change is such as might have been reasonably contemplated at the time the assessment was made, or such

[1] Hendry *v.* Trinity & Sabine R. Co., (Tex.) 24 Am. & Eng. R. Cas. 286. In the case cited the court distinguished the case of Texas, etc., Co. *v.* Hays, 5 Texas Law R. 771, in which it was held that rails, ties and the like were not to be considered in estimating the land-owner's damages.

[2] Jacksonville, etc., R. Co. *v.* Kidder, 21 Ill. 131; Peoria, etc., R. Co. *v.* Birkett, 62 Ill. 332; Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 112 Ill. 589; Wabash, etc., R. Co. *v.* McDougall, 118 Ill. 229; Kansas City, etc., R. Co. *v.* Kregelo, 32 Kan. 608; Carpenter *v.* Easton, etc., R. Co., 24 N. J. Eq. 249, 408, 26 N. J. Eq. 168. See Hill *v.* Mohawk, etc., R. Co., 7 N. Y. 152. In Chicago, etc., Co. *v.* Henneberry, 153 Ill. 354, s. c. 38 N. E. R. 1043, it was held that where there is such a material alteration of the railroad as causes the lands of an adjoining owner to overflow he is entitled to damages.

as is ordinarily made by railroad companies, then, in our opinion, it is covered by the original award of compensation.[1]

§ 1000. Owner at time possession is taken is entitled to damages—Vendor and vendee.—The settled general rule is that where a railroad company has entered into actual possession of lands, the right to the damages vests in the person owning the land at the time possession is taken.[2] The right to the damages is a personal right vested in the vendor. As the right is a personal one, it is governed by the general doctrine that personal rights do not pass by a conveyance of the land, and hence the right of action remains in the vendor.[3] Under a code providing for the assignment of rights of action, the claim may be assigned.

§ 1001. Who is entitled to the compensation where the land is conveyed after appropriation proceedings are commenced—Vendor and vendee.—The rule supported by the great weight of authority is that the person who owns the property at the time possession is taken, or title vests in the railroad company, is entitled to the compensation.[4] But there is difficulty in the

[1] Perry *v.* Lehigh, etc., R. Co., 30 N. Y. Supp. 140, citing Dearborn *v.* Boston, etc., R. Co., 24 N. H. 179, 186; Hollins *v.* Demorest, 129 N. Y. 676, s. c. 29 N. E. R. 1093. See Atchison, etc., R. Co. *v.* Pratt, 53 Ill. App. 263; Pierce on Railroads, 216.

[2] Roberts *v.* Northern Pacific R. Co., 158 U. S. 1, s. c. 15 Sup. Ct. R. 756; Indiana, etc., R. Co. *v.* Allen, 100 Ind. 409; Church *v.* Grand Rapids, etc., R. Co., 70 Ind. 161; Walton *v.* Green Bay, etc., R. Co., 70 Wis. 414; McFadden *v.* Johnson, 72 Pa. St. 335; Warrell *v.* Wheeling, etc., R. Co., 130 Pa. St. 600; King *v.* Mayor, etc., of New York, 102 N. Y. 171; McLendon *v.* Atlanta, etc., R. Co., 54 Ga. 293; Hentz *v.* Long Island, etc., R. Co., 13 Barb. 646; Drury *v.* Midland R. Co., 127 Mass. 571; Wood *v.* Commissioners, 122 Mass. 394; Hilton *v.* St. Louis, 99 Mo. 199; Dunlap *v.* Toledo, etc., R. Co., 46 Mich. 190, 50 Mich. 470; Milwaukee, etc., R. Co. *v.* Strange, 63 Wis. 178; Smith *v.* Railway Co., 88 Tenn. 611. We are not at this place referring to the rights of tenants, mortgagees, lienholders and the like, but only to the rights of vendors and vendees.

[3] Schuylkill Navigation Co. *v.* Decker, 2 Watts 343; McFadden *v.* Johnson, 72 Pa. St. 334; Sargent *v.* Machias, 65 Me. 591; Pierce on Railroads, 185. See Bridgman *v.* St. Johnsbery, etc., R. Co., 58 Vt. 198; Inge *v.* Police Jury, 14 La. Ann. 117; Wood *v.* Commissioners, 122 Mass. 394; Harshbarger *v.* Midland R. Co., 131 Ind. 177, 180.

[4] Rice *v.* City of Chicago, 57 Ill. App. 558; Magee *v.* City of Brooklyn, 144 N. Y. 265, s. c. 39 N. E. R. 87;

practical application of the rule. If a railroad company begins proceedings against all whom the record shows to have any title to, interest or estate in the land sought to be appropriated, it seems to us that those who acquire rights subsequently by purchase or otherwise, should be held to take notice of the proceedings, and that if the compensation is, in good faith, paid to the persons who appeared of record to be entitled thereto at the time the proceedings were commenced, the railroad company must be regarded as having done its duty and can not be made liable to one who acquires rights subsequent to the commencement of the appropriation proceedings. We do not doubt that the owner at the time the right to compensation accrues may obtain it by an intervening petition or other appropriate procedure, but we do doubt the correctness of the doctrine of some of the cases that the railroad company is bound to examine the record to ascertain what persons acquire interest after the appropriation proceedings are commenced. The rule, as laid down in many cases, is that it is sufficient to make parties those shown by the record or by possession to have an interest in the land,[1] and a necessary sequence is that the railroad com-

Kiebler *v.* Holmes, 58 Mo. App. 119; Meginnis *v.* Nunamaker, 64 Pa. St. 374; Carli *v.* Stillwater, etc., R. Co., 16 Minn. 260; Bean *v.* Warner, 38 N. H. 247; Curran *v.* Shattuck, 24 Cal. 427. See Lawrence's Appeal, 78 Pa. St. 365; Davis *v.* Titusville, etc., R. Co., 114 Pa. St. 308; McIntyre *v.* Easton, etc., R. Co., 26 N. J. Eq. 425; Kuhn *v.* Freeman, 15 Kan. 423; Stevenson *v.* Loehr, 57 Ill. 509; Pinkerton *v.* Boston, etc., R. Co., 109 Mass. 527; Stokes *v.* Parker, 53 N. J. L. 183; Clarke *v.* Cleveland, 9 Ohio C. C. 118; Chicago, etc., R. Co. *v.* Metropolitan, etc., R. Co., 152 Ill. 519, s. c. 38 N. E. R. 736; Kohn *v.* Manhattan, etc., R. Co., 31 N. Y. S. 859. The rule asserted by the New York cases is held not to apply where the grantor reserves a right to the damages. Kingsland *v.* Kings County, etc., R. Co., 31 N. Y. Supp. 582. But see Kernochan *v.* New York, etc., R. Co., 128 N. Y. 559, s. c. 29 N. E. R. 65; Pappenheim *v.* Metropolitan, etc., Railroad, 128 N. Y. 463, s. c. 28 N. E. R. 518; Pegram *v.* New York, etc., R. Co., 147 N. Y. 135, s. c. 41 N. E. R. 424. As to right of remainder man to intervene in proceedings against life tenant, see Jones *v.* Asheville, 116 N. Car. 817, s. c. 21 S. E. R. 691. See, generally, Frey *v.* Duluth, etc., R. Co., 91 Wis. 309, s. c. 64 N. W. R. 1038. In a case where a road was projected but abandoned and afterwards revived, it was held that one who obtained title under a sale on a judgment, was entitled to receive the compensation awarded upon the revival of the enterprise. Jones *v.* Miller, (Va.), s. c. 23 S. E. R. 35.

[1] Bell *v.* Cox, 122 Ind. 153, s. c. 23 N. E. R. 705; Stewart *v.* White, 98

pany may safely pay such persons the compensation unless it has actual notice that they are not entitled to receive it.

§ 1002. Notice to purchaser by existence of railroad.—One who purchases land after the construction of the railroad must take notice of the rights of the company as shown by the occupancy of the land and the construction of the road.[1] Such a purchaser does not obtain a title superior to that of the railroad company. He may, however, maintain an action for damages, caused by a substantial change in the construction of the road which was not contemplated in the original grant of a right of way or award of compensation.[2]

§ 1003. To whom compensation should be paid.—In considering at another place the question who should be made parties to condemnation proceedings we have discussed the question as to who is entitled to receive the compensation or damages for property appropriated under the right of eminent domain.[3] At this place we shall very briefly consider the general question and direct attention to some of the authorities. It may be said generally that compensation must be paid to the persons owning estates or interests in the property. Different interests may be held by different persons, but all must be compensated according to their respective interests or estates. It has been held that damages for land held by a trustee will belong to the *cestui que trust*,[4] and while this is true, we sup-

Mo. 226, s. c. 11 S. W. R. 568; Brown *v.* County Commissioners, 12 Metcf. 208; Pickford *v.* Mayor of Lynn, 98 Mass. 491; Drury *v.* Midland R. Co., 127 Mass. 571; King *v.* Mayor, etc., of New York, 102 N. Y. 171; Plumer *v.* Wausau, etc., Co., 49 Wis. 449. See Cool *v.* Crommet, 13 Me. 250; Lawrence *v.* Nahant, 136 Mass. 477; Birge *v.* Chicago, etc., R. Co., 65 Iowa 440; Chambers *v.* Carteret, etc., Co., 54 N. J. Law 85; Gilligan *v.* Providence, 11 R. I. 258; Board of Levee Com. *v.* Johnson, 66 Miss. 248. Elliott on Roads and Streets, 236.

[1] Paul *v.* Connersville, etc., R. Co., 51 Ind. 527; Indiana, etc., R. Co. *v.* McBroom, 114 Ind. 198; Jeffersonville, etc., R. Co. *v.* Oyler, 60 Ind. 383; Chicago, etc., R. Co. *v.* Henneberry, 153 Ill. 354, s. c. 38 N. E. R. 1043; Railroad Co. *v.* Morgan, 72 Ill. 155. *Ante*, § 949.

[2] Chicago, etc., R. Co. *v.* Henneberry, 153 Ill. 354, s. c. 38 N. E. R. 1043.

[3] *Post*, § 1025; see *ante*, §§ 1000, 1001.

[4] Whitney *v.* Milwaukee, 57 Wis. 639.

pose that ordinarily the trustee would be entitled to receive and hold the money for the purposes of the trust, and that if the trustee were made a party to the proceedings the beneficiary would be bound.[1] It is held that where lands subject to a life estate are condemned the life tenant is entitled to the use of the damages during his tenancy.[2] If the land is in the possession of a tenant from year to year, he should receive the value of his crops, while the owner of the fee should have damages for injuries to the land.[3] A mortgagee of the land taken is entitled to have the damages applied in payment of his debt,[4] and where he is not made a party he may maintain a bill in equity for that purpose.[5] Where land that had been duly condemned and paid for by a railroad company which had never taken possession of it was afterward condemned by a second company, it was held that the first damages should be paid to the first company and not to the original owner.[6] The court may compel rival claimants of the award to establish their respective rights by an appropriate action.[7]

[1] The general rule is that beneficiaries are bound by a judgment or decree against the trustee. Kerrison *v.* Stewart, 93 U. S. 155; Vatterlein *v.* Barnes, 124 U. S. 169; Shaw *v.* Norfolk, etc., Co., 5 Gray 162; Campbell *v.* Railroad Co., 1 Woods 368; Rogers *v.* Rogers, 3 Paige 379; Winslow *v.* Minnesota, etc., R. Co., 4 Minn. 313; Campbell *v.* Watson, 8 Ohio 498; Robertson *v.* Van Cleave, 129 Ind. 217, 220.

[2] Kansas City, etc., R. Co. *v.* Weaver, 86 Mo. 473. In Colcough *v.* Nashville, etc., R. Co., 2 Head. (Tenn.) 171, it was held that the damages should be distributed according to the respective values of the different estates.

[3] Rooney *v.* Sacramento Valley R. Co., 6 Cal. 638.

[4] If the mortgagee is not given an opportunity to assert his rights, the better opinion is that he may proceed to foreclose against the land as if it had never been condemned, in case the remainder of the land proves insufficient to satisfy the mortgage debt. Adams *v.* St. Johnsbury, etc., R. Co., 57 Vt. 240; Dodge *v.* Omaha, etc., R. Co., 20 Neb. 276; Kennedy *v.* Milwaukee, etc., R. Co., 22 Wis. 581; North Hudson R. Co. *v.* Rooraem, 28 N. J. Eq. 450; Severin *v.* Cole, 38 Iowa 463.

[5] Platt *v.* Bright, 29 N. J. Eq. 128; Wood *v.* Westborough, 140 Mass. 403.

[6] Dubuque, etc., R. Co. *v.* Diehl, 64 Iowa 635.

[7] Gerrard *v.* Omaha, etc., R. Co., 14 Neb. 270; Metropolitan Board of Works *v.* Sant, 38 L. J. Ch. 7. It has been held that where the mortgagee was not a party, the corporation might pay the damages into court and apply to have the rights of the parties adjusted so that it should not have to pay twice. Wooster *v.* Sugar River V. R. Co., 57 Wis. 311.

§ 1004. **Effect of assessment of damages.**—The general rule is that the assessment of damages in appropriation proceedings is presumed to include all injuries resulting from the particular appropriation. The corporation acquires the right to construct its road in a suitable and proper manner for its own convenience and the accommodation of the public. And no action can be maintained by the owner either then or at any future time, for damages resulting from the proper construction and maintainance of the road across his land.[1] The assessment is often said "to be made once for all." The future necessities as well as the present needs of the company are conclusively presumed to have been taken into consideration, and the award of the appraisers is a bar to an action for damages for any use of the right of way which the future needs of the corporation may require.[2] The fact that the injuries were unforeseen,[3] or that, owing to the lack of any definite plan of construction on the part of the railroad, it was impossible to know at the time the damages were assessed what damages would be done in making cuts and fills, and constructing

[1] Dearborn *v.* Boston, etc., R. Co., 24 N. H. 179; Perley *v.* Boston, etc., R. Co., 57 N. H. 212; Pittsburgh, etc., R. Co. *v.* Gilleland, 56 Pa. St. 445; Tucker *v.* Erie, etc., R. Co,, 27 Pa. St. 281; Van Schoick *v.* Delaware, etc., Canal Co., 20 N. J. Law 249; McCormick *v.* Kansas City, etc., R. Co., 57 Mo. 433; Bailey *v.* Woburn, 126 Mass. 416; Fowle *v.* New Haven, etc., R. Co., 112 Mass. 334; Furniss *v.* Hudson River R. Co., 5 Sandf. 551; Elizabethtown, etc., R. Co. *v.* Combs, 10 Bush. (Ky.) 382; Chesapeake, etc., Canal Co. *v.* Grove, 11 G. & J. (Md.) 398; Porter *v.* Midland R. Co., 125 Ind. 476; White *v.* Chicago, etc., R. Co., 122 Ind. 317.

[2] White *v.* Chicago, etc., R. Co., 122 Ind. 317; Chicago, etc., R. Co. *v.* Smith, 111 Ill. 363. Where a change of location is made under authority of the legislature, the land-owner may recover damages for the alteration, if any actual damage or injury has been sustained thereby to the extent of such additional injury and no more. Baltimore, etc., R. Co. *v.* Compton, 2 Gill (Md.) 20. A land-owner who has accepted the damages awarded to him upon condemnation and confirmed on appeal, is estopped to dispute the company's right to occupy the lands for any use authorized by the company's charter. Dodge *v.* Burns, 6 Wis. 514.

[3] Aldrich *v.* Cheshire, etc., R. Co., 21 N. H. 359. In this case, a spring which supplied the owner's buildings with water was drained by an excavation made in constructing the road, and he was denied any additional compensation, although in the assessment of damages, the probability of destroying the spring had not been considered.

bridges,[1] does not alter the rule. The jury are conclusively presumed to have assessed the damages for every injury that they could legally include in their assessment.[2] If an item of damages was erroneously omitted by the commissioners or jury in making the assessment of damages, or if they proceeded upon erroneous principles, the remedy is by appeal or by proceedings to review, and not by an independent suit.[3]

[1] Lewis' Em. Dom., § 566. Where the agents of the company represented to the commissioners making the appraisement that the road would be constructed in a particular manner, thereby reducing the appraisement below what it would otherwise have been, and the company constructed the road by a different plan which caused much greater damage to the landowner, it was held that he could not maintain an independent action for constructing the railroad contrary to the representations upon which the award was based, but that, so long as the award was not set aside by appeal or by proceedings to review, it was binding to all present or future damages growing out of the construction of the road in any careful and proper manner. Butman *v.* Vermont Central R. Co., 27 Vt. 500.

[2] Porter *v.* Midland R. Co., 125 Ind. 476; White *v.* Chicago, etc., R. Co., 122 Ind. 317; Lafayette, etc., R. Co. *v.* New Albany, etc., R. Co., 13 Ind. 90; Lafayette, etc., R. Co. *v.* Smith, 6 Ind. 249; Mellen *v.* Western R. Co., 4 Gray (Mass.) 301; Stevens *v.* Proprietors of Middlesex Canal, 12 Mass. 466; Aldrich *v.* Cheshire R. Co., 21 N. H. 359; Dearborn *v.* Boston, etc., R. Co., 24 N. H. 179; Perley *v.* Boston, etc., R. Co., 57 N. H. 212; Baltimore, etc., R. Co. *v.* Magruder, 34 Md. 79; Chesapeake, etc., Canal Co. *v.* Grove, 11 G. & J. (Md.) 398; Mason *v.* Kennebec, etc., R. Co., 31 Me. 215; Boothby *v.* Androscoggin, etc., R. Co., 51 Me. 318; Sabin *v.* Vermont Cent. R. Co., 25 Vt. 363; Vermont Cent. R. Co. *v.* Baxter, 22 Vt. 365; Selden *v.* Delaware, etc., Canal Co., 29 N. Y. 634; Furniss *v.* Hudson River R. Co., 5 Sandf. (N. Y.) 551; Fehr *v.* Schuylkill Nav. Co., 69 Pa. St. 161; Cumberland Valley R. Co. *v.* McLanahan, 59 Pa. St. 23; Philadelphia, etc., R. Co. *v.* Williams, 54 Pa. St. 103; Pettibone *v.* La Crosse, etc., R. Co., 14 Wis. 443; Sherman *v.* Milwaukee, etc., R. Co., 40 Wis. 645; Lindell *v.* Hannibal, etc., R. Co., 36 Mo. 543; Clark *v.* Hannibal, etc., R. Co., 36 Mo. 202; Brown *v.* Beatty, 34 Miss, 227; Daniels *v.* Chicago, etc., R. Co., 35 Iowa 129; Stodhill *v.* Chicago, etc., R. Co., 43 Iowa 26; Cairo, etc., R. Co. *v.* Turner, 31 Ark. 494; Colcough *v.* Nashville, etc., R. Co., 2 Head. (Tenn.) 171; Tennessee, etc., R. Co. *v.* Adams, 3 Head. (Tenn.) 596; McIntire *v.* Western, etc., R. Co., 67 N. Car. 278; Little *v.* Dublin, etc., R. Co., 7 Ir. C. L. 82.

[3] Butman *v.* Vermont Cent, R. Co., 27 Vt. 500; McArthur *v.* McEachin, 64 N. Car. 454; Morris Canal, etc., Co. *v.* Seward, 23 N. J. Law 219; People *v.* Wasson, 64 N. Y. 167; Spaulding *v.* Arlington, 126 Mass. 492. So, in case the owner presented his claim for damages to the commissioners, and it was disallowed by them under a misapprehension of their authorities and duties, the owner's sole remedy is by a proceeding to review the award. Van Schoick *v.* Delaware, etc., R. Co., 20 N. J. L. 249.

§ 1005. **Award of compensation does not cover negligent acts.**—Compensation is awarded, no matter what may be the nature of the condemnation proceedings, for the property taken and not for injuries resulting from negligence in the construction or operation of the railroad. While it is the general rule that damages are awarded once for all, they are, nevertheless, not given to compensate a party for injuries caused him by the negligence of the railroad company in the construction or operation of its road. In awarding damages, the jury, commissioners, viewers, appraisers, or whatever tribunal makes the award, proceeds, in legal contemplation, upon the theory that in constructing and operating its road the railroad company will use ordinary and reasonable care to prevent injury to landowners.[1] In some of the cases it is held that injuries caused by negligence are not covered by the assessment even though the negligent acts were done before the damages were assessed.[2]

[1] White *v.* Chicago, etc., R. Co., 122 Ind. 317, 329; Nason *v.* Woonsocket, etc., R. Co., 4 R. I. 377; Fremont, etc., R. Co. *v.* Whalen, 11 Neb. 585; Jones *v.* Chicago, etc., R. Co., 68 Ill. 380; Sinia *v.* Louisville, etc., R. Co., 71 Miss. 547, s. c. 14 So. R. 87; Wheeler *v.* Rochester, etc., R. Co., 12 Barb. 227; March *v.* Portsmouth, etc., R. Co., 19 N. H. 372; Setzler *v.* Pennsylvania, etc., R. Co., 112 Pa. St. 56; Neilson *v.* Chicago, etc., R. Co., 58 Wis. 516; Spencer *v.* Hartford, etc., R. Co., 10 R. I. 14; Hunt *v.* Iowa, etc., R. Co., 86 Iowa 15, s. c. 41 Am. St. R. 473. In Kansas City, etc., etc., R. Co. *v.* Lackey, 72 Miss. 881, s. c. 16 So. R. 909, the rule was thus stated: "In the condemnation proceedings the owner received compensation from the railroad company only for such damages as he would sustain by the proper construction of its line. Neither the owner nor the commissioners who condemned the right of way, and awarded compensation, would have been justified, the owner in asking, or the commissioners in imposing, any sum of money for damages to be due by an improper construction of the railroad thereafter. The presumption was that the railroad would properly construct its road, and hence no damages could properly have been awarded for injuries that could never occur if appellant properly constructed its road." See Fleming *v.* Chicago, etc., R. Co., 34 Iowa 353; King *v.* Iowa, etc., R. Co., 34 Iowa 458; Miller *v.* Keokuk, etc., R. Co., 63 Iowa 680, 685.

[2] Selma, etc., R. Co. *v.* Keith, 53 Ga. 178; Missouri, etc., R. Co. *v.* Ward, 10 Kan. 352; Blodgett *v.* Utica, etc., R. Co., 64 Barb. (N. Y.) 580; Oregon, etc., R. Co. *v.* Barlow, 3 Ore. 311; Mathews *v.* St. Paul, etc., R. Co., 18 Minn. 434; McClinton *v.* Pittsburgh, etc., R. Co., 66 Pa. St. 404. See Pierce *v.* Worcester, etc., R. Co., 105 Mass. 199; Clark *v.* Vermont, etc., R. Co., 28 Vt. 103. It is held that where the

The rule applies to negligent interference with water courses, as where a stream is wrongfully diverted[1] or otherwise interfered with by the negligent construction of a bridge.[2] The rule has been extended to interference with lateral support. Thus it has been held that where excavations are made by which the adjoining soil is unnecessarily deprived of support and caused to give away and slide into the cut, the company is liable.[3]

§1006. **Interest—Allowance of.**—The general rule is that interest should be allowed to the land-owner from the time of the taking in all cases where there is any delay in making payment.[4] Thus, where, by the location of its road a railroad

assessment is made after the road is constructed, the jury in assessing damages may take into account the manner in which it is built. Hayes *v.* Ottawa, etc., R. Co., 54 Ill. 373; Dearborn *v.* Boston, etc., R. Co., 24 N. H. 179; Watson *v.* Pittsburg, etc., R. Co., 37 Pa. St. 469; Perley *v.* Boston, etc., R. Co., 57 N. H. 212; Eaton *v.* Boston, etc., R. Co., 51 N. H. 504; Dearborn *v.* Boston, etc., R. Co., 24 N. H. 179; Hooker *v.* New Haven, etc., R. Co., 15 Conn. 312; Whitehouse *v.* Androscoggin R. Co., 52 Me. 208; Mason *v.* Kennebec, etc., R. Co., 31 Me. 215; Belfinger *v.* New York Central R. Co., 23 N. Y. 42; Brown *v.* Cayuga, etc., R. Co., 12 N. Y. 486; Waterman *v.* Connecticut, etc., R. Co., 30 Vt. 610; Clark *v.* Vermont, etc., R. Co., 28 Vt. 103; Hatch *v.* Vermont Cent. R. Co., 25 Vt. 49, 28 Vt. 142; Vermont Central R. Co. *v.* Baxter, 22 Vt. 365; Fehr *v.* Schuylkill Nav. Co., 69 Pa. St. 161; Pittsburgh, etc., R. Co. *v.* Gilleland, 56 Pa. St. 445; Hazen *v.* Boston, etc., R. Co., 2 Gray (Mass.) 574; Proprietors of Locks and Canals *v.* Nashua, etc., R. Co., 10 Cush. (Mass.) 385; Southside R. Co. *v.* Daniel, 20 Gratt. (Va.) 344; Oregon, etc., R. Co. *v.* Barlow, 3 Ore. 311; Baltimore, etc., R. Co. *v.* Reaney, 42 Md. 117; Terre Haute, etc., R. Co. *v.* McKinley, 33 Ind. 274; Gear *v.* Chicago, C. & D. R. Co., 43 Iowa 83; Fleming *v.* Chicago, etc., R. Co., 34 Iowa 353; McCormick *v.* Kansas City, etc., R. Co., 57 Mo. 433; Rau *v.* Minnesota Valley R. Co., 13 Minn. 442; Colcough *v.* Nashville, etc., R. Co., 2 Head (Tenn.) 171; Lyon *v.* Green Bay, etc., R. Co., 42 Wis. 538; Lawrence *v.* Great Northern R. Co., 16 Q. B. 643; Turner *v.* Sheffield, etc., R. Co., 10 M. & W. 425; Brand *v.* Hammersmith, etc., R. Co., L. R. 2 Q. B. 223, L. R. 4 H. L. 171.

[1] Stodghill *v.* Chicago, etc., R. Co., 43 Iowa 26; Baltimore, R. Co. *v.* Magruder, 34 Md. 79.

[2] Selma, etc., R. Co. *v.* Keith, 53 Ga. 178; Spencer *v.* Hartford, etc., R. Co., 10 R. I. 14; Pittsburgh, etc., R. Co. *v.* Gilleland, 56 Pa. St. 445.

[3] Dyer *v.* St. Paul, 27 Minn. 457; City of Quincy *v.* Jones, 76 Ill. 231; Metropolitan Board of Works *v.* Metropolitan R. Co., 37 L. J. C. P. 281; 38 L. J. C. P. 172.

[4] In Williams *v.* New Orleans, etc., R. Co., 60 Miss. 689, it appeared that the railroad company had had the

company acquires the right of immediate entry, interest must be allowed from the date of the location. And the fact that a petition for damages, seasonably filed, is not brought to a hearing until several years thereafter does not defeat this right.[1] And where the taking is not complete until the damages are paid, if the railroad company secures possession of the land pending an appeal, by paying into court the amount of the original assessment, it will be liable for interest from that date on the amount of damages as finally determined, in case the assessment is increased.[2] Where the jury were instructed that interest from the time the property was taken constituted a part of the plaintiff's damages, it will be presumed that interest to the date of the verdict is included therein, and judgment should be rendered simply for the amount of the verdict,[3] but, it is proper to have assessment on appeal made as of the date of the original award, and the court should, in such case, add interest to the amount of the verdict in rendering judgment.[4]

damages duly assessed some years before, but had taken and retained possession of a part of the land condemned without paying or tendering the assessed damages. The court held that "until there has been such payment or tender the one party has acquired nothing and the other lost nothing," and that, therefore, the land-owner was entitled to compensation for the value of the land taken as it was at the date of the trial. But it allowed him his election whether he would take that value or the sum awarded upon the former attempt at condemnation with interest from the date of the award. In support of the text see Concord R. Co. *v.* Greely, 23 N. H. 237; Shattuck *v.* Wilton R. Co., 23 N. H. 269; Old Colony R. Co. *v.* Miller, 125 Mass. 1; Reed *v.* Hanover Branch R. Co., 105 Mass. 303; Presbrey *v.* Old Colony R. Co., 103 Mass. 1; Knauft *v.* St. Paul, etc., R. Co., 22 Minn. 173; Bangor, etc., R. Co. *v.* McComb, 60 Me. 290; Metler *v.* Easton, etc., R. Co., 37 N. J. L., 222; Missouri River, etc., R. Co. *v.* Owen, 8 Kan. 409; Delaware, etc., R. Co. *v.* Burson, 61 Pa. St. 369.

[1] Hartshorn *v.* Burlington, etc., R. Co., 52 Iowa 613; Drury *v.* Midland R. Co., 127 Mass. 571. The fact that the owner was left in possession for some time after the right of possession accrued to the railroad company does not affect his right to interest. Old Colony R. Co. *v.* Miller, 125 Mass. 1; City of Philadelphia *v.* Dyer, 41 Pa. St. 463; Warren *v.* First Div. of St. Paul, etc., R. Co., 21 Minn. 424.

[2] Warren *v.* St. Paul, etc., R. Co., 21 Minn. 424; Atlantic, etc., R. Co. *v.* Koblentz, 21 Ohio St. 334; Rhys *v.* Dare Valley R. Co., L. R. 19 Eq. 93.

[3] Diedrich *v.* Northwestern Union R. Co., 47 Wis. 662.

[4] Warren *v.* First Div. of St. Paul, etc., R. Co., 21 Minn. 424; Whitacre *v.* St. Paul, etc., R. Co., 24 Minn. 311.

§ 1007. **Presumption of payment of compensation—Statute of limitations.**—Upon much the same principle as that on which the doctrine of estoppel rests, it is held that if a claim for compensation is not presented within the time designated by the statute of limitations, the presumption is that the damages were paid.[1] The decisions affirm that the legislature may prescribe the time within which claims shall be presented.[2] A statute limiting the time within which proceedings may be prosecuted for the recovery of compensation, must give a reasonable time to the land-owner in which to institute his proceedings, otherwise there would be an impairment of his constitutional rights.[3] The legislature is the judge of what is a reasonable time, and courts can not review the legislative judgment unless the time prescribed is so clearly insufficient as to be a practical denial of the right to enforce proceedings for the recovery of compensation.[4] The right of an owner whose property is seized in proceedings *in invitum* to compensation is regarded with favor, and a statute limiting the time for prosecuting a claim will not be applied unless it clearly covers the case. Thus a statute limiting the time for commencing actions for trespass will not be applied to proceedings under a statute

[1] Brookville, etc., Co. *v.* Butler, 91 Ind. 134; Nelson *v.* Fleming, 56 Ind. 310; Mark *v.* State, 97 N. Y. 572; Terry *v.* New York, etc., R. Co., 22 Barb. 574. But see Wheeling, etc., R. Co. *v.* Warrell, 122 Pa. St. 613, s. c. 16 Atl. R. 20; Chicago, etc., R. Co. *v.* Galt, 133 Ill. 657, s. c. 23 N. E. R. 425, 44 Am. & Eng. R. Cas. 43; McCormick *v.* Evans, 33 Ill. 327; Elliott's Roads and Streets, 206, authorities notes 4, 5.

[2] Stewart *v.* State, 105 N. Y. 254; Benedict *v.* State, 120 N. Y. 228; Rexford *v.* Knight, 11 N. Y. 308; Mark *v.* State, 97 N. Y. 572. In jurisdictions where special and local laws are forbidden it may be doubted whether a statute applicable solely to a special class of cases would be valid.

[3] Cooley's Const. Lim. (6th ed.) 449. See City of Philadelphia *v.* Wright, 100 Pa. St. 235.

[4] Cooley's Const. Lim. (6th ed.) 540. See Lincoln *v.* Colusa County, 28 Cal. 662; Potter *v.* Ames, 43 Cal. 75; Berry *v.* Ransdall, 4 Metc. (Ky.) 292; State, etc., *v.* Messenger, 27 Minn. 119; Auld *v.* Butcher, 2 Kan. 135; Koshkonong *v.* Burton, 104 U. S. 668; King *v.* Belcher, 30 S. Car. 381; Terry *v.* Anderson, 95 U. S. 628; Pereles *v.* City of Watertown, 8 Biss. 79; Trustees of Cincinnati R. Co. *v.* Haas, 42 Ohio St. 239; Revere *v.* Boston, 14 Gray 218; Callison *v.* Hedrick, 15 Gratt. 244; Potter *v.* Ames, 43 Cal. 75; Carolina, etc., R. Co. *v.* McKaskill, 94 N. Car. 746; Welsh *v.* Chicago, etc., R. Co., 19 Mo. App. 127.

providing for appropriation proceedings.[1] The statute of limitations begins to run at the time the right of action accrues, but it is not possible to lay down any definite rule for determining when the cause of action is complete insomuch as the question depends very largely upon the statute governing the particular case.[2] It may be safely said that where the case is not controlled by particular statutory provisions, the statute of limitations begins to run from the time the owner's dominion over the property ceases.[3]

§ 1008. **Waiver—Estoppel.**—A land-owner may waive his right to compensation, and by conduct may estop himself from successfully claiming compensation or damages. It has been held that where an abutting owner invites a railroad company to construct its track in a street he is estopped to claim damages.[4] There is reason for affirming that the doctrine of some of the cases referred to in the note is to be carefully applied for, it would, as we believe, lead to injustice to hold that an owner of private property is estopped by the mere fact that he favors the location of a railroad on his land, since it may be justly presumed that he does not mean by his conduct to de-

[1] Shortle *v.* Louisville, etc., Co., 130 Ind. 505, distinguishing Midland,etc., R. Co. *v.* Smith, 125 Ind. 509; Strickler, *v.* Midland, etc., R. Co., 125 Ind. 412, and denying the doctrine of Foster *v.* Cumberland, etc., R. Co., 23 Pa. St. 371; Union Canal Co. *v.* Woodside, 11 Pa. St. 176. In the first case cited it was said that the doctrine of the Pennsylvania cases cited was modified in Delaware, etc., R. Co. *v.* Burson, 61 Pa. St. 369. See Lawrence R. Co. *v.* Cobb, 35 Ohio St. 94; Cohen *v.* Cleveland, 43 Ohio St. 190; Houston, etc., R. Co. *v.* Chaffin, 60 Tex. 553; Donnelly *v.* Brooklyn, 121 N. Y. 9. Adverse possession may be relied on. Sherlock *v.* Louisville, etc., R. Co., 115 Ind. 22; Railroad Co. *v.* O'Harra, 48 Ohio St. 343.

[2] Davis *v.* New Bedford, 133 Mass. 49; Brower *v.* Philadelphia, 142 Pa. St. 350; Volkmar St., 124 Pa. St. 320; Baltimore, etc., R. Co. *v.* Fifth Baptist Church, 108 U. S. 317.

[3] See, generally, Moore *v.* Boston, 8 Cush. 274; Rider *v.* Stryker, 63 N. Y. 136; Hazen *v.* Boston, etc., R. Co., 2 Gray 574; Davidson *v.* Boston, etc., R. Co., 3 Cush. 91; Barker *v.* Taunton, 119 Mass. 392.

[4] Burkam *v.* Ohio, etc., R. Co., 122 Ind. 344; Scarritt *v.* Kansas City, etc., R. Co., 127 Mo. 298, s. c. 29 S. W. R. 1024; Penn Mutual Ins. Co. *v.* Heiss, 141 Ill. 35, s. c. 33 Am. St. R. 273; Illinois, etc., R. Co. *v.* Allen, 39 Ill. 205; Toledo, etc., Co. *v.* Hunter, 50 Ill. 325; Wolfe *v.* Covington, etc., R. Co., 15 B. Monr. 404; Miller *v.* Auburn, etc., R. Co., 6 Hill 61; Murdock *v.* Prospect, etc., R. Co., 10 Hun 598; Lewis' Eminent Domain, § 120; Randolph, Eminent Domain, 132.

prive himself of the right to the compensation to which the law entitles him.[1] There can, however, be no doubt that the doctrine of waiver and estoppel does apply to cases of the appropriation of property under the right of eminent domain. Even constitutional rights may be waived, and a party may, by his conduct, be estopped from asserting them.[2] If there is an effective estoppel against the owner at or prior to the time the rights of the railway company are acquired it will bind all who thereafter acquire an interest or estate in the land.[3] Some of the courts hold that conduct may estop an owner from successfully claiming that there was a trespass, and yet not estop him from claiming compensation for the property taken.[4] The principle which authorizes this distinction is the same as that which allows a claim for damages to be prosecuted in many instances, but denies a right to maintain ejectment or injunction.[5]

[1] Consumers', etc., Co. *v.* Huntsinger, 12 Ind. App. 285, 39 N. E. R. 423, on rehearing 42 N. E. R. 640; Woodward *v.* Webb, 65 Pa. St. 254; Craig *v.* Lewis, 110 Mass. 377; Gilman *v.* Sheboygan, etc., R. Co., 40 Wis. 653; Evansville, etc., R. Co. *v.* Charlton, 6 Ind. App. 56, s. c. 33 N. E. R. 129. But while mere silence may not operate as an estoppel affirmative acts may so operate. Authorities preceding note. See Platt *v.* Pennsylvania Co., 43 Ohio St. 228; *In re* Niagara, etc., R. Co., 121 N. Y. 319; Moore *v.* Sanford, 151 Mass. 285.

[2] Vickery *v.* Board, 134 Ind. 554; Great Falls, etc., Co. *v.* Attorney-General, 124 U. S. 581; Detmold *v.* Drake, 46 N. Y. 318; City of Brooklyn *v.* Copeland, 106 N. Y. 496; Embury *v.* Conner, 3 N. Y. 511, s. c. 53 Am. Dec. 325; Pryzbylowyicz *v.* Missouri, etc., Railroad, 17 Fed. R. 492; Sharp *v.* Witham, 65 Iowa 566; Pitkin *v.* Springfield, 112 Mass. 509. See, generally, Daniels *v.* Tearney, 102 U. S. 415; Burlington, etc., R. Co. *v.* Stewart, 39 Iowa 267; Ferguson *v.* Landram, 1 Bush. 548, s. c. 5 Bush. 230; State *v.* Mitchell, 31 Ohio St. 592; Van Hook *v.* Whitlock, 26 Wend. 43; Perryman *v.* Greenville, 51 Ala. 507; Lee *v.* Tillotson, 24 Wend. 337; People *v.* Murray, 5 Hill 468; Elliott on Roads and Streets, 422.

[3] Moore *v.* Roberts, 64 Wis. 538; Gurnsey *v.* Edwards, 26 N. H. 224. See Battles *v.* Braintree, 14 Vt. 348; Merchants', etc., Co. *v.* Chicago, etc., 79 Iowa 613.

[4] Pennsylvania R. Co. *v.* Platt, 47 Ohio St. 366; Erie R. Co. *v.* Delaware, etc., R. Co., 21 N. J. Eq. 283. See Bloomfield, etc., R. Co. *v.* Grace, 112 Ind. 128.

[5] Roberts *v.* Northern Pacific R. Co., 158 U. S. 1, s. c. 15 Sup. Ct. R. 756; Lexington, etc., R. Co. *v.* Ormsby, 7 Dana (Ky.) 276; Harlow *v.* Marquette, etc., R. Co., 41 Mich. 336, s. c. 2 N. W. R. 48; Cairo, etc., R. Co. *v.* Turner, 31 Ark. 494; Pettibone *v.* La Crosse, etc., R. Co., 14 Wis. 443; Chicago, etc., Railroad Co. *v.* Goodwin, 111 Ill. 273; Indiana, etc., Co. *v.* Allen, 113 Ind. 581; Smart *v.* Portsmouth, etc., R. Co., 20 N. H. 233; Harrington *v.* St. Paul, etc., R. Co., 17 Minn. 215.

CHAPTER XL.

PROCEDURE IN APPROPRIATION CASES.

§ 1009. Procedure—Introductory.
1010. Nature of the proceedings.
1011. Tribunals—Generally.
1012. Nature of the tribunal for assessment of benefits and damages.
1013. Creation of the tribunal—Legislative power.
1014. Tribunals—Jurisdiction—Decision of majority.
1015. Appointment of appraisers or commissioners to assess benefits and damages.
1016. Duty to appoint appraisers or commissioners--Mandamus.
1017. Qualifications of jurors, appraisers or commissioners.
1018. Oath must be taken by jurors or commissioners.
1019. Notice—General doctrine.
1020. Notice—Requisites of.
1021. Notice—Political questions—Expediency.
1022. Notice—Description.
1023. Service of notice.
1024. Summoning.
1025. Parties.
1026. Parties—Amendments.
1027. Effort to agree.
1028. Petition or articles of appropriation.
1029. Contents of the petition.
1030. Title.
1031. Effect of pendency of proceedings to condemn.
1032. Dismissal of proceedings—Effect of.
§ 1033. Abandonment of proceedings.
1034. Meetings of commissioners or jurors.
1035. Open and close.
1036. Evidence of value—Illustrative instances.
1037. Competency of witnesses.
1038. Opinions of witnesses.
1039. Power of commissioners to act upon their own knowledge.
1040. View.
1041. Report of commissioners.
1042. Report of commissioners—Requisites of—Illustrative cases.
1043. Time within which report must be made.
1044. Objections to report.
1045. Confirmation or rejection of report—Modification.
1046. Misconduct of jurors or commissioners.
1047. Waiver of objections.
1048. Remedies to enforce payment of compensation.
1049. Remedies of land-owner.
1050. Possession pending appeal.
1051. Tender.
1052. Acceptance of damages—Estoppel.
1053. Appeal.
1054. Certiorari.
1055. Company a trespasser when proceedings are void.

§ 1009. **Procedure—Introductory.**—The procedure in cases of seizure of private property under the right of eminent domain is so largely controlled and regulated by statutes that we can not go far into details. There are, however, general principles of a fundamental nature which apply to such proceedings almost universally, and of those principles we shall briefly treat. In many respects the statutes of the different states proceed upon much the same general lines, but there is, nevertheless, a wide diversity in matters of detail. All that can be properly done in a general treatise is to state and illustrate general principles, for it would be impossible, in a work of such a character, to treat matters dependent upon legislative enactments, and this we shall not undertake to do, except incidentally and for the purpose of showing the practical application of general principles.

§ 1010. **Nature of the proceeding.**—In order that there may be due process of law, it is essential that the subject of compensation be regulated by a legislative enactment,[1] but it is not necessary that all the details of procedure be prescribed in the statute, since the statute, when enacted, takes its place as part of a uniform system of law, and is to be aided and interpreted by other statutes and the general principles of jurisprudence. The proceeding must be, in its nature judicial, but it is not a proceeding in ordinary course of the common law entitling the a parties to a jury trial.[2] As to whether it is a "civil action" or

[1] In Secombe *v.* Railroad Co., 23 Wall 108, the court, in speaking of the legislative power to prescribe the course of proceeding, said: "There is no limitation upon the power of the legislature in this respect, if the purpose be a public one and just compensation be paid or tendered to the owner for the property taken." It seems to us that the rule is stated too narrowly in the case cited, for, as we believe, provision must be made by law for notice. See upon the general subject, Secomb *v.* Milwaukee, etc., R. Co., 49 How. Pr. 75; Weir *v.* St. Paul, etc., R. Co., 18 Minn. 155; Langford *v.* Ramsey County Commissioners, 16 Minn. 375; Musick *v.* Kansas City, etc , R. Co., 114 Mo. 309, s. c. 21 S. W. R. 491.

[2] *Ante*, § 983. Expressions in some of the cases seem to affirm that the jury or commissioners are not invested with judicial functions. Grand Rapids, etc., Co. *v.* Chesebro, 74 Mich. 466, s. c. 42 N. W. R. 66, 39 Am. & Eng. R. Cas. 159; Toledo, etc., R. Co. *v.* Dunlap, 47 Mich. 456, s. c. 11 N.

"special proceeding," within the meaning of that term, as used in the codes of the different states, is a question upon which there is some diversity of opinion, but the weight of authority is that it is, in many respects, a special proceeding and not a civil action.[1] But in so far as concerns the right of appeal from a trial court to an appellate tribunal we think the proceeding must be regarded as a civil action.[2] The settled rule is that the provisions of the statute prescribing the mode of proceeding must be pursued.[3]

W. R. 271, 5 Am. & Eng. R. Cas. 378. Possibly this may be true where the tribunal is a temporary one, and final action is to be taken by a court, but, however this may be, we think it clear that there must be at some stage of the proceeding action by a judicial tribunal. State *v.* Neville, 110 Mo. 345, s. c. 19 S. W. R. 491.

[1] Hartley *v.* Keokuk, etc., R. Co., 85 Iowa 455, s. c. 52 N. W. R. 352; *In re* New York, etc., R. Co., 63 How. Pr. 123; Cours *v.* Vermont, etc., R. Co., 25 Vt. 476.

[2] Elliott's Appellate Procedure, § 253, note 1. Albany, etc., R. Co. *v.* Lansing, 16 Barb. (N. Y.) 68; Pack *v.* Chesapeake, etc., R. Co., 5 W. Va. 118; Howard *v.* Proprietors of Locks and Canals, 12 Cush. (Mass.) 259; Colorado Midland R. Co. *v.* Jones, 29 Fed. Rep. 193. Where an appeal or writ of error was allowed in civil cases, the statute has been held to apply to condemnation proceedings. Atlantic, etc., R. Co. *v.* Sullivant, 5 Ohio St. 276; Scott *v.* Lasell, 71 Iowa 180. See Warren *v.* First Division, etc., R. Co., 18 Minn. 384. And a statute allowing challenges in all civil cases was held to apply to eminent domain proceedings. Convers *v.* Grand Rapids, etc., R. Co., 18 Mich. 459. Proceedings under some statutes have been held to be special proceedings, to which acts governing civil cases do not apply. Knoth *v.* Barclay, 8 Colo. 300; Sacramento, etc., R. Co. *v.* Harlan, 24 Cal. 334; Dukes *v.* Working, 93 Ind. 501.

[3] The decisions are very numerous and we cite only a few of the great number. Charleston, etc., Co. *v.* Comstock, 36 W. Va. 263, s. c. 15 S. E. R. 69; Chicago, etc., R. Co. *v.* Galt, 133 Ill. 657, s. c. 24 N. E. R. 674; Mobley *v.* Breed, 48 Ga. 44; Tracy *v.* Elizabethtown, etc., R. Co., 80 Ky. 259, s. c. 14 Am. & Eng. R. Cas. 407; Wilson *v.* Baltimore, etc., R. Co., 5 Del. Ch. 524; Missouri, etc., R. Co. *v.* Carter, 85 Mo. 448; Colorado, etc., R. Co. *v.* Allen, 13 Colo. 229, s. c. 22 Pac. R. 605; Dargan *v.* Carolina, etc., R. Co., 113 N. C. 596, s. c. 18 S. E. R. 653; Lewis *v.* St. Paul, etc., R. Co., 5 S. Dak. 148, s. c. 58 N. W. R. 580, 57 Am. & Eng. R. Cas. 612; Galveston, etc., R. Co. *v.* Mud Creek, etc., Co., 1 Tex. App. (Civil Cases) 169; Alexandria, etc., R. Co. *v.* Alexandria, etc., R. Co., 75 Va. 780, s. c. 10 Am. & Eng. R. Cas. 23; New Jersey, etc., Co. *v.* Morris, etc., Co., 44 N. J. Eq. 398, s. c. 15 Atl. R. 227; Petition of Providence, etc., R. Co., 17 R. I. 324, s. c. 21 Atl. R. 965; Stannards, etc., Association *v.* Brandes, 35 N. Y. Supp. 1015; Dickey *v.* Chicago, 152 Ill. 468, s. c. 38 N. E. R. 932.

§ 1011. **Tribunals—Generally.**—As we have elsewhere shown private property can not be seized for a public use without the payment of compensation to the owner.[1] Compensation must, as we have said, be determined and fixed by a judicial tribunal, for the question of compensation, under our system, is a judicial question,[2] and neither legislative nor administrative. As there must be compensation, and as the question of compensation is a judicial one, provision must be made for a tribunal invested with power to determine the measure of compensation to which the land-owner is entitled. What the power of the tribunal shall be is, to a very great extent, a legislative question, but the tribunal must be, in its nature, judicial, and must have power to ascertain and determine the question of compensation. There is, as will hereafter appear, some conflict as to the power of a temporary tribunal, such as appraisers, commissioners or the like, but we think it entirely clear on principle, that before a final decision of the question of compensation there must be judicial action. We are, indeed, persuaded that on principle the temporary tribunal must be invested with *quasi* judicial powers at least, since the power to determine the measure of compensation can not be justly regarded as administrative, legislative or executive, but there are respectable authorities to the contrary.[3]

§ 1012. **Nature of the tribunal for the assessment of benefit and damages.**—In the absence of constitutional provisions prescribing the mode of creating tribunals for the assessment of benefits and damages, the legislature may establish such tribunals as it deems proper, but, as is evident from what has been said, it must provide for a judicial tribunal, that is, a tribunal having power to hear and decide, though, according to the weight of authority, not a court in the strict sense of the term. Unless the constitution so requires the legislature is not bound to submit the assessment of benefits to a jury of twelve

[1] *Ante*, § 979.

[2] *Ante*, § 983; Elliott's Roads and Streets, 212.

[3] See notes to Bass *v.* City of Fort Wayne, 121 Ind. 389, s. c. 1 Am. R. & Corp. Rep. (Lewis) 173, 180.

men. The right of trial by jury, which the American constitutions generally declare shall remain inviolate, does not embrace proceedings in cases of the seizure of private property under the right of eminent domain.[1] There are cases holding that unless the constitution especially provides otherwise the tribunal to assess damages upon condemnation may consist of any person or number of persons, at the option of the legislature.[2] But, we suppose that where the legislature is forbidden to enact special and local laws it can not designate particular persons

[1] 2 Hare's Am. Const. Law. 869, citing Butler *v.* Worcester, 112 Mass. 541, 556; Anderson *v.* Caldwell, 91 Ind. 451; Lipes *v.* Hand, 104 Ind. 503; Cramer *v.* Cleveland, etc., R. Co., 5 Ohio St. 140, 145; McKinney *v.* Mongahela, etc., Co., 14 Pa. St. 65; Pennsylvania R. Co. *v.* First German Lutheran Congregation, 53 Pa. St. 445. See, also, City of Kansas City *v.* Vineyard, 128 Mo. 75, s. c. 30 S. W. R. 326; Evansville, etc., R. Co. *v.* Miller, 30 Ind. 209; Indianapolis, etc., Gravel Road Co. *v.* Christian, 93 Ind. 360; Henderson, etc., R. Co. *v.* Dickerson, 17 B. Mon. (Ky.) 173; Virginia, etc., R. Co. *v.* Elliott, 5 Nev. 358; Gold *v.* Vermont Cent. R. Co., 19 Vt. 478; Houston, etc., R. Co. *v.* Milburn, 34 Tex. 224; Buffalo Bayou, etc., R. Co. *v.* Ferris, 26 Tex. 588; Central Branch, etc., R. Co. *v.* Atchison, etc., R. Co., 28 Kan. 453; Pennsylvania R. Co. *v.* First German Lutheran Congregation, 53 Pa. St. 445; Kramer *v.* Cleveland, etc., R. Co., 5 Ohio St. 140; Raleigh, etc., R. Co. *v.* Davis, 2 Dev. & B. (N. Car.) Law. 451; McIntire *v.* Western N. Car. R. Co., 67 N. Car. 278; Beekman *v.* Saratoga, etc., R. Co., 3 Paige (N. Y.) 45; Petition of Mt. Washington Road Co., 35 N. H. 134; Louisiana, etc., R. Co. *v.* Pickett, 25 Mo. 535; Montgomery Southern R. Co. *v.* Sayre, 72 Ala. 443; People *v.* Michigan, etc., R. Co., 3 Mich. 496; Bailey *v.* Philadelphia, etc., R. Co., 4 Harr. (Del.) 389; Whiteman *v.* Wilmington, etc., R. Co., 2 Harr. (Del.) 514; Cairo, etc., R. Co. *v.* Trout, 32 Ark. 17; Ames *v.* Lake Superior, etc., R. Co., 21 Minn. 241; Kimball *v.* Board, etc., 46 Cal. 19; Johnson *v.* Joliett, etc., R. Co., 23 Ill. 202; Kendall *v.* Post, 8 Ore. 141; Anderson *v.* Turbeville, 6 Caldw. (Tenn.) 150; New Orleans, etc., R. Co. *v.* Drake 60 Miss. 621; Bonaparte *v.* Camden, etc., R. Co., 1 Baldwin (U. S.) 205; Missouri Pac. R. Co. *v.* Humes, 115 U. S. 512. *Contra*, Southwestern R. Co. *v.* Southern, etc., Co., 46 Ga. 43; Newcomb *v.* Smith, 1 Chandler (Wis.) 71; Salem Turnpike, etc., *v.* County of Essex, 100 Mass. 282. See Martin *v.* Tyler, 4 N. Dak. 278, s. c. 60 N. W. R. 392, 25 L. R. A. 838; *In re* Condemnation of Independence Av., etc., 128 Mo. 272, s. c. 30 S. W. R. 763; City of Kansas City *v.* Smart, 128 Mo. 272; People *v.* Board of Trustees, 80 Hun 385, s. c. 30 N. Y. Supp. 325.

[2] Evansville, etc., R. Co. *v.* Miller, 30 Ind. 209; Indianapolis, etc., Gravel Road Co. *v.* Christian, 93 Ind. 360; Raleigh, etc., R. Co. *v.* Davis, 2 Dev. & B. (N. Car.) Law 451; Ames *v.* Lake Superior, etc., R. Co., 21 Minn. 241; Kramer *v.* Cleveland, etc., Co., 5 Ohio St. 140; Virginia, etc., R. Co. *v.* Elliott, 5 Nev. 358; New Orleans, etc., R. Co. *v.* Drake, 60 Miss. 621.

to form a portion or all of such tribunal, to act in a particular case.[1] In states where the right to a jury trial in such proceedings is guaranteed by the constitution, if an assessment by commissioners is provided for, it must be reviewable by a jury on appeal.[2] In a case where the constitution provides for an assessment by a jury of twelve men, as prescribed by law, a statute providing for a decision by a majority was held invalid.[3] Where a jury is provided for by a statute and there are no words limiting or defining the meaning of the term "jury," the statute is generally held to mean a common law jury of twelve men.[4] But it is also held that where the constitution recognizes different kinds of juries in different tribunals, the legislature may prescribe whichever form is used in the tribunal in which the proceedings are conducted.[5] The right to a jury trial may be waived, even though the constitution provides that the damages shall be assessed by a jury,[6] and the failure to appeal from a preliminary award of appraisers amounts to such a waiver.[7]

[1] Langford *v.* County Commissioners, 16 Minn. 375.

[2] Aldridge *v.* Tuscumbia, etc., R. Co., 2 Stew. & P. (Ala.) 199; Whiteman *v.* Wilmington, etc., R. Co., 2 Harr. (Del.) 514; Mayor, etc., of Atlanta *v.* Central R. Co., 53 Ga. 120; Louisville, etc., R. Co. *v.* Dryden, 39 Ind. 393; Norristown, etc., Turnp. Co. *v.* Burkett, 26 Ind. 53; Tharp *v.* Witham, 65 Iowa 566; Whitehead *v.* Arkansas Cent. R. Co., 28 Ark. 460.

[3] Jacksonville, etc., R. Co. *v.* Adams, 33 Fla. 608, s. c. 15 So. R. 257, 24 L. R. A. 272; Chicago, etc., R. Co. *v.* Hock, 118 Ill. 587. But where there is no such constitutional provision as that quoted in the text, provision may be made for a majority decision. *Post*, § 1014. As to method of reaching a verdict, see Orange, etc., R. Co. *v.* Craver, 32 Fla. 28, s. c. 13 So. R. 444, 57 Am. & Eng. R. Cas. 511.

[4] Chicago, etc., R. Co. *v.* Sanford, 23 Mich. 418; Mitchell *v.* Illinois, etc., R. Co., 68 Ill. 286; Whitehead *v.* Arkansas, etc., R. Co., 28 Ark. 460; Clark *v.* Utica, 18 Barb. 451; Smith *v.* Atlantic, etc., R. Co., 25 Ohio St. 91. Questions coming before such a jury must be decided by the unanimous voice of the members. McLellan *v.* County Commissioners, 21 Me. 390.

[5] McManus *v.* McDonough, 107 Ill. 95. In New York, where the constitution requires the damages to be appraised by a jury *or* not less than three commissioners, it was held competent for the legislature to provide for a tribunal termed a jury, consisting of less than twelve members, which should decide all questions coming before it, by a majority vote. Cruger *v.* Hudson River R. Co., 12 N. Y. 190.

[6] Chicago, etc., R. Co. *v.* Hock, 118 Ill. 587.

[7] Tharp *v.* Witham, 65 Iowa 566.

§ 1013. **Creation of the tribunal—Legislative power.**—Broad as is the legislative power over the subject of creating tribunals for the assessment of benefits and damages the power is by no means unlimited. The legislature can not under guise of providing rules of procedure so fetter the tribunal that it can not exercise free and impartial judgment. It may be safely laid down as a general rule that the legislature can not make arbitrary rules that will restrain the tribunal from exercising judicial functions, although it may prescribe rules of procedure. The tribunal can not be subjected to legislative dictatorship and hence the legislature can not directly or indirectly declare what the land-owner's compensation shall be, but must submit that question to an impartial tribunal.[1] The principle we have stated prohibits the legislature from effectively declaring that the tribunal shall adopt the assessment or estimate of an assessor or any officer.[2]

§ 1014. **Tribunal—Jurisdiction—Decision of majority.**—It is essential to the validity of the decision of a tribunal that it should have jurisdiction of the general subject, for if there is no jurisdiction the proceedings are *coram non judice*. Where the tribunal is a temporary one of naked statutory powers there can be no doubt that jurisdiction of the subject must affirmatively appear and the weight of authority is that this is true where the tribunal is one of inferior jurisdiction although it is a permanent judicial tribunal. Jurisdiction of the subject can not be conferred by the parties, but must be given by law. These elementary principles apply to tribunals in appropriation or condemnation cases and it is not deemed necessary to do much more than barely mention them.[3] In condemnation

[1] *Ante*, § 983; Matter of City of Buffalo, 139 N. Y. 422; Rich *v.* City of Chicago, 59 Ill. 286; Ames *v.* Lake Superior, etc., R. Co., 21 Minn. 241; People *v.* Kniskern, 54 N. Y. 52; Power's Appeal, 29 Mich. 504. See State *v.* Sewer Commissioners, 39 N. J. Law 665; Davis *v.* Howell, 47 N. J. Law 280; State *v.* Perth Amboy, 52 N. J. L. 132, s. c. 18 Atl. R. 670.

[2] County Court *v.* Griswold, 58 Mo. 175. See, generally, Pennsylvania R. Co. *v.* Baltimore, etc., R. Co., 60 Md. 263; Commonwealth *v.* Pittsburgh, etc., R. Co., 58 Pa. St. 26; City of Kansas *v.* Baird, 98 Mo. 215; Rhine *v.* McKinney, 53 Tex. 354; Bruggerman *v.* True, 25 Minn. 123.

[3] See, generally, Gray *v.* St. Louis, etc., R. Co., 81 Mo. 125, s. c. 22 Am.

proceedings only such questions can be tried as the statute makes provision for trying.[1] Where the jurisdiction is vested in the courts it is held that a judge can not hear the case out of court.[2] The general rule is that proceedings under the right of eminent domain must be brought in the county in which the land is situated.[3] Where the law provides for a trial by jury and does not provide for a decision by a majority then we suppose the ordinary rule applies and the decision must be unanimous. The rule declared by some of the cases is that where there is a power granted to two or more all must unite except where provision is made to the contrary, but there is a diversity of opinion upon this question.[4] It has been held

& Eng. R. Cas. 106; *In re* Long Island, etc., R. Co., 45 N. Y. 364; People *v.* Tubbs, 49 N. Y. 356; Kansas City, etc., Co. *v.* Campbell, 62 Mo. 585; De Buol *v.* Freeport, etc., R. Co., 111 Ill. 499; Chicago, etc., R. Co. *v.* Young, 96 Mo. 39, s. c. 8 S. W. R. 776; Hughes *v.* Lake Erie, etc., R. Co., 21 Ind. 175; Denver, etc., Co. *v.* Otis, 7 Colo. 198, s. c. 2 Pac. R. 925; Denver City, etc., R. Co. *v.* Middaugh, 12 Colo. 434, s. c. 21 Pac. R. 565; Galveston, etc., Co. *v.* Gulf, etc., R. Co., 72 Tex. 454, s. c. 10 S. W. R. 537.

[1] Oregon, etc., R. Co. *v.* Baily, 3 Ore. 164.

[2] *In re* Broadway, etc., R. Co., 73 Hun 7, s. c. 57 N. Y. S. Rep. 108; Washington, etc., R. Co. *v.* Coeur D'Alene, etc., R. Co., 2 Ida. 991, s. c. 28 Pac. R. 394. See Lewis *v.* St. Paul, etc., R. Co., 5 S. Dak. 148, s. c. 58 N. W. R. 580, 57 Am. & Eng. R. Cas. 612; Baltimore, etc., R. Co. *v.* Louisiana, etc., R. Co., 39 La. Ann. 659, 2 So. R. 67.

[3] Missouri, etc., R. Co. *v.* Carter, 85 Mo. 448, s. c. 28 Am. & Eng. R. Cas. 249; St. Louis, etc., R. Co. *v.* Lewright, 113 Mo. 660; California, etc., R. Co. *v.* Southern, etc., R. Co., 65 Cal. 409, s. c. 4 Pac. R. 388; *In re* City of Buffalo, 139 N. Y. 422, s. c. 34 N. E. R. 1103. Condemnation proceedings should be matter of record. Lewis *v.* St. Paul, etc. R. Co., 5 So. Dak. 148, s. c. 58 N. W. 580, 57 Am. & Eng. R. Cas. 612.

[4] Virginia R. Co. *v.* Lovejoy, 8 Nev. 100; Beynon *v.* Rrandywine, etc., T. L. Co., 39 Ind. 129; People *v.* Hynds, 30 N. Y. 470; Cruger *v.* Hudson River R. Co., 12 N. Y. 190; Young *v.* Buckingham, 5 Ohio 485; Moore *v.* Green etc., R. Co., 3 Phila. (Pa.) 417; Griscom *v.* Gilmore, 16 N. J. Law. 105; Galbraith *v.* Littiech, 73 Ill. 209. Under a proper construction of the Missouri statute directing the appointment of three commissioners to appraise land taken *in invitum*, the report of the commissioners is not rendered nugatory by the fact that only two of them acted and signed the report. Such a report is sufficient to authorize the court to render a judgment vesting the title of the land in the company. Quayle *v.* Missouri, etc., R. Co., 63 Mo. 465; Louk *v.* Woods, 15 Ill. 256; *In re* Brooklyn, etc., R. Co., 80 Hun 355, s. c. 30 N. Y. Supp. 131. Many cases, however, hold that all the commissioners must join in the deliberations although a majority may decide. Matter of Appli-

that where a general statute provides that a majority of persons designated to discharge certain duties may act the majority of commissioners appointed to assess benefits and damages may make an award.[1] The rule that where courts have concurrent jurisdiction the one which first obtains jurisdiction will retain it applies to condemnation proceedings,[2] but where the statute requires joint action by two tribunals both must act.[3]

§ 1015. Appointment of appraisers or commissioners to assess benefits and damages.—There is some diversity of opinion as to the power of a court to appoint appraisers, commissioners or the like, to assess benefits and damages, some of the authorities inclining to the view that the power of appointment is an executive and not a judicial function,[4] and that appointments can not be made by the courts. In our opinion the power to appoint commissioners, appraisers or the like, to assess benefits and damages is judicial and may be exercised by the courts. The judicial power extends beyond the mere trial and decision of causes, and is broad enough to authorize the appointment of such ministers or officers as may be necessary to enable a court to effectively exercise its functions.[5] We doubt whether power to appoint agents or officers to perform duties not connected with the administration of the law by the courts, or to act in matters foreign to the purpose for which courts are organized can be conferred upon the judiciary, but we think that the assessment of benefits and damages being essentially a judicial matter and connected with the administration of the law by the courts, the courts may be empowered to appoint appraisers, commissioners or the like to assess ben-

cation of Mayor, etc., New York, 99 N. Y. 569, 34 Hun 441; State *v.* Findley, 67 Wis. 86; Smith *v.* Trenton, etc., Co., 17 N. J. Law 5; Curry *v.* Jones, 4 Del. Ch. 559.

[1] Serrell *v.* Oakland Probate Judge (Mich.), 65 N. W. R. 107, distinguishing Kress *v.* Hammond, 92 Mich. 372, s. c. 52 N. W. R. 728.

[2] Hughes *v.* Lake Erie, etc., R. Co., 21 Ind. 175; Miller *v.* County Commissioners, 119 Mass. 485.

[3] City of St. Louis *v.* Gleason, 93 Mo. 33, s. c. 8 S. W. R. 348.

[4] Taylor *v.* Commonwealth, 3 J. J. Marsh. 401; State *v.* Barbour, 53 Conn. 76; Achley's Case, 4 Abb. Pr. R. 35.

[5] Striker *v.* Kelly, 2 Denio. 323; *In re* Cooper, 22 N. Y. 67; State *v.* Noble *et al.*, 118 Ind. 350, 360.

efits and damages. The power to appoint is not, however, exclusively judicial, for the authorities affirm the right of the legislature itself to appoint or to confer the power to appoint upon judicial, executive or administrative officers.[1] The power must be exercised by the board or tribunal upon which the power is conferred.[2] Broad as is the power which the adjudged cases accord to the legislature there is this important limitation upon it, namely, the tribunal must be an impartial one, and its action subject to judicial control at some stage of the proceedings.[3] Where there is provision for an appeal the appointment of commissioners may be made by members of a public corporation.[4] While the rule declared by the authorities is that the legislature may appoint commissioners or appraisers itself or may vest the power of appointment in ministerial or executive officers, the action of appraisers and commissioners by whomsoever appointed, must be under judicial control, otherwise the fundamental principle that the award of compensation is a judicial function would be violated.[5]

§ 1016. **Duty to appoint appraisers or commissioners—Mandamus.**—It is broadly asserted in some of the cases that where a proper petition is presented, and proper notice is given, the

[1] State *v.* Commissioners, 28 Kan. 431; Morris *v.* Comptroller, 54 N. J. Law 268; Shoemaker *v.* United States, 147 U. S. 282.

[2] House *v.* Rochester, 15 Barb. 517; Menges *v.* Albany, 56 N. Y. 374.

[3] Bradley *v.* City of Frankfort, 99 Ind. 417; Hessler *v.* Drainage Com., 53 Ill. 105; Powers *v.* Bears, 12 Wis. 213; Rhine *v.* McKinney, 53 Tex. 354; Lumsden *v.* Milwaukee, 8 Wis. 485; Paul *v.* Detroit, 32 Mich. 108; State *v.* City of Fond du Lac, 42 Wis. 287; Petition of Nashua, 12 N. H. 425; Mitchell *v.* Holderners, 29 N. H. 523; Petition of New Boston, 49 N. H. 328; State *v.* Atkinson, 27 N. J. Law 420. But see City of Bridgeport *v.* Giddings, 43 Conn. 304; Johnston *v.* Rankin, 70 N. C. 550.

[4] Bass *v.* City of Fort Wayne, 121 Ind. 389; McMicken *v.* Cincinnati, 4 Ohio St. 394; State *v.* Crane, 36 N. J. Law 394; City of Minneapolis *v.* Wilkin, 30 Minn. 140.

[5] *Ante*, § 983; Charles River Bridge *v.* Warren Bridge, 11 Pet. 420; Vanhorne's Lessee *v.* Dorrance, 2 Dall. (U. S.) 304; Langford *v.* County Commissioners, 16 Minn. 375; Cunningham *v.* Campbell, 33 Ga. 625; Kramer *v.* Cleveland, etc., R. Co., 5 Ohio St. 140; Pennsylvania R. Co. *v.* Baltimore R. Co., 60 Md. 263; McMicken *v.* Cincinnati, 4 Ohio St. 394; City of San Francisco *v.* Scott, 4 Cal. 114; Elliott's Roads and Streets 212.

appointment of commissioners or selection of a jury to assess the land-owner's damages is a matter of right, and if the judge or other officer, charged with the ministerial duty of ordering a jury or appointing commissioners, refuses to act, he may be compelled, by mandamus, to do so.[1] It seems to us that there is difficulty in maintaining this doctrine where the power to appoint is conferred upon a court. If the proceedings are judicial and the duty is imposed upon a court, the refusal to make the appointment is, as we are inclined to believe, an error to be reviewed by *certiorari*, appeal or the like, and not upon an application for mandamus. Where, however, the duty is imposed upon administrative officers, their performance of that duty may be coerced by mandamus. But even as to ministerial officers the rule allowing a mandamus to compel the performance of a duty will not apply if the duty be purely a discretionary one.

§ 1017. Qualifications of jurors—Appraisers as commissioners.—The fundamental principle that no one can be a judge in his own case requires it to be held that the members of the tribunal appointed to assess benefits and damages should be disinterested. This principle governs although the statute may not provide that the members of the tribunal shall not be interested, since statutes are to be construed in connection with other statutes and the general principles of law.[2] Neither members of the condemning corporation nor its agent,[3] nor

[1] Western U. R. Co. *v.* Dickson, 30 Wis. 389; *In re* Thirty-fourth Street R. Co., 102 N. Y. 343; Illinois Cent. R. Co. *v.* Rucker, 14 Ill. 353; Chicago, etc., R. Co. *v.* Wilson, 17 Ill. 123. See *In re* Southern, etc., R. Co., 146 N. Y. 352, s. c. 40 N. E. R. 1000.

[2] *Ante*, § 1015; Douglass *v.* Byrnes, 63 Fed. R. 16.

[3] Powers *v.* Bears, 12 Wis. 213. An employe of the company is not competent to serve as a juror. Central R. Co. *v.* Mitchell, 63 Ga. 173. Persons owning land in the neighborhood are not disqualified from acting as viewers where their land does not immediately adjoin the railroad. Newbecker *v.* Susquehanna R. Co., 1 Pears. (Pa.) 57. In Douglass *v.* Byrnes, 63 Fed. R. 16, there is a full discussion of the general question and it was held that a person who accepts a retainer as an attorney for one of the parties is disqualified. The court cited Sacramento, etc., Mining Co. *v.* Showers, 6 Nev. 291; Pittsburgh, etc., R. Co. *v.*

persons appointed by it are competent to serve as appraisers, where the other party is not also represented.[1] In accordance with the general principle stated it is held that if the jury is selected exclusively from a few towns in the country whose inhabitants are deeply interested in the proposed improvement, a challenge to the array should be allowed.[2] One whose name is struck off the venire in choosing a struck jury is incompetent to fill a vacancy in such jury.[3] The fact that a commissioner to assess damages upon the condemnation of land for a railroad right of way is a stockholder in another railroad which has already acquired its right of way does not make him incompetent.[4] Objections to the competency of commissioners or jurors may be waived by agreement,[5] or otherwise. It is generally held that taking part in an inquest by interested persons with knowledge of their interest is such a waiver.[6] To prevent a waiver the objection should be taken at the earliest opportunity.[7] But if there is excusable ignorance of the disqualification the general rule stated will not prevail.[8] A cor-

Porter, 32 Ohio St. 328; *In re* Buffalo, etc., Co., 32 Hun 289; Ensign *v.* Harney, 15 Neb. 330, s. c. 18 N. W. R. 73; Bowler *v.* Washington, 62 Me. 302; Palmer *v.* Utah, etc., R. Co., 2 Ida. 290, s. c. 18 Pac. R. 429; McDaniels *v.* McDaniels, 40 Vt. 363; Dond *v.* Guthrie, 13 Ill. App. 653; Johnson *v.* Hobart, 45 Fed. R. 542; Burke *v.* McDonald, 2 Ida. 1022, s. c. 29 Pac. R. 98; Patten's Pet., 16 N. H. 283; Beacon *v.* Shreve, 22 N. J. Law 176; Blake *v.* County Commissioners, 114 Mass. 583; Peavey *v.* Wolfborough, 37 N. H. 286; Phillipsburgh Bank *v.* Fulmer, 31 N. J. Law 53.

[1] Rhine *v.* McKinney, 53 Tex. 354.

[2] Haslam *v.* Galena, etc., R. Co., 64 Ill. 353. The mere fact that the county of which the juror is a citizen is interested in the suit was held not to render him incompetent within the statutes of West Virginia. Baltimore, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 17 W. Va. 812.

[3] *In re* Detroit, etc., R. Co., 2 Doug. (Mich.) 367.

[4] People *v.* First Judge, etc., 2 Hill (N. Y.) 398.

[5] People *v.* Taylor, 34 Barb. (N. Y.) 481. See Matter of New York, etc., R. Co., 35 Hun (N. Y.) 575.

[6] Walker *v.* Boston, etc., R. Co., 3 Cush. (Mass.) 1; Fitchburg, etc., R. Co. *v.* Boston, etc., R. Co., 3 Cush. (Mass.) 58; Mansfield, etc., R. Co. *v.* Clark, 23 Mich. 519; Smith *v.* School District, 40 Mich. 143; Crowell *v.* Londonderry, 63 N. H. 42; Jameson *v.* Androscoggin R. Co., 52 Me. 412.

[7] Astor *v.* Mayor, etc., New York, 62 N. Y. 580; Hilltown Road, 18 Pa. St. 233; Burnham *v.* Goffstown, 50 N. H. 560; Matter of Wells County Road, 7 Ohio St. 16; Emanuel Hospital *v.* Metropolitan R. Co., 19 L. T. Rep. N. S. 692.

[8] Giles *v.* Caines, 3 Caines (N. Y.) 107; Newberry *v.* Furnival, 56 N. Y. 638; Wolford *v.* Oakley, 1 Sheldon (N.

poration can not object to the award because part of the commissioners were its own stockholders,[1] but, of course, the adverse party may successfully object in such a case. The general principle is well illustrated by the cases which hold that persons who are active in promoting the proposed improvement, are disqualified.[2] Stockholders in a corporation which is a party to condemnation proceedings are, it is very clear, disqualified from acting as appraisers,[3] and this rule is generally enforced although the statute is silent on the subject of the interest of appraisers.[4] In many of the states it is provided that the commissioners or jurors to assess damages upon the condemnation of land shall be disinterested,[5] and under such

Y.) 261; Elliott's Appellate Procedure, §§ 676, 691. Where the act which disqualifies, as, for instance, the acceptance of a retainer, is unknown to the adverse party the failure to object is not a waiver.

[1] Strang *v.* Beloit, etc., R. Co., 16 Wis. 635. In Rock Island R. Co. *v.* Lynch, 23 Ill. 645, it was held that the award of commissioners, one of whom was disqualified but whose disqualification was unknown, is void even though such commissioner voted with the minority.

[2] Such a disqualification can not be removed by agreement of parties. Michigan, etc., R. Co. *v.* Barnes, 40 Mich. 383. In Detroit, etc., Co. *v.* Crane, 50 Mich. 182, it was held that one who has subscribed to a fund in aid of a railway is not disqualified to act as a commissioner to assess damages against another projected road which is to be leased to the first named road.

[3] Peninsular R. Co. *v.* Howard, 20 Mich. 18; Rock Island, etc., R. Co. *v.* Lynch, 23 Ill. 645; Friend, Appellant, 53 Me. 387. The fact that one has subscribed for stock on which he has paid nothing and is in default does not disqualify him. Chesapeake, etc., Canal Co. *v.* Binney, 4 Cranch C. C. 68. In Georgia R. Co. *v.* Hart, 60 Ga. 550, it was held that a stockholder's son was disqualified because of his near relationship to a person having an interest.

[4] See Giesy *v.* Cincinnati, etc., R. Co., 4 Ohio St. 308; Kansas City, etc., R. Co. *v.* Campbell, 62 Mo. 585; Ames *v.* Lake Superior, etc., R. Co., 21 Minn. 241; Buffalo Bayou, etc., R. Co. *v.* Ferris, 26 Tex. 588; Bernet *v.* Camden, etc., R. Co., 14 N. J. L. 145; People *v.* Michigan, etc., R. Co., 3 Mich. 496; Pennsylvania R. Co. *v.* First German Lutheran Congregation, 53 Pa. St. 445; Donner *v.* Palmer, 23 Cal. 40; Powers *v.* Bears, 12 Wis. 214; Forbes *v.* Howard, 4 R. I. 364; Inge *v.* Police Jury, 14 La. Ann. 117; Thompson *v.* Conway, 53 N. H. 622; Bryant *v.* Glidden, 36 Me. 36. One may have a claim against the company and yet not have such an interest as will prevent him from serving as a commissioner to assess damages. Newbecker *v.* Susquehannah R. Co., 1 Pearson (Pa.) 57.

[5] Stimson's Am. Stat. (1892), § 8749, citing laws of Pennsylvania, Minnesota, Wyoming, Nevada, Utah, New Mexico, New Hampshire, Virginia, Tennessee.

statutes any material interest, however slight, must, as we suppose, disqualify. In some jurisdictions the damages are assessed by the commissioners, of whom one may be designated by the plaintiff and one by the defendant.[1] We think there is reason to doubt whether a party can be compelled to submit his rights to the decision of a tribunal thus constituted, but, of course, he may do so by consent, and acquiescence is regarded as a tacit agreement. In many of the states special commissioners to assess damages upon condemnation must be freeholders,[2] though such a requirement is not usually made as to jurors, whether summoned to assess the damages in the first instance,[3] or on appeal from the commissioners, and where such qualifications are prescribed, the commissioners or jurors must possess them, otherwise an objection to their competency, opportunely made, will prevail.[4]

§ 1018. **Oath must be taken by jurors or commissioners.**— The commissioners or jurors should in all cases be sworn as required by the statute, and some of the cases hold that a failure on their part to take the prescribed oath will render all

[1] Code, 1882, Ga., § 1689 (l); Gen. Stat. 1885, Neb., § 862. For the construction of a statute providing that the court should appoint five commissioners from a list of twelve names, six of which were furnished by the company and six by the land-owner, see Troy, etc., R. Co. *v.* Cleveland, 6 How. Pr. (N. Y.) 238.

[2] Stimson's Am. Stat. (1892), § 8749, citing laws of Pennsylvania, Vermont, Connecticut, New Jersey, Indiana, Michigan, Wisconsin, Minnesota, North Carolina, Kentucky, Missouri, New Mexico, Oregon, Nevada, Texas, Montana, Wyoming, Oklahoma, Iowa, Nebraska, Virginia, West Virginia. In Mississippi it was held that one holding lands under a title bond conditioned for the conveyance to him of a fee simple upon the payment of the purchase-money, was a freeholder within such a statute. New Orleans, etc., R. Co. *v.* Hemphill, 35 Miss. 17. It is sufficient if the commissioners become freeholders at any time before their appointment. New York, etc., R. Co. *v.* Townsend, 36 Hun (N. Y.) 630. An heir of one who, by will directed his land to be sold, was held to be a freeholder. People *v.* Scott, 8 Hun (N. Y.) 566.

[3] See Laws of Maryland, Arkansas, Tennessee, Washington, Louisiana, Florida, Missouri, cited in Stimson's Am. Stat. 1892, § 8749.

[4] In West Virginia the jury must consist of freeholders. Worth's Code, 1887, W. Va. Ch. 42, § 17. See Adams *v.* San Angelo, etc., Co., (Tex. Civ. App.), 25 S. W. R. 165, s. c. 26 S. W. R. 1104.

their proceedings invalid.[1] It seems to us that the failure to take the oath ought not to be available in a collateral attack, but should be deemed a mere irregularity, not rendering the proceedings absolutely void.[2] The rule is very strictly enforced in some of the courts, and it is held that the record must show affirmatively that the jurors or commissioners were duly sworn.[3] But it is generally held that a recital in the record that the commissioners were sworn according to law is sufficient to show that they took the proper oath,[4] and this certainly is the sensible doctrine. A mere irregularity in the form of the oath taken will not be cause for setting aside the proceedings where it is apparent that the proper matters were before the jury for consideration, and the objecting party could have suffered no damages from the irregularity.[5] Proceeding to a hearing with knowledge of an omission to take the oath or of an irregularity in the manner of taking it,[6] or taking an appeal to a court in

[1] Harper *v.* Lexington, etc., R. Co., 2 Dana (Ky.) 227; Bohlman *v.* Green Bay, etc., R. Co., 40 Wis. 157; Keenan *v.* Commissioners' Court, 26 Ala. 568; State *v.* Bayonne, 35 N. J. Law 476; Bowler *v.* Perrin, Drain Commissioner, 47 Mich. 154; People *v.* Conner, 46 Barb. (N. Y.) 333; Frith *v.* Justices, 30 Ga. 723; Adams *v.* San Antonio, etc., Co., (Tex. Civ. App.), 25 S. W. R. 165, s. c. 26 S. W. R. 1104. Omission of the word "faithfully" from prescribed form of the oath held sufficient to invalidate the proceedings. *In re* Gilroy, 85 Hun 424, s. c. 32 N. Y. Supp. 891.

[2] Huling *v.* Kaw Valley, etc., R. Co., 130 U. S. 559, s. c. 9 Sup. Ct. R. 603, citing Commissioners *v.* Espen, 12 Kan. 531; Venard *v.* Cross, 8 Kan. 248; Cooper *v.* Reynolds, 10 Wall. 308; Voorhees *v.* Bank, 10 Pet. 449.

[3] Virginia R. Co. *v.* Lovejoy, 8 Nev. 100.

[4] Lyon *v.* Green Bay, etc., R. Co., 42 Wis. 538; Hannibal, etc., R. Co. *v.* Morton, 27 Mo. 317; New Orleans, etc., R. Co. *v.* Hemphill, 35 Miss. 17; *In re* Road, etc., 90 Pa. St. 190; Long *v.* Commissioner's Court, 18 Ala. 482. Where the sole record of the oath is contained in the record certified by the commissioners themselves, the oath which they took must be set forth that it may appear that the statute was complied with. State *v.* Van Geison, 15 N. J. Law 339; Cambria Street, 75 Pa. St. 357. The return of the sheriff that the jury were duly impanelled and sworn according to law, to discharge their duties, "will be construed to be a statement that the jury were properly sworn, and not a recital of the substance of the oath administered." New Orleans, etc., R. Co. *v.* Hemphill, 35 Miss. 17.

[5] Grafton, etc., R. Co. *v.* Foreman, 24 W. Va. 662.

[6] Rockford, etc., R. Co. *v.* McKinley, 64 Ill. 338. Parties who were before the court will be presumed to have notice of omissions and irregularities in the proceedings. Raymond *v.* County Comrs., 63 Me. 110.

which the proceedings are tried *de novo* amounts to a waiver of such defects.[1]

§ 1019. **Notice—General doctrine.**—The authorities with very little conflict affirm that notice is essential in appropriation proceedings.[2] There is, however, a conflict upon the question whether the statute authorizing the proceedings must provide for notice. It is held by many of the courts that, although notice is indispensable, it is not essential to the validity of the statute that it should provide for notice to the property owner.[3] Other cases hold a different doctrine affirming that a statute providing for the seizure of property is not valid unless it also provides for notice.[4] In our opinion a statute

[1] Patton *v.* Clark, 9 Yerg. (Tenn.) 268.

[2] City of St. Paul *v.* Nickl, 42 Minn. 262, s.c. 44 N.W. 42, 1 Am. R.R. & Corp. Rep. (Lewis) 127; Williams *v.* Monroe, 125 Mo. 574, s. c. 28 S. W. R. 853; Kansas City, etc., R. Co. *v.* Fisher, 53 Kan. 512; Knoblauch *v.* City of Minneapolis, 56 Minn. 321; Wulzen *v.* Board of Supervisors, 101 Cal. 15; Stuart *v.* Palmer, 74 N. Y. 183; Baltimore, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 17 W. Va. 812; Windsor *v.* McVeigh, 93 U. S. 274; People *v.* O'Brien, 111 N. Y. 1, s. c. 2 L. R. A. 255; Campbell *v.* Campbell, 63 Ill. 462; Happy *v.* Mosher, 48 N. Y. 313; Kennard *v.* Louisiana, 92 U. S. 480; Rowan *v.* State, 30 Wis. 129; Garvin *v.* Dausman, 114 Ind. 429; Kuntz *v.* Sumption, 117 Ind. 1; Whiteford Township *v.* Probate Judge, 53 Mich. 130; Brown *v.* City of Denver, 7 Colo. 305; United Stated *v.* Jones, 109 U. S. 513; People *v.* Gilon, 121 N. Y. 551; Township of Kearney *v.* Ballantine, 54 N. J. Law 194; Leavitt *v.* Eastman, 77 Me. 117. See, generally, Baltimore, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 17 W. Va. 812; Reitenbaugh *v.* Chester Valley R. Co., 21 Pa. St. 100; *In re* Road, etc., 109 Pa. St. 118; Atlantic R. Co. *v.* Cumberland County Comrs., 51 Me. 36; Tracy *v.* Elizabethtown, etc., R. Co., 80 Ky. 259; Chicago, etc., R. Co. *v.* Smith, 78 Ill. 96; Mulligan *v.* Smith, 59 Cal. 206; Walbridge *v.* Cabot, (Vt.) 30 Atl. R. 805; State *v.* Reed, 38 N. H. 59; Town of Thetford *v.* Kilburn, 36 Vt. 179; Zimmerman *v.* Canfield, 42 Ohio St. 463; State *v.* Fond du Lac, 42 Wis. 287; Lynch *v.* Rutland, 66 Vt. 570; Gamble *v.* McCrady, 75 N. Car. 509; Chesapeake, etc., Canal Co. *v.* Union Bank, 4 Cranch C. C. 75; Burns *v.* Multnomah R. Co., 8 Sawyer (U. S.) 543; Union Pac. R. Co. *v.* Leavenworth, etc., R. Co., 29 Fed. R. 728.

[3] State *v.* Mayor, etc., of Jersey City, 24 N. J. Law 662; State *v.* Trenton, 36 N. J. Law 499; Peoria, etc., Co. *v.* Warner, 61 Ill. 52; Tracy *v.* Elizabethtown, etc., Co., 80 Ky. 259.

[4] Lewis on Eminent Domain, § 368, p. 480; Elliott's Roads and Streets, 152; Kuntz *v.* Sumption, 117 Ind. 1; State *v.* Fond du Lac, 42 Wis. 287; Seifert *v.* Brooks, 34 Wis. 443. See Whiteford Township *v.* Probate Judge, 53 Mich. 130. Dissenting opinions of Cooley, C. J., Sherwood, J., and

which authorizes the seizure of property, but does not prescribe what notice shall be given violates fundamental principles and should be regarded as void. It seems to us that a statute which authorizes the exercise of the extraordinary power of seizing private property should prescribe what the notice shall be insomuch as such a statute should be complete in itself in so far as regards the fundamental elements of the procedure. It ought not to be left to courts to supply such an essential part of the procedure as notice, nor ought such a question to be left in such doubt that it can only be solved by construction. If notice is not provided for by the legislature the omission can only be supplied by judicial legislation, for a right to seize private property can only be given by express statutory enactment and if the courts supply what is omitted in such a statute they act as legislators. It can not be justly said that the omission can be supplied by the aid of the rules of the common law since the right to appropriate property depends entirely upon statute and not upon the common law. If the right to seize property is entirely statutory then, as it seems to us, the notice must be provided for by the statute, since a notice not provided for by statute is not provided for by law, and notice not provided for by law is no notice at all.[1] While it is well established that notice is essential yet it is generally held that it is competent for the legislature to prescribe what the notice shall be.[2] The legislature may provide for constructive or personal notice,[3] and if the notice, no matter

Campbell, J., in Whiteford Tp. *v.* Probate Judge, 53 Mich. 130; *Quære* in People, *ex rel.*, Ayres *v.* Richards, 38 Mich. 214. Dissenting opinion of Bartley, J., in Kramer *v.* Cleveland, etc., R. Co., 5 Ohio St. 140, 165.

[1] Norvell *v.* Porter, 62 Mo. 309; Osborne *v.* Schutt, 67 Mo. 712; Harmon *v.* Birchard, 8 Blkf. 418; Terre Haute, etc., R. Co. *v.* Baker, 122 Ind. 433, 441; Scudder *v.* Jones, 134 Ind. 547, 551. Some of the cases hold that provision for notice may be implied. Branson *v.* Gee, 25 Ore. 462, s. c. 24 L. R. A. 355; Ulman *v.* Mayor of Baltimore, 72 Md. 587, s. c. 11 L. R. A. 224. See generally, Paulsen *v.* Portland, 16 Ore. 450, s. c. 1 L. R. A. 673, 19 Pac. R. 450.

[2] Walker *v.* Boston, etc., R. Co., 3 Cush. 1; City of Salem *v.* Eastern R. Co., 98 Mass. 431; Mason *v.* Messenger, 17 Iowa 261; Matter of Middletown, 82 N. Y. 196; Elliott's Roads and Streets, 152.

[3] United States, etc., Co. *v.* United

whether personal or constructive, be not palpably and unquestionably unreasonable it will be sufficient. Constructive notice satisfies the constitutional provision requiring due process of law.[1] The weight of authority is that the land-owner should have notice of the time when the application for the appointment of commissioners or appraisers or for the calling of a special jury to assess damages will be presented to the court,[2] in order that he may see that proper persons only are selected to make the appraisement, or may resist the application, if it is insufficient either in form or substance.[3]

§ 1020. **Notice—Requisites of.**—As notice is required in order to satisfy the provisions of the constitution requiring due process of law, it must be a reasonable notice. The subject is, as we have said, so largely a legislative one that it is competent for the legislature to prescribe the form, and, within limits, the substance of the notice. There are cases holding that where the land-owner is a resident the notice must be per-

States, etc., Co., 18 N. Y. 199; Cupp *v.* Commissioners, 19 Ohio St. 173; Starbuck *v.* Murray, 5 Wend. 148, s. c. 21 Am. Dec. 172; Owners *v.* Mayor, 15 Wend. 374; Polly *v.* Saratoga, etc., Co., 9 Barb. 449; Wilkin *v.* First Division of St. Paul, 16 Minn. 271; New Orleans, etc., Co. *v.* Hemphill, 35 Miss. 17; Missouri, etc., Co. *v.* Shepard, 9 Kan. 647; Weir *v.* St. Paul, etc., Co., 18 Minn. 155; Wilson *v.* Hathaway, 42 Iowa 173; Lent *v.* Tillson, 140 U. S. 316, s. c. 11 Sup. Ct. R. 825; Huling *v.* Kaw Valley, etc., R. Co., 130 U. S. 559, s. c. 9 Sup. Ct. R. 603; Harvey *v.* Tyler, 2 Wall. 328; Secombe *v.* Railroad Co., 23 Wall. 108; Pennoyer *v.* Neff, 95 U. S. 714, 743.

[1] Huling *v.* Kaw Valley, etc., R. Co., 130 U. S. 559; Hagar *v.* Reclamation Dist., 111 U. S. 701, s. c. 4 Sup. Ct. R. 663; McMillen *v.* Anderson, 95 U. S. 37; Davidson *v.* New Orleans, 96 U. S. 97; Boom Co. *v.* Patterson, 98 U. S. 403, 406.

[2] In some states, notice of the formation of a tribunal for the assessment of damages is not necessary, but notice of the hearing before such tribunal is sufficient. Zack *v.* Pennsylvania R. Co., 25 Pa. St. 394; Long Island R. Co. *v.* Bennett, 10 Hun (N. Y.) 91; Matter of the Village of Middletown, 82 N. Y. 196; Hunter *v.* Matthews, 1 Rob. (Va.) 468; Weir *v.* St. Paul, etc., R. Co., 18 Minn. 155; Chesapeake, etc., Canal Co. *v.* Union Bank, 4 Cranch (U. S. C. C.) 75.

[3] Baltimore, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 17 W. Va. 812; Tracy *v.* Elizabethtown, etc., R. Co., 80 Ky. 259; State *v.* Fond du Lac, 42 Wis. 287; Peoria, etc., R. Co. *v.* Warner, 61 Ill. 52; Gamble *v.* McCrady, 75 N. C. 509; Central Turnpike Corp., 7 Pick. (Mass.) 13; Langford *v.* County Comrs., 16 Minn. 375; Lewis' Em. Dom., § 366.

sonal, but the great weight of authority is that the legislature may provide for notice by publication or by posting only,[1] and need not even require it to be addressed to the owners by name; but may simply require it to describe the land, to indicate the nature of the proceeding, and to specify the time when, and the place where, the parties interested must appear to protect their rights.[2] A failure to comply with the requirements of the statute as to notice will, unless waived by appearance or otherwise, render all subsequent proceedings erroneous, and they may be arrested or set aside upon motion.[3] The notice must be definite as to the time and place where the proceeding will be had, and notice of a proceeding to be had in a certain village which covers two square miles without specifying any particular place in the village, is void for indefiniteness.[4] Where there is no notice at all the proceedings will be treated

[1] *Ante*, § 1019; Harper *v.* Lexington, etc., R. Co., 2 Dana (Ky.) 227; St. Paul, etc., R. Co. *v.* Minneapolis, 35 Minn. 141; Polly *v.* Saratoga, etc., R. Co., 9 Barb. (N. Y.) 449; Baltimore, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 27 W. Va. 812; Missouri River, etc., R. Co. *v.* Shepard, 9 Kan. 647; Baltimore, etc., R. Co. *v.* North, 103 Ind. 486; Indianapolis, etc., R. Co. *v.* State, 105 Ind. 37; Wilson *v.* Hathaway, 42 Iowa 173; People, *ex rel.* Ayres *v.* Richards, 38 Mich. 214; *In re* Road, etc., 114 Pa. St. 627; Cupp *v.* Commissioners, 19 Ohio St. 173; State *v.* Beeman, 35 Me. 242; State *v.* Trenton, 36 N. J. Law 499; Lent *v.* Tillson, 72 Cal. 404; Hildreth *v.* Lowell, 11 Gray (Mass.) 345; Methodist P. Church *v.* Mayor, etc., of Baltimore, 6 Gill. (Md.) 391; Application of Village of Middletown, 82 N. Y. 196; Zimmerman *v.* Canfield, 42 Ohio St. 463.

[2] McIntyre *v.* Marine, 93 Ind. 193; Indianapolis, etc., Road Co. *v.* State, 105 Ind. 37; McMicken *v.* Cincinnati, 4 Ohio St. 394. Cases in preceding note; Lewis' Em. Dom. Sec. 367.

[3] Appeal of Central R. Co., 102 Pa. St. 38; Reitenbaugh *v.* Chester Valley R. Co., 21 Pa. St. 100; Matter of New York, etc., R. Co., 62 Barb. (N. Y.) 85; Norton *v.* Wallkill Valley R. Co., 63 Barb. (N. Y.) 77; Morgan's Louisiana, etc., R. Co. *v.* Bourdier, 1 McGloin (La.) 232; Brazee *v.* Raymond, 59 Mich. 548; Commissioners *v.* Thompson, 15 Ala. 134; Morgan *v.* Chicago, etc., R. Co., 36 Mich. 428; New Orleans, etc., R. Co. *v.* Frederic, 46 Miss. 1.

[4] Minneapolis, etc., R. Co. *v.* Kanne, 32 Minn. 174; *In re* Johnson, 49 N. J. Law 381; Wallkill Valley R. Co. *v.* Norton, 12 Abb. Pr. (U.S.) 317; Rensselaer, etc., R. Co. *v.* Davis, 43 N. Y. 137; *In re* Broadway, etc., R. Co., 69 Hun 275, s. c. 23 N. Y. Supp. 609. See Thompson *v.* Chicago, etc., Co., 110 Mo. 147, s. c. 19 S. W. R. 77, as to the effect of failure to hear the application at the time specified in the notice.

as a nullity even when attacked in a collateral proceeding.[1] Some of the cases go so far as to hold that the proceedings are void although there is notice, if the notice is defective, but it seems to us that some of the cases go too far. A provision that the notice shall recite the substance of the petition was held to be substantially complied with by a notice which informed the land-owner that the company would make application for the appointment of commissioners to view his property and assess the damages he would sustain by the establishment of a railroad across it upon a location which was particularly described, although it did not purport to recite the petition.[2] If the statute requires the notice to name the owner, the requirement must be complied with; otherwise the proceedings will be erroneous.[3]

§ 1021. **Notice—Political questions—Expediency.**—The rule that there must be notice in order to constitute due process of law does not extend to questions upon which the property owner is not entitled to a hearing. There are questions upon which the parties are not entitled to a hearing and as to those questions it is not necessary that there should be notice, unless the statute requires it.[4] The question whether the proposed improvement shall be made, and in what mode, are political questions which may be settled in any manner chosen by the legislature, without any notice to the owner except such as it

[1] Hull *v.* Chicago, etc., R. Co., 21 Neb. 371; Lohman *v.* St. Paul, etc., 18 Minn. 174; Cruger *v.* Hudson River R. Co., 12 N. Y. 190; Leavitt *v.* Eastman, 77 Me. 117; Barnes *v.* Fox, 61 Iowa 18.

[2] Quincy, etc., R. Co. *v.* Taylor, 43 Mo. 35.

[3] Birge *v.* Chicago, etc., R. Co., 65 Iowa 440. If the notice name only a life tenant the remainder-man is not bound by the proceeding. Chicago, etc., R. Co. *v.* Smith, 78 Ill. 96. In these cases the proceedings were held void, collaterally, as to persons not named. The interest of the life tenant is not affected by a proceeding against the remainder-man. Railroad Co. *v.* Boyer, 13 Pa. St. 497.

[4] Weaver *v.* Templin, 113 Ind. 298; Preble *v.* Portland, 45 Me. 241; People *v.* Smith, 21 N. Y. 595; Baltimore, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 17 W. Va. 812; Holt *v.* Somerville, 127 Mass. 408. Where the statute requires that notice shall be given upon questions of policy, expediency, necessity or the like, then notice is essential. Paul *v.* Detroit, 32 Mich. 108; Pearsall *v.* Board of Supervisors, 74 Mich. 558; State *v.* Fond du Lac, 42 Wis. 287.

sees fit to prescribe,[1] provided, of course, that the proposed use is a public one,[2] and the constitution places no limit upon this right. But where the constitution permits the condemnation of the property only after a public necessity for the taking has been found by a jury, the property owner is entitled to such notice as will enable him to dispute the existence of such a necessity.[3] It has been held that at whatever stage of the proceedings the owner of land sought to be condemned is summoned to appear after such notice he has the right to contest the appropriation of his land to the petitioner's use.[4]

§ 1022. **Notice—Description.**—No particular description of the property taken need be contained in the notice unless the statute particularly requires it,[5] and even where a description was required, it has been held sufficient to describe the land as that "now occupied by the New Jersey railroad company as the location of its track,"[6] or to describe it by reference to a map filed by the condemning company.[7] But where the statute provides for a definite description, it must be strictly complied with.[8] The principle that if the persons entitled to notice appear and take part in the proceedings, of which they are required to be notified, failure to object operates as a waiver of objections, applies to the descriptions, and, indeed, to all other parts of the notice.[9]

[1] Kramer *v.* Cleveland, etc., R. Co., 5 Ohio St. 140; Zimmerman *v.* Canfield, 42 Ohio St. 463; Harper *v.* Lexington, etc., R. Co., 2 Dana (Ky.) 227; Lent *v.* Tillson, 72 Cal. 404; Challiss *v.* Atchison, etc., R. Co., 16 Kan. 117; Secombe *v.* Railroad Co., 23 Wall (U. S.) 109; Weir *v.* St. Paul, etc., R. Co., 18 Minn. 155.

[2] Baltimore, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 17 W. Va. 812.

[3] Seifert *v.* Brooks, 34 Wis. 443.

[4] Baltimore, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 17 W. Va. 812.

[5] Doughty *v.* Somerville, etc., R. Co., 21 N. J. Law 442; Wilkin *v.* First Division, etc., R. Co., 16 Minn. 271.

[6] Coster *v.* New Jersey R. Co., 23 N. J. Law 227.

[7] Hazen *v.* Boston, etc., R. Co., 2 Gray (Mass.) 574.

[8] Strang *v.* Beloit, etc., R. Co., 16 Wis. 635; Vail *v.* Morris, etc., R. Co., 21 N. J. L. 189.

[9] Swinney *v.* Fort Wayne, etc., R. Co., 59 Ind. 205, 219; Indiana, etc., R. Co. *v.* Allen, 100 Ind. 409; East Saginaw, etc., R. Co. *v.* Benham, 28 Mich. 459; Concord R. Co. *v.* Greely, 17 N. H. 47; Boston, etc., R. Co. *v.* Folsom, 46 N. H. 64; Barre Turnpike Co. *v.* Appleton, 2 Pick. (Mass.) 430; Huston *v.* Clark, 112 Ill. 344; Atchison, etc., R. Co. *v.* Patch, 28 Kan.

§ 1023. **Service of notice.**—Where the mode of giving or serving notice is prescribed by statute that mode must be substantially pursued. Where notice is prescribed and the mode of service is not designated, it seems to us that service would be good if made in accordance with the general rules governing service, for the particular statute may, in that respect, be aided by other statutes and other rules of law.[1] It has been held that where service upon an agent is relied upon, it must be shown that the agent was authorized to receive such service,[2] but this may be done by showing the duties or position of the agent, and that he is embraced within the statute authorizing service upon the agents.[3] Where the statute provides for notice by publication and the notice is published in different newspapers, sent to different subscribers for part of the prescribed time, it will not be effective although taking all the publications in the different papers, it appears that it was published the prescribed number of weeks.[4] Where the notice is by publication the affidavit prescribed by statute must be filed.[5] It is a general rule that where notice by publication is prescribed it must be given in accordance with the statute in all material particulars.[6] There are cases holding that where a part only

470; Stephens *v.* Commissioners, 36 Kan. 664; Brock *v.* Barnet, 57 Vt. 172; Muire *v.* Falconer, 10 Gratt. (Va.) 12; Corrigal *v.* London, etc., R. Co., 5 M. & G. 219, 44 Eng. C. L. 123.

[1] Notice by mail, unless such notice is provided for by the statute, is not sufficient. Morgan *v.* Chicago, etc., R. Co., 36 Mich. 428. Notice by publication, as prescribed by statute, is good. Huling *v.* Kaw, etc., R. Co., 130 U. S. 559, s. c. 9 Sup. Ct. R. 603; St. Paul, etc., R. Co. *v.* Minneapolis, 35 Minn. 141, s. c. 27 N. W. R. 500, 24 Am. & Eng. R. Cas. 309; Winnebago, etc., Co. *v.* Wisconsin, etc., Co., 81 Wis. 389, s. c. 51 N. W. R. 576; Birge *v.* Chicago, etc., R. Co., 65 Iowa 440, s. c. 21 N. W. R. 767, 20 Am. & Eng. R. Cas. 291. It is held that where personal service is required, service on the owner in another state satisfies the statute. State *v.* Hudson River, etc., Co. (N. J.), 25 Atl. R. 853.

[2] Memphis, etc., R. Co. *v.* Parsons, etc., Co., 26 Kan. 503; Dunlap *v.* Toledo, etc., R. Co., 46 Mich. 190, s. c. 9 N. W. R. 249.

[3] *In re* St. Paul, etc., R. Co., 36 Minn. 85, s. c. 30 N. W. R. 432, 28 Am. & Eng. R. Cas. 255.

[4] Hull *v.* Chicago, etc., R. Co., 21 Neb. 371, s. c. 32 N. W. R. 162.

[5] Brown *v.* St. Paul, etc., R. Co., 38 Minn. 506, s. c. 38 N. W. R. 698; Barber *v.* Morris, 37 Minn. 194, s. c. 33 N. W. R. 559.

[6] Mississippi River, etc., R. Co. *v.* Jones, 54 Mo. App. 529. See Chicago, etc., R. Co. *v.* Smith, 78 Ill. 96; Brad-

of those entitled thereto are given notice, proceedings which are otherwise regular will bind such as are notified, but will be invalid as to those not receiving notice, but there is some diversity of opinion on the general question.[1] Infants, who own an estate in common with their mother, with whom they live, are not bound by a notice addressed to the mother only.[2] Where service is required to be made upon the owner or owners it must be made upon all who come within the meaning of the term "owner" or "owners." In general, the word owner includes the holder of any legal or equitable estate, such as lessees,[3] mortgagees,[4] or vendees in possession.[5] No general designation of the "persons interested" by the language used in the statute can supply the place of the names of such persons, where the statute requires the notice to be given to "all persons interested."[6] Where one is notified as an occupant, he must defend for whatever interest he has.[7]

ley *v.* Missouri Pacific R. Co., 91 Mo. 493, s. c. 30 Am. & Eng. R. Cas. 379; Hunt *v.* Smith, 9 Kan. 137.

[1] New Orleans R. Co. *v.* Frederic, 46 Miss. 1; Smith *v.* Chicago, etc., R. Co., 67 Ill. 191; Detroit, etc., R. Co. *v.* Detroit, 49 Mich. 47; Columbus, etc., R. Co. *v.* Witherow, 82 Ala. 190; Moses *v.* St. Louis, etc., Dock Co., 84 Mo. 242; State *v.* Easton and Amboy, etc., R. Co., 36 N. J. Law 181; Garmoe *v.* Sturgeon, 65 Iowa 147; Barlage *v.* Detroit, etc., R. Co., 54 Mich. 564, s. c. 20 N. W. R. 587, 17 Am. & Eng. R. Cas. 131.

[2] New Orleans, etc., R. Co. *v.* Frederic, 46 Miss. 1; Swinney *v.* Fort Wayne, etc., R. Co., 59 Ind. 205. See generally, Lohman *v.* St. Paul, etc., R. Co., 18 Minn. 174; Rheiner *v.* Union, etc., R. Co., 31 Minn. 289, s. c. 14 Am. & Eng. R. Cas. 373. But see Charleston, etc., Co. *v.* Comstock, 36 W. Va. 263, s. c. 15 S. E. R. 69.

[3] Pennsylvania R. Co. *v.* Eby, 107 Pa. 166; Colcough *v.* Nashville, etc., R. Co., 2 Head (Tenn.) 171; Baltimore, etc., R. Co. *v.* Thompson, 10 Md. 76; Gilligan *v.* Providence, 11 R. I. 258.

[4] Dodge *v.* Omaha, etc., R. Co., 20 Neb. 276; Severin *v.* Cole, 38 Iowa 463.

[5] Smith *v.* Ferris, 6 Hun (N. Y.) 553.

[6] Birge *v.* Chicago, etc., R. Co., 65 Iowa 440. A mortgagee is a person interested within the meaning of such a statute. Pratt *v.* Bright, 29 N. J. Eq. 128; Michigan, etc., R. Co. *v.* Barnes, 40 Mich. 383; Wilson *v.* European, etc., R. Co., 67 Me. 358. So, also, are persons holding judgment liens against the land. Watson *v.* New York Cent. R. Co., 6 Abb. (N. Y.) Pr. N. S. 91; State *v.* Easton, etc., R. Co., 36 N. J. Law 181.

[7] McIntyre *v.* Easton, etc., R. Co., 26 N. J. Eq. 425. See, generally, Platt *v.* Bright, 29 N. J. Eq. 128; Severin *v.* Cole, 38 Iowa 463; Boynton *v.* Peterborough, 4 Cush. 467; Nortou *v.* Wallkill, etc., R. Co., 63 Barb. 77; Baltimore, etc., R. Co. *v.* Baltzell, 75 Md.

§ 1024. **Summoning the jury or commissioners.**—The general rule is that the provisions of the statute as to the appointment of commissioners or the summoning of a jury must be strictly pursued.[1] But where the statute simply provides that the proceedings shall be in a certain court before a jury, the jury is to be drawn as in other cases.[2] The failure to fix a day for the jury to meet, as required by the statute, has been held to invalidate a warrant for summoning them.[3] Some of the courts hold that the order or warrant under which they act should state definitely the duties which the jury or commissioners are to perform, but this rule can not apply where the statute provides for the submission of the matter to an ordinary jury.[4] It is also held that the warrant must be returned to the proper court or all proceedings under it will be void.[5] It is said, however, that if more than the required number of jurors are summoned, the proceedings will not be erroneous, if only twelve are empanelled.[6] A jury, summoned by a disinterested deputy sheriff, while another was interested, was held to have no power to act under a statute which provided that if the sheriff or either of his deputies was interested, the jury should be summoned by the coroner.[7] And where the statute required that a precept be issued to the sheriff to summon a jury, it was held to be

94, s. c. 23 Atl. R. 74; Quincy, etc., R. Co. *v.* Taylor, 43 Mo. 35; Cory *v.* Chicago, etc., R. Co., 100 Mo. 282, s. c. 13 S. W. R. 346; *In re* New York, etc., R. Co., 29 Hun 269; *In re* Broadway, etc., R. Co., 34 Hun 414.

[1] A substantial compliance has been held sufficient. Queen *v.* Lancaster, etc., R. Co., 6 A. & E. N. S. 759, 51 E. C. L. 757.

[2] It is said, however that there can not be a peremptory challenge to a juror unless it is expressly conferred by statute, and that a statute allowing peremptory challenge in "civil causes" does not apply to proceedings under the right of eminent domain. Peninsular R. Co. *v.* Howard, 20 Mich. 18. See Davis *v.* Bangor, etc., 60 Me. 303. We can not believe that the doctrine of the cases cited can apply where the statute provides in general terms for a jury trial.

[3] Chesapeake,etc., Canal Co.*v.* Key, 3 Cranch (U. S. C. C.) 599.

[4] Heise *v.* Pennsylvania R. Co., 62 Pa. St. 67. But see Mitchell *v.* Bridgewater, 10 Cush. (Mass.) 411.

[5] Cassidy *v.* Kennebec, etc., R. Co., 45 Me. 263.

[6] Fitchburg R. Co. *v.* Boston, etc., R. Co., 3 Cush. (Mass.) 58.

[7] Barre Turnpike Corporation *v.* Appleton, 2 Pick. (Mass.) 430. Where the officer who summoned the jury was a stockholder the proceedings were set aside and a *venire de novo* awarded. Woodstock R. Co. *v.* Tup-

error for him to select the jury from a list of names prepared by his deputy.[1]

§ 1025. **Parties.**—The general rule is that all persons who have an estate, interest or right in the land sought to be appropriated should be parties to the proceedings.[2] As we have elsewhere said our opinion is that, while it is true that the general rule is as stated yet it is only persons whose rights, titles, interests, or estates appear of record that must be made parties, except where possession conveys notice. We do not believe that a company desiring to appropriate land is bound to look elsewhere than to the records or to the occupancy of the lands. As a rule proceedings to secure the condemnation of lands must be prosecuted by the party entitled to the lands, and not by a contractor or agent.[3] Where damages are sought under the statute in cases where land is appropriated the owners are, of course, the proper parties plaintiffs.[4] Proceedings for the condemnation of the land should be brought in the name of the company authorized to construct the road for which it is taken. And the fact that such company has parted

per, 12 New Brunswick 457. By appearing and taking part in the proceedings, the defendant waives all objections on account of the sheriff being an interested party. Corrigal *v.* London, etc., R. Co., 5 M. & G. 219, 44 Eng. C. L. 123.

[1] Pennsylvania R. Co. *v.* Heister, 8 Pa. St. 445.

[2] Grand Rapids, etc., R. Co. *v.* Alley, 34 Mich. 18; Charleston, etc., R. Co. *v.* Comstock, 36 W. Va. 263, s. c. 15 S. E. R. 69; Davis *v.* La Crosse, etc., R. Co., 12 Wis. 16; Patterson *v.* Binghamton, 88 Hun 272, s. c. 34 N. Y. Supp. 416; Chicago, etc., R. Co. *v.* Town of Cicero, 154 Ill. 656, s. c. 39 N. E. R. 574; Williams *v.* Monroe, 125 Mo. 574, s. c. 28 S. W. R. 853; Walbridge *v.* Cabot, 67 Vt. 114, s. c. 30 Atl. R. 805; Justice *v.* Philadelphia, 169 Pa. St. 503, 32 Atl. R. 592, 36 W. N. C. 509; Moore *v.* Mayor, 8 N. Y. 110; Gwynne *v.* Cincinnati, 3 Ohio 24; State *v.* Easton R. Co., 36 N. J. Law 181; Austin *v.* Rutland, etc., R. Co., 45 Vt. 215; *In re* Philips, etc., L. R. 6 Eq. 250; *In re* Pfleger, L. R. 6 Eq. 426; Shelton *v.* Derby, 27 Conn. 414.

[3] Colorado, etc., R. Co. *v.* Ruedi, 2 Colo. App. 202, s. c. 29 Pac. R. 1034; Kansas, etc., R. Co. *v.* Streeter, 8 Kan. 133. See Cory *v.* Chicago, etc., R. Co., 100 Mo. 282, s. c. 13 S. W. R. 346; Deitrichs *v.* Lincoln, etc., R. Co., 13 Neb. 361, s. c. 13 N. W. R. 624; Junction, etc., R. Co. *v.* Silver, 27 Kan. 741, s. c. 14 Am. & Eng. R. Cas. 324; Proprietors, etc., *v.* Nashua, etc., Co., 10 Cush. 385.

[4] Hibbs *v.* Chicago, etc., R. Co., 39 Iowa 340. But it is held that unless the statute authorizes the owner to initiate the proceedings he can not do so. Indianapolis, etc., Co. *v.* Reed, 52 Ind. 357; Bentonville, etc., R. Co. *v.* Baker, 45 Ark. 252.

with its property and franchises by sale,[1] or lease,[2] does not prevent the institution of such proceedings in its name. The fact that proceedings are prosecuted in the name of the petitioner as agent for the railroad company does not invalidate them.[3] Where damages are to be assessed for land already appropriated, the owner of the land at the time it was taken is the proper party defendant,[4] and in case of his death pending proceedings, they should be revived in the name of his personal representatives.[5] But if a future acquisition of title is sought, the owner of the land at the time the proceedings are instituted is the proper defendant.[6] If the land has been seized by the railroad company without right, and subsequently a proceeding is begun to acquire title, the owner of the land at the time the proceeding is instituted is entitled to the compensation.[7]

[1] Cory *v.* Chicago, etc., R. Co., 100 Mo. 282. In this case it was held that a statute requiring actions to be brought in the name of the real party in interest does not embrace proceedings of this character nor affect the jurisdiction of the court.

[2] Gottschalk *v.* Lincoln, etc., R. Co., 14 Neb. 389.

[3] Hannibal, etc., R. Co. *v.* Morton, 27 Mo. 317.

[4] Davidson *v.* Boston, etc., R. Co., 3 Cush. (Mass.) 91; Drury *v.* Midland R. Co., 127 Mass. 571. In Pennsylvania, the location of a railroad fixes its right to take any lands across which it runs, and all assessments of damages must be made with reference to the date of the location, and in favor of the person owning the land at that time. Davis *v.* Titusville, etc., R. Co., 114 Pa. St. 308.

[5] Valley R. Co. *v.* Bohm, 29 Ohio St. 633; Peoria, etc., R. Co. *v.* Rice, 75 Ill. 329; Darling *v.* Blackstone, etc., Co., 16 Gray (Mass.) 187; Upper Appomattox Co. *v.* Hardings, 11 Gratt. (Va.) 1. If proceedings to assess the compensation for lands already taken are brought after the death of the owner, his personal representatives, and not the heirs or devisees, are the proper parties. Whitman *v.* Boston, etc., R. Co., 3 Allen (Mass.) 133; Church *v.* Grand Rapids, etc., R. Co., 70 Ind. 161; Neal *v.* Knox, etc., R. Co., 61 Me. 298.

[6] Smith *v.* Chicago, etc., R. Co., 67 Ill. 191; Elizabethtown, etc., R. Co. *v.* Helm, 8 Bush. (Ky.) 681. One who was not an owner of the land at the time the proceedings were instituted can not take an appeal from the award; the fact that he has purchased the property after condemnation proceedings were begun does not make him a proper party to such proceedings. Connable *v.* Chicago, etc., R. Co., 60 Iowa 27; Cedar Rapids, etc., R. Co. *v.* Chicago, etc., R. Co., 60 Iowa 35. One who purchases land after the condemnation of a right of way across it has no claim to the compensation therefor. After condemnation the claim to compensation is a personal claim of the owner in whose favor it was assessed. Dixon *v.* Baltimore, etc., R. Co., 1 Mackey (D. C.) 78, 3 Am. & Eng. R. Cas. 201.

[7] Hatfield *v.* Central R. Co., 29 N. J.

A right to compensation once accrued does not pass by a subsequent conveyance of the land, even with covenants of warranty, unless the deed contains an express stipulation to that effect.[1] It follows from this rule that the grantor, where there is no assignment, is the proper party in proceedings to recover the damages. Though even where the compensation is required to precede the taking, it has been held that the construction of a railroad upon the land of another with his knowledge and without any objection on his part so far fixes the rights of the parties that the subsequent conveyance of the land carries with it no right to the damages caused by such construction.[2] But the right although it does not pass with the land is an assignable one. As we have said the proceeding must be against all persons having an interest in the land sought to be taken. This includes mortgagees, whether in possession,[3] or

Law 571; Donald *v.* St. Louis, etc., R. Co., 52 Iowa 411; Harrington *v.* St. Paul, etc., R. Co., 17 Minn. 215; Galveston, etc., R. Co. *v.* Pfeuffer, 56 Tex. 66. *Contra*, McLendon *v.* Atlanta, etc., R. Co., 54 Ga. 293. See Pomeroy *v.* Chicago, etc., R. Co., 25 Wis. 641.

[1] Drury *v.* Midland R. Co., 127 Mass. 571; Carli *v.* Stillwater, etc., R. Co., 16 Minn. 260; Indiana, etc., R. Co. *v.* Allen, 100 Ind. 409; Paducah, etc., R. Co. *v.* Stovall, 12 Heisk. (Tenn.) 1; Pomeroy *v.* Chicago, etc., R. Co., 25 Wis. 641; Chicago, etc., R. Co. *v.* Maher, 91 Ill. 312; Tenbrooke *v.* Jahke, 77 Pa. St. 392; Davis *v.* Titusville, etc., R. Co., 114 Pa. St. 308; Central R. Co. *v.* Merkel, 32 Tex. 723; McLendon *v.* Atlanta, etc., R. Co., 54 Ga. 293; Lewis *v.* Wilmington, etc., R. Co., 11 Rich. L. (S. Car.) 91; Indiana, etc., R. Co. *v.* Allen, 100 Ind. 409.

[2] A mortgagee in possession is entitled to the same notice as an owner. Ballard *v.* Ballard Vale Co., 5 Gray (Mass.) 468; Parker, Petitioner, 36 N. H. 84. In England an equitable mortgagee is entitled to notice. Martin *v.* London, etc., R. Co., 35 L. J. Ch. 795. Where the statute simply provides for a proceeding against the "owners" and contains no provision for the protection of the inchoate rights the company may acquire the land free from all inchoate rights by simply proceeding against those holding the present title, and rights of dower, curtesy, etc., etc., can only be urged against the compensation awarded. Moore *v.* New York, 4 Sandf. (N. Y.) 456; McCracken *v.* Hayward, 2 How. (U. S.) 608.

[3] Michigan, etc., R. Co. *v.* Barnes, 40 Mich. 383; Wilson *v.* European, etc., R. Co., 67 Me. 358; Aspinwall *v.* Chicago, etc., Co., 41 Wis. 474; Wooster *v.* Sugar River Valley R. Co., 57 Wis. 311; Adams *v.* St. Johnsbury, etc., R. Co., 57 Vt. 240; South Park Comrs. *v.* Todd, 112 Ill. 379; North Hudson, etc., R. Co. *v.* Booraem, 28 N. J. Eq. 450; Severin *v.* Cole, 38 Iowa 463; Stewart *v.* Raymond R. Co., 7 S. & M. (Miss.) 568; Martin *v.* London,

not.[1] If the statute gives the right to compensation to the person owning the property taken at a particular time, as "when the railroad is finished," a subsequent grantee can not have the damages assessed.[2] Some of the courts hold that judgment creditors are necessary parties,[3] but other courts hold otherwise distinguishing between a mortgage lien and a judgment lien.[4] Vendees holding under an executory contract for the purchase of the land taken, should be parties to the proceedings,[5] as well as those who are properly designated "the owners."[6] The term "owners" includes lessees,[7] life ten-

etc., R. Co., L. R. 1 Eq. Cas. 145; 1 Jones on Mortg., § 681. In Breed *v.* Eastern R. Co.,5 Gray (Mass.) 470,*n.* it is said that the mortgagor can recover the full amount of damages without reference to the mortgagee. And a similar holding has been made in other cases. But the courts in which this rule obtains hold that the mortgage lien in equity follows the fund which is a substitute for the land, and, that by the timely application to a court of chancery, the mortgagee may have such fund applied on his debt, although it is not due. Crane *v.* Elizabeth, 36 N. J. Eq. 339; McIntyre *v.* Easton, etc., R. Co., 26 N. J. Eq. 425; Farnsworth *v.* Boston, 126 Mass. 1; Astor *v.* Hoyt, 5 Wend. (N. Y.) 603.

[1] Indiana, etc., R. Co. *v.* Allen, 100 Ind. 409.

[2] Lewis *v.* Wilmington, etc., R. Co., 11 Rich. L. (S. Car.) 91.

[3] Where the statute provides that a judgment shall operate as a lien upon the lands of the defendant, a payment of the damages to such a judgment creditor amounts *pro tanto*, to a payment to the owner. Chicago, etc., R. Co. *v.* Chamberlain, 84 Ill. 333.

[4] Watson *v.* New York, etc., R. Co., 47 N. Y. 157; Gimbel *v.* Stolte, 59 Ind. 446; Shirk *v.* Thomas, 121 Ind. 147, 149.

[5] Pinkerton *v.* Boston, etc., R. Co., 109 Mass. 527; Hastings, etc., R. Co. *v.* Ingalls, 15 Neb. 123; St. Louis, etc., R. Co. *v.* Wilder, 17 Kan. 239; Colcough *v.* Nashville, etc., R. Co., 2 Head. (Tenn.) 171. The holder of an equitable interest is entitled to compensation under a statute which provides for the payment of damages to "parties interested." Drury *v.* Midland R. Co., 127 Mass. 571.

[6] Vendees in possession have been held to be *owners*. Smith *v.* Ferris, 6 Hun (N. Y.) 553. And so have mortgagees. Dodge *v.* Omaha, etc., R. Co., 20 Neb. 276; Severin *v.* Cole, 38 Iowa 463; Wade *v.* Hennessy, 55 Vt. 207.

[7] *Ante*, § 1023; North Pennsylvania R. Co. *v.* Davis, 26 Pa. St. 238; Getz *v.* Philadelphia, etc., R. Co., 105 Pa. St. 547; Pennsylvania R. Co. *v.* Eby, 107 Pa. St. 166; Telephone, etc., Co. *v.* Forke, 2 Tex. App. Civil Cas. 318; Town of Storm Lake *v.* Iowa Falls, etc., R. Co., 62 Iowa 218; Colcough *v.* Nashville, etc., R. Co., 2 Head. (Tenn.) 171; Baltimore, etc., R. Co. *v.* Thompson, 10 Md. 76; McCauley *v.* Brooks, 16 Cal. 11; Rogers *v.* Docks Co., 34 L. J. Eq. 165; Willey *v.* Southeastern R. Co., 1 McN. & G. 58. Where a tenancy expires pending condemnation proceedings, the tenant can not, by holding over with the consent of the owner, acquire any right as against the condemning corporation. Schreiber *v.*

ants,[1] reversioners,[2] heirs or devisees[3] and tenants in common,[4] or persons having any other vested interest which goes to make up the entire estate.[5] Also persons holding an estate in trust

Chicago, etc., R. Co., 115 Ill. 340. See Englewood, etc., R. Co. *v.* Chicago, etc., R. Co., 117 Ill. 611. Where the land is held by lease the compensation should be apportioned between the lessor and lessee according to the value of their respective interests. Baltimore, etc., R. Co. *v.* Thompson, 10 Md. 76. The damage to the lessee should be ascertained by reference to the difference between the annual value of the land before and after the taking. Lawrence *v.* Boston, 119 Mass. 126. Lessees of land with covenants of renewal are entitled to the value of their rights under such covenants, in addition to the value of the remaining term. North Pennsylvania R. Co. *v.* Davis, 26 Pa. St. 238; Norwich R. Co. *v.* Wodehouse, 11 Beav. 382. See Alabama R. Co. *v.* Kenney, 39 Ala. 307. Where the tenant had a reasonable expectancy of many years' possession of the land of which she had long held possession, she was held entitled to the marketable value of such expectancy. *Ex parte*, Farlow, 2 B. & Ad. 341. Most cases, however, hold that a tenant can assert no rights as against the condemning corporation which he could not interpose to a notice from his landlord to quit. Reg. *v.* Hungerford Market Co., 4 B. & Ad. 596; Reg. *v.* London, etc., R. Co., 10 Ad. & El. 3; Rex. *v.* Liverpool, etc., R. Co., 4 Ad. & El. 650; Matter of Palmer and Hungerford Market Co., 9 Ad. & El. 463. Where a new lease has been executed to take effect when the old term ends, the tenant is entitled to the value of the new lease. Cobb *v.* Boston, 109 Mass. 438.

[1] Railroad Co. *v.* Boyer, 13 Pa. St. 497; Ross *v.* Elizabethtown, etc., R. Co., 20 N. J. Law 230; Bentonville R. Co. *v.* Baker, 45 Ark. 252. The value of the life-tenant's interest is to be estimated by multiplying the net annual value of the premises by the years of the life-tenant's expectancy of life, and reducing the same by calculation to a cash basis. Pittsburgh, etc., R. Co. *v.* Bentley, 88 Pa. St. 178.

[2] Ross *v.* Elizabethtown, etc., R.Co., 20 N. J. Law 230; Bentonville R. Co. *v.* Baker, 45 Ark. 252.

[3] Boynton *v.* Peterborough, etc., R. Co., 4 Cush. (Mass.) 467; Pittsburgh, etc., R. Co. *v.* Swinney, 97 Ind. 586. Where the owner dies after the right of compensation has accrued, the right to compensation vests in his personal representatives. Whitman *v.* Boston, etc., R. Co., 3 Allen (Mass.) 133; Neal *v.* Knox, etc., R. Co., 61 Me. 298; Church *v.* Grand Rapids, etc., R. Co., 70 Ind. 161.

[4] Bowman *v.* Venice, etc., R. Co., 102 Ill. 459; Pittsburgh, etc., R. Co. *v.* Hall, 25 Pa. St. 336; Columbia, etc., Bridge Co. *v.* Geise, 34 N. J. Law 268; Watson *v.* Milwaukee, etc., R. Co., 57 Wis. 332. Under the statutes of some states, it has been held that the omission to make one tenant in common a party would avoid the proceedings. Grand Rapids, etc., R. Co. *v.* Alley, 34 Mich. 16; Phillips *v.* Sherman, 61 Me. 548; Morgan's Louisiana, etc., R. Co. *v.* Bourdier, McGloin (La.) 232; Railroad Co. *v.* Bucher, 7 Watts (Pa.) 33.

[5] Philadelphia, etc., R. Co. *v.* Williams, 54 Pa. St. 103; Lexington, etc., R. Co. *v.* McMurtry, 3 B. Mon. (Ky.) 516; Colcough *v.* Nashville, etc., R. Co., 2 Head. (Tenn.) 171; Gerrard *v.* Omaha, etc., R. Co., 14 Neb. 270;

for another[1] and persons holding under a tax deed,[2] or by adverse possession which might ripen into an absolute title[3] are also necessary parties.[4] One who has taken steps to acquire title to public lands under the homestead or pre-emption laws has a vested right which makes him a necessary party to the condemnation of a right of way across such lands.[5] But the holder of a mere license not coupled with an interest is not entitled to compensation for taking the lands upon which the license is to be exercised.[6] Some of the cases hold that the husband or wife of the land-owner should be made a party, that all interests in the land may be properly adjudicated,[7] but

Stoneham *v.* London, etc., R. Co., L. R. 7 Q. B. 1. Where compensation is assessed to but one of several owners of an estate, the presumption will be that it is his interest in the premises. Rex *v.* Nottingham Water Works, 6 Ad. & El. 355. Where the statute requires the company to "make compensation to the owners or proprietors of all private lands, etc., taken, or for any loss or damage they may sustain thereby, it was held that compensation must be made to any person having a beneficial interest in the land. Lister *v.* Lobley, 6 Nev. & M. 340; Russell *v.* Shenton, 3 Q. B. 449; Chauntler *v.* Robinson, 4 Exch. 163. The holder of an easement is entitled to compensation for the destruction of his easement. Philadelphia, etc., R. Co. *v.* Williams, 54 Pa. St. 103.

[1] State *v.* Easton, etc., R. Co., 36 N. J. Law 181; Davis *v.* Charles River, etc., R. Co., 11 Cush. (Mass.) 506; Hidden *v.* Davisson, 51 Cal. 138. Where one partner held property in trust for the firm, it was held proper for both to join in a petition for damages. Reed *v.* Hanover, etc., R. Co., 105 Mass. 303. Where the railroad company institutes proceedings, it is irregular to join the *cestui que trust* as a party. State *v.* Easton, etc., R. Co., 36 N. J. Law 181.

[2] Gerrard *v.* Omaha, etc., R. Co., 14 Neb. 270.

[3] *Ex parte* Winder, L. R. 6 Ch. Div. 696.

[4] A trespasser in possession has no such interest as to entitle him to be made a party. Rosa *v.* Missouri, etc., R. Co., 18 Kan. 124.

[5] Red River, etc., R. Co. *v.* Sture, 32 Minn. 95; Doran *v.* Central Pacific R. Co., 24 Cal. 245; Rosa *v.* Missouri, etc., R. Co., 18 Kan. 124. One in possession of public lands without right can not recover compensation for anything but crops and improvements. California Northern R. Co. *v.* Gould, 21 Cal. 254; Doran *v.* Central Pac. R. Co., 24 Cal. 245; Western Pac. R. Co. *v.* Tevis, 41 Cal. 489; Rosa *v.* Missouri, etc., R. Co., 18 Kan. 124; Knoth *v.* Barclay, 8 Colo. 300; Allard *v.* Lobau, 3 Martin (La.) N. S. 293; Lewis' Em. Dom., 330.

[6] Bird *v.* Great Eastern R. Co., 34 L. J. C. P. 366.

[7] East Tennessee, etc., R. Co. *v.* Love, 3 Head (Tenn.) 63; Corey *v.* Probate Judge, 56 Mich. 524; Lewis' Em. Dom. Sec. 323. Some authorities hold that the title to land held in fee by the husband can be divested without making the wife a party. Randall *v.* Texas Cent. R. Co., 63 Tex. 586; Wheeler *v.* Kirtland, 27 N. J. Eq. 534.

we do not believe this to be the sound doctrine, for we think an inchoate right is not such a right as entitles the person possessed of it to be made a party in proceedings under the right of eminent domain.[1] If the title is doubtful, all persons claiming an interest should be made parties.[2] Proceedings in which a necessary party was not joined are utterly void as to such party.[3] But where the corporation had in good faith condemned the title of all persons of whose interest it had any knowledge, and was proceeding in good faith to build its road, it was held that a court of equity should refuse to enjoin the construction of the road at the suit of one not made a party if the corporation would execute a sufficient bond to insure the speedy condemnation of the complainant's interests and payment of his damages.[4] In a proceeding against an infant, it is usually necessary that he be personally served with notice,

See Weaver *v.* Gregg, 6 Ohio St. 547. After the death of the husband, his widow is a necessary party to the condemnation of land in which her right of dower has not been otherwise divested. Columbia, etc., Bridge Co. *v.* Geise, 34 N. J. Law 268; New Orleans, etc., R. Co. *v.* Frederic, 46 Miss. 1; 2 Scribner on Dower, Chap. 2, Sec. 3. In Colorado, it is necessary to join both husband and wife as defendants in a condemnation proceeding. Colorado, etc., R. Co., *v.* Allen, 13 Colo. 229.

[1] Venable *v.* Wabash, etc., R. Co., 112 Mo. 103, s. c. 18 L. R. A. 68, 71, quoting Elliott on Roads and Streets, 108; 2 Dill on Municipal Corp., § 594; Mills on Eminent Domain, § 71.

[2] Bentonville, etc., R. Co. *v.* Stroud, 45 Ark. 278; Lewis' Em. Dom., § 331. The fact that one owner is omitted does not affect the validity of the proceedings as to those who are made parties unless the statute expressly requires all parties in interest to be joined in a single proceeding. State *v.* Easton, etc., R. Co., 36 N. J. Law 181. In some cases the fact that proceedings were void as to one party in interest has been held to invalidate them as to all. Anderson *v.* Pemberton, 89 Mo. 61; Brush *v.* City of Detroit, 32 Mich. 43.

[3] Detroit, etc., R. Co. *v.* Detroit, 49 Mich. 47; Smith *v.* Chicago, etc., R. Co., 67 Ill. 191; State *v.* Easton, etc., R. Co., 36 N. J. Law 181; Garmoe *v.* Sturgeon, 65 Iowa 147; Columbus, etc., R. Co. *v.* Witherow, 82 Ala. 190; Hagar *v.* Brainerd, 44 Vt. 294.

[4] Columbus, etc., R. Co. *v.* Witherow, 82 Ala. 190. Any considerable delay on the part of a land-owner in asserting his rights will be sufficient reason to refuse an injunction restraining the operation of the railroad across his land, after the rights of the public have intervened. Whittlesey *v.* Hartford, etc., R. Co., 23 Conn. 421. See Richards *v.* Des Moines Valley R. Co., 18 Iowa 259; Irish *v.* Burlington, etc., R. Co., 44 Iowa 380; Torrey *v.* Camden, etc., R. Co., 18 N. J. Eq. 293; Stretton *v.* Great Western, etc., R. Co., 40 L. J. Eq. 50.

and that his interests be actively defended by a guardian *ad litem* appointed by the court.[1] Unless the statute provides otherwise, all persons having an interest in the land sought to be taken may be joined in a single proceeding although their interests are separate.[2] But a provision that "any number of owners, residents in the same county or circuit, may be joined in one petition," was held to impliedly forbid the joinder of those not residing in the same county or circuit.[3]

§ 1026. **Parties—Amendments.**—There is diversity of opinion as to the right to amend, some of the cases holding that as the proceedings are *in invitum*, material amendments can not be allowed, but other cases take a more liberal view and allow amendments.[4] Thus it has been held that the proceedings may be amended at any time upon cause shown,[5] either by the addition of new parties,[6] or by discontinuing as to those found to have no interest.[7] Where there is a change of interest the

[1] Hotchkiss *v.* Auburn, etc., R. Co., 36 Barb. (N. Y.) 600; Missouri Pacific R. Co. *v.* Carter, 85 Mo. 448; Clarke *v.* Gilmanton, 12 N. H. 515. But see New Orleans, etc., R. Co. *v.* Hemphill, 35 Miss. 17.

[2] Evergreen, etc., Ass'n. *v.* Beecher, 53 Conn. 551; Proprietors, etc. *v.* Nashua, etc., R. Co., 10 Cush. 385; Reed *v.* Hanover Branch R. Co., 105 Mass. 303; Colcough *v.* Nashville, etc., R. Co., 2 Head (Tenn.) 171; McKee *v.* St. Louis, 17 Mo. 184; Hot Springs R. Co. *v.* Tyler, 36 Ark. 205; Railroad *v.* Boyer, 13 Pa. St. 497; Getz *v.* Philadelphia, etc., R. Co., 105 Pa. St. 547; Goodwin *v.* Gibbs, 70 Me. 243; Webster *v.* Holland, 58 Me. 168; Troy, etc., R. Co. *v.* Cleveland, 6 How. (N. Y.) Pr. 238. Persons who are jointly interested in the land should be joined as defendants. East Saginaw, etc., R. Co. *v.* Benham, 28 Mich. 459; Grand Rapids, etc., R. Co. *v.* Alley, 34 Mich. 16; Southern Pacific R. Co. *v.* Wilson, 49 Cal. 396; Ashby *v.* Eastern R. Co., 5 Met. (Mass.) 368; Whitcher *v.* Benton, 48 N. H. 157.

[3] Quincy, etc., R. Co. *v.* Kellog, 54 Mo. 334.

[4] Littlefield *v.* Boston, etc., R. Co., 65 Me. 248; Colorado, etc., R. Co. *v.* Allen, 13 Colo. 229, s. c. 22 Pac. R. 605.

[5] Chicago, etc., R. Co. *v.* Gates, 120 Ill. 86, s. c. 11 N. E. R. 527; Davidson *v.* Boston, etc., R. Co., 3 Cush. 91; *In re* New York, etc., R. Co., 26 Hun 194; Bowman *v.* Venice, etc., R. Co., 102 Ill. 459. See, generally, Quincy, etc., R. Co. *v.* Kellogg, 54 Mo. 334; Missouri Pacific R. Co. *v.* Wilson, 45 Mo. App. 1; Wood *v.* Commissioners, 122 Mass. 394; Fitch *v.* Stevens, 2 Metc. 505.

[6] Matter of New York, etc., R. Co., 26 Hun (N. Y.) 194; Wood *v.* Comrs. of Bridges, 122 Mass. 394.

[7] Missouri Pac. R. Co. *v.* Carter, 85 Mo. 448.

company acquiring the interest may be substituted as petitioner.[1] The tendency of the modern cases is to liberally extend the right to make amendments, and this, we think, is the true doctrine. The right to amend should not, however, be so extended as to work injustice to a party by unjustly delaying proceedings or depriving him of reasonable opportunity to prepare for trial.[2]

§ 1027. **Effort to agree.**—In most of the states railroad companies are only authorized to resort to an assessment of the damages for land taken under the power of eminent domain after an ineffectual attempt to agree upon a price for its purchase. The decisions upon this subject are numerous and not entirely harmonious.[3] In some of the states the statutes expressly require the petition for such an assessment to show that the company has been unable to acquire title to the land sought, and the reason of its inability to do so, and under such a stat-

[1] California, etc., R. Co. *v.* Hooper, 76 Cal. 404, s. c. 18 Pac. R. 599. See, generally, *In re* Rochester, etc., R. Co., 54 Hun 634, s. c. 26 N. Y. S. R. 753.

[2] Midland, etc., R. Co. *v.* Smith, 109 Ind. 488; Boyd *v.* Negley, 40 Pa. St. 377; Pennsylvania, etc., R. Co. *v.* Bunnell, 81 Pa. St. 414; Young *v.* Laconia, 59 N. H. 534; Grand Junction, etc., R. Co. *v.* County Com., 14 Gray 553; Eslich *v.* Mason City, etc., R. Co., 75 Iowa 443; Southwestern, etc., R. Co. *v.* Hickory, etc., Ditch Co., 18 Colo. 489; Contra Costa, etc., R. Co. *v.* Moss, 23 Cal. 323; Town of Windham *v.* Litchfield, 22 Conn. 226; Matter of Prospect, etc., R. Co., 67 N. Y. 371; Coolman *v.* Fleming, 82 Ind. 117; Chicago, etc., R. Co. *v.* Hunter, 128 Ind. 213. But a petition can not be so amended as to bring the proceedings under a statute different from that under which they were commenced. Peoria, etc., R. Co. *v.* Black, 58 Ill. 33.

[3] Wilkinson *v.* St. Louis, etc., Co., 102 Mo. 130 , s. c. 14 S. W. R. 177; Oregon, etc., R. Co. *v.* Oregon, etc., Co., 3 Ore. 178; Reed *v.* Ohio, etc., R. Co., 126 Ill. 48, s. c. 17 N. E. R. 807, 36 Am. & Eng. R. Cas. 234; Allen *v.* Wilmington, etc , R. Co., 102 N. C. 381, s. c. 9 S. E. R. 4; Grand Rapids, etc., R. Co. *v.* Weiden, 70 Mich. 390, s. c. 38 N. W. R. 294; Chicago, etc., R. Co. *v.* Young, 96 Mo. 39, s. c. 8 S. W. R. 776; New York, etc., R. Co. *v.* Godwin, 12 Abb. Pr. R. (N. S.) 21; Neal *v.* Pittsburgh, etc., R. Co., 2 Grant (Pa.) 137; Council Bluffs, etc., R. Co. *v.* Bentley, 62 Iowa 446, s. c. 17 N. W. R. 668, 20 Am. & Eng. R. Cas. 401; Fort Street, etc., Co. *v.* Jones, 83 Mich. 415, s. c. 47 N. W. R. 349; State *v.* National Docks, etc., Co., 55 N. J. L. 194, 26 Atl. R. 145; Swinney *v.* Fort Wayne, etc., R. Co., 59 Ind. 205; Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 116 Ind. 578, s. c. 19 N. E. R. 440, 37 Am. &. Eng. R. Cas. 430.

ute the reason should be stated in the petition.[1] By some of the courts it is held that inability to agree is a jurisdictional fact in the absence of which the court can not entertain a proceeding to condemn property,[2] but there are decisions asserting a different doctrine.[3] In states where an attempt to agree is made necessary, proceedings in which no attempt to agree was shown, have been held void, even upon a collateral attack.[4] And it is held that the effort to agree must extend to all the matters sought to be settled by the condemnation proceedings.[5] The general rule is that the petition must allege an unsuccessful attempt to agree.[6] It is generally sufficient to aver the in-

[1] Matter of Marsh, 71 N. Y. 315.

[2] Chicago, etc., R. Co. *v.* Chamberlain, 84 Ill. 333; Reed *v.* Ohio, etc., R. Co., 126 Ill. 48; Oregon R., etc., Co. *v.* Oregon Real Estate Co., 10 Ore. 444; Ells *v.* Pacific R. Co., 51 Mo. 200; Kansas City, etc., R. Co. *v.* Campbell, 62 Mo. 585; Powers *v.* Hazelton, etc., R. Co., 33 Ohio St. 429; Reed *v.* Ohio, etc., R. Co., 126 Ill. 48, s. c. 17 N. E. R. 807; Doughty *v.* Somerville, etc., R. Co., 21 N. J. Law 442; Coster *v.* New Jersey R. Co., 23 N. J. Law 227; Lincoln *v.* Colusa Co., 28 Cal. 662; Matter of New York, etc., R. Co., 62 Barb. (N. Y.) 85; Adams *v.* Saratoga, etc., R. Co., 10 N. Y. 328; Williams *v.* Hartford, etc., R. Co., 13 Conn. 397; Reitenbaugh *v.* Chester Valley R. Co., 21 Pa. St. 100; Whisler *v.* Drain Coms., 40 Mich. 591; Matter of Lockport, etc., R. Co., 77 N. Y. 557, 563; Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 116 Ind. 578.

[3] It was held in Illinois that such a provision in a statute was directory. Hall *v.* People, 57 Ill. 307. And in Massachusetts and Tennesee, it has been held that under the statutes in question, one of the parties could elect not to agree, and begin proceedings forthwith. Ætna Mills *v.* Waltham, 126 Mass. 422; Bigelow *v.* Mississippi Central, etc., R. Co., 2 Head (Tenn.) 624. See Chicago, etc., R. Co. *v.* Randolph, etc., 103 Mo. 451, s. c. 15 S. W. R. 437.

[4] Whitely *v.* Platte County, 73 Mo. 30; Cunningham *v.* Pacific R. Co., 61 Mo. 33; Moses *v.* St. Louis Sectional Dock Co., 84 Mo. 242; Adams *v.* Saratoga, etc., R. Co., 10 N. Y. 328. *Contra*, Ney *v.* Swinney, 36 Ind. 454. See Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 116 Ind. 578; Borland *v.* Mississippi, etc., R. Co., 8 Iowa 148; Oregonian, etc., R. Co. *v.* Hill, 9 Ore. 377.

[5] Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 116 Ind. 578.

[6] Matter of Lockport, etc., R. Co., 77 N. Y. 557; Contra Costa R. Co. *v.* Moss, 23 Cal. 323; O'Hara *v.* Pennsylvania R. Co., 25 Pa. St. 445; Darlington *v.* United States, 82 Pa. St. 382. In Pennsylvania R. Co. *v.* Porter, 29 Pa. St. 165, the petitioner was permitted to amend its petition by inserting an allegation of inability to agree upon the compensation. See Cunningham *v.* Pacific, etc., R. Co., 61 Mo. 33; *In re* Philadelphia, etc., Co., 7 Phila. 461; Kansas City, etc., R. Co. *v.* Campbell, 62 Mo. 585; St. Louis, etc., R. Co. *v.* Lewright, 113 Mo. 660. See Toledo, etc., R. Co. *v.* Detroit, etc., R. Co., 62

ability to agree in the language of the statute,[1] and it is not necessary to set forth, in specific detail, what has been done.[2] The general averment of an inability "to acquire the right of way from said owners by voluntary grant or purchase" was held to be a substantial compliance with a statute authorizing condemnation only in case the compensation could not be agreed upon.[3] And under a similar statute an allegation that the parties were unable to agree as to the right of way was held sufficient after verdict.[4] The averment of an effort to agree must be positive and not merely by way of recital.[5] Proof must be made of the attempt to agree in like manner with the other facts averred,[6] though it has been said that a failure to traverse the allegation of such an attempt waived the necessity for proof upon this point.[7] The affidavit of an agent of the corporation has been held sufficient *prima facie* evidence that it could not agree with the land-owner.[8] The attempt to agree must be made

Mich. 564, s. c. 29 N. W. R. 500, 28 Am. & Eng. R. Cas. 272; Gear *v.* Dubuque, etc., R. Co., 20 Iowa 523; Oregon, etc., R. Co. *v.* Oregon, etc., Co., 10 Ore. 444.

[1] Cory *v.* Chicago, etc., R. Co., 100 Mo. 282; Matter of Lockport, etc., R. Co., 77 N. Y. 557; Reitenbaugh *v.* Chester Valley R. Co., 21 Pa. St. 100.

[2] Matter of Suburban R. T. Co., 38 Hun (N. Y.) 553; Hannibal, etc., R. Co. *v.* Muder, 49 Mo. 165; United States *v.* Oregon R., etc., Co., 16 Fed. 524.

[3] Bowman *v.* Venice, etc., R. Co., 102 Ill. 459; Chicago, etc., R. Co. *v.* Chamberlain, 84 Ill. 333.

[4] Oregon R., etc., Co. *v.* Oregon, etc., Co., 10 Ore. 444.

[5] Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 116 Ind. 578.

[6] Powers *v.* Hazelton, etc., R. Co., 33 Ohio St. 429; Williams *v.* Hartford, etc., R. Co., 13 Conn. 397; Gilmer *v.* Lime Point, 19 Cal. 47; Oregon R., etc., R. Co. *v.* Oregon, etc., R. Co., 10 Ore. 444; Matter of Marsh, 71 N. Y. 315.

[7] Ward *v.* Minnesota, etc., R. Co., 119 Ill. 287; President, etc. *v.* Diffebach, 1 Yates (Pa.) 367. In Cory *v.* Chicago, etc., R. Co., 100 Mo. 282, the plaintiff sought to set aside as void condemnation proceedings based upon a petition which contained the averment that the company "can not agree with the defendants as to the amount of compensation to be paid." The court said: "This averment conformed to the general law, was sufficient, and it was not necessary to sustain this averment of the petition by oral testimony; nor was it competent for the plaintiff to nullify the effect of the record by denying the truth of such assertion."

[8] Doughty *v.* Somerville R. Co., 21 N. J. Law 442. As to proving an effort to agree, see Ward *v.* Minnesota, etc., R. Co., 119 Ill. 287, s. c. 10 N. E. R. 365; *In re* Rochester, etc., R. Co., 110 N. Y. 119, s. c. 17 N. E. R.

in good faith, but an attempt to buy at what the company deems a reasonable price is sufficient.[1] And where no answer was returned to either of two propositions submitted to the landowner, the company was permitted to condemn.[2] Where several estates in the same land were held by different persons it was held that an inability to agree with the owner of the fee was sufficient.[3]

§ 1028. **Petition or articles of appropriation.**—The pleading on the part of a party seeking to secure the condemnation of land is usually called a petition, but in some states it is called the "article of appropriation." We shall use the term "petition" as designating the pleading or instrument filed by a party who seeks to secure the condemnation of private property. According to some of the authorities a petition for the assessment of damages constitutes a complaint, the sufficiency of which may be tested as in ordinary actions,[4] but additional pleadings are not contemplated, and, if any are filed, they may be stricken from the files on motion.[5] The general rule is that until a

678; *In re* Niagara, etc., R. Co., 108 N. Y. 375; Fort Street, etc., Co. *v.* Jones, 83 Mich. 415, s. c. 47 N. W. R. 349; West Virginia, etc., Co. *v.* Volcanic, etc., R., 5 W. Va. 382. See Coster *v.* New Jersey, etc., R. Co., 23 N. J. Law 227.

[1] Matter of Prospect Park, etc., R. Co., 67 N. Y. 371.

[2] West Virginia Trans. Co. *v.* Volcanic Oil, etc., Co., 5 W. Va. 382.

[3] Toledo, etc., R. Co. *v.* Dunlap, 47 Mich. 456.

[4] Church *v.* Grand Rapids, etc., R. Co., 70 Ind. 161. In Denver, etc., R. Co. *v.* Lamborn, 8 Colo. 380, it is said that proceedings to condemn land are special proceedings, and are governed by different rules of pleading and practice. The time and way to object for want of proper title, parties, etc., is by exceptions to the report of the appraisers when it is filed. Camp *v.* Coal Creek, etc., R. Co., 11 Lea (Tenn.) 705.

[5] Smith *v.* Chicago etc., R. Co., 105 Ill. 511; Johnson *v.* Freeport, etc., R. Co., 111 Ill. 413. Under the Illinois statute, where the interests of the defendant are not accurately stated in the petition, a cross-petition may be filed, setting out fully his interests. Johnson *v.* Freeport, etc., R. Co., 116 Ill. 521. An answer describing land and claiming damage thereto was held to answer the purpose of a cross-petition. Chicago, etc., R. Co. *v.* Hopkins, 90 Ill. 316. At whatever stage of the proceedings additional parties are made defendants to such a proceeding, they may, after notice to appear, contest the appropriation. Baltimore, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 17 W. Va. 812.

proper petition is filed, the court has no power to take any action in the premises.[1] Jurisdictional facts must be averred.[2] Proceedings to condemn property under the power of eminent domain are purely statutory, and the statute must be strictly pursued,[3] and the fact that all preliminary requirements of the statute have been met should be stated in the petition,[4] except where the statute provides what the petition shall contain. It is competent for the legislature to prescribe what the petition shall contain, and if it conforms to the statutory requirement it is sufficient. A substantial compliance with the requirements of the statute, as to the form and wording of the petition, is sufficient,[5] but it is held that the omission of any averment required by the statute will render it fatally defective.[6] The allegations of the petition should be positive and not merely by way of recital,[7] and the facts set forth must be definitely stated.[8] The petition must be properly signed, and where the

[1] Smith *v.* Chicago, etc., R. Co., 105 Ill. 511; Toledo, etc., R. Co. *v.* East Saginaw, etc., R. Co., 72 Mich. 206, s. c. 40 N. W. R. 436; People *v.* Board, etc., 72 Mich. 234.

[2] Durham, etc., R. Co. *v.* Richmond, etc., R. Co., 106 N. Car. 16, s. c. 10 S. E. R. 1041, 44 Am. & Eng. R. Cas. 168. See, *In re* New York, etc., R. Co., 62 Barb. 85; Norton *v.* Wallkill, etc., R. Co., 61 Barb. 476.

[3] Colorado Cent. R. Co. *v.* Allen, 13 Colo. 229.

[4] Colorado Cent. R. Co. *v.* Allen, 13 Colo. 229; Durham, etc., R. Co. *v.* Richmond, etc., R. Co., 106 N. Car. 16.

[5] Townsend *v.* Chicago, etc., R. Co., 91 Ill. 545; Bowman *v.* Venice, etc., R. Co., 102 Ill. 459; Indianapolis, etc., R. Co. *v.* Christian, 93 Ind. 360; Stevens *v.* Board of Supervisors, 41 Iowa 341. Where the statute authorized the land-owner to petition for the assessment of damages, a general statement of the fact that the railroad "angled" across his land was held sufficiently definite to authorize the assessment of damages for land upon which a railroad had already been constructed. Martinsville, etc., R. Co. *v.* Bridges, 6 Ind. 400.

[6] *In re* Grove St., 61 Cal. 438. (Failure to aver that "public interests required" the improvement.) Reed *v.* Ohio, etc., R. Co., 126 Ill. 48; Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 116 Ind. 578. (Failure to aver an inability to agree.) Powers *v.* Irish, 23 Mich. 429; Hays *v.* Campbell, 17 Ind. 430. (Failure to state names of owners of land taken.) Durham, etc., R. Co. *v.* Richmond, etc., R. Co., 106 N. Car. 16. (Failure to allege filing of map, giving of notice, etc.) Colorado Cent. R. Co. *v.* Allen, 13 Colo. 229. (No averment of value of property sought to be taken.) See United States *v.* Oregon R., etc., Co., 16 Fed. R. 524.

[7] Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 116 Ind. 578.

[8] Hays *v.* Campbell, 17 Ind. 430.

statute requires verification it must be verified by the proper party.[1] A failure to give the names of the owners in the petition has been held to be cause for demurrer,[2] but this defect may be cured by amendment.[3] It has been held sufficient to give the names and residences of a number of land-owners, with a description of the property of each, in schedules attached to the petition.[4] If the name of one joint-owner is contained in the petition it is sufficient to give the court jurisdiction, though where the rights of one, in any material sense, depend upon the disposition of the case as to the others, each party would have a right to insist on all the parties being brought before the court before proceeding to a trial.[5] Where the petition avers ownership on the part of a defendant he need offer no proof of his title,[6] but the character of his estate may be inquired into,[7] and it has been held that naming a person as a respondent in

[1] Harvey *v.* Lloyd, 3 Pa. St. 331; *In re* Metropolitan, etc., R. Co., 7 N. Y. Supp. 708; *In re* New York, etc., R. Co., 33 Hun 148. Verification by attorney held sufficient. *In re* St. Lawrence, etc., R. Co., 133 N. Y. 270, s. c. 31 N. E. R. 218.

[2] Morton *v.* Franklin Co., 62 Me. 455. See Hill *v.* Glendon, etc., R. Co., 113 N. Car. 259, s. c. 18 S. E. R. 171; Peoria, etc., R. Co. *v.* Laurie, 63 Ill. 264; Union, etc., Co. *v.* Frederick, 117 Mo. 138, s. c. 21 S. W. R. 1118, 57 Am. & Eng. R. Cas. 656; California, etc., R. Co. *v.* Colton, etc., Co., (Cal.) 2 Pacific R. 38.

[3] Russell *v.* Turner, 62 Me. 496; Washington Ice Co. *v.* Lay, 103 Ind. 48; Bowman *v.* Venice, etc., R. Co., 102 Ill. 459.

[4] Matter of Board of Commissioners, 52 N. Y. 131.

[5] Bowman *v.* Venice, etc., R. Co., 102 Ill. 459. Including as joint owners, persons having no interest in the property is immaterial, if the true owners are named. Boyd *v.* Negley, 40 Pa. St. 377.

[6] Selma R. Co. *v.* Camp. 45 Ga. 180; Norristown Turnpike Co. *v.* Burket, 26 Ind. 53; Peoria, etc., R. Co. *v.* Laurie, 63 Ill. 264; St. Louis, etc., R. Co. *v.* Teters, 68 Ill. 144; St. Paul, etc., R. Co. *v.* Matthews, 16 Minn. 341; Rippe *v.* Chicago, etc., R. Co., 23 Minn. 18; Crise *v.* Auditor, 17 Ark. 572. It is said that in all cases where the land-owner seeks to recover damages for land not taken, he must establish his ownership of the land. St. Paul, etc., R. Co. *v.* Matthews, 16 Minn. 341.

[7] International, etc., R. Co. *v.* Benitos, 59 Tex. 326. The owner is at liberty to show that his title is different from that stated in the petition. Brisbine *v.* St. Paul, etc., R. Co., 23 Minn. 114. Unless the statute provides for submitting the question of title to them, commissioners to assess damages, can not pass upon questions of title. Spring Valley Water Works *v.* San Francisco, 22 Cal. 434.

proceedings for the condemnation of land is an admission of his title, unless it is expressly denied.[1]

§ 1029. **Contents of the petition.**—In many of the states the petition must state that the taking is necessary for public use,[2] and this, in effect, is required in most of the states.[3] It seems to us that even where there is no statute requiring the petition to show that the land is needed for a public use this fact must be alleged, but that the allegation is sufficient if it shows that the land is required for legitimate railroad purposes. The purpose for which property is sought to be taken should be stated that it may be known whether such purpose is within the objects for which land may be taken by authority of the particular statute under which the proceeding is brought.[4] The authority of corporations to take land under the eminent domain should appear in the petition either by reference to the laws under which it was incorporated[5] or by other averments. In some states the petitioner may, by leave of court, amend the description contained in his petition, and the writ issued

[1] Golden, etc., R. Co. *v.* Haggart, 9 Colo. 346; Chicago, etc., R. Co. *v.* Hopkins, 90 Ill. 316.

[2] Valley R. Co. *v.* Bohm, 34 Ohio St. 114; Atchison, etc., R. Co. *v.* Lyon, 24 Kan. 745; South Carolina, etc., R. Co. *v.* Blake, 9 Rich. (S. Car.) Law 228; Grand Rapids, etc., R. Co. *v.* Van Driele, 24 Mich. 409; Smith *v.* Chicago, etc., R. Co., 105 Ill. 511; *In re* Grove St., 61 Cal. 438. See Colville *v.* Judy, 73 Mo. 651; City of Helena *v.* Harvey, 6 Mont. 114. The petition must be broad enough to authorize the condemnation for the uses desired, for the petitioner will be confined to the use specified in the petition. Barnes *v.* Chicago, etc., R. Co., (Tex. Civ. App.), 33 S. W. R. 601.

[3] In Illinois the statute requires the petition to set forth "the purpose for which said property is sought to be taken," and from this the court is required to judge of the necessity of taking the property, and of the public nature of the use for which it is sought to be taken. Smith *v.* Chicago, etc., R. Co., 105 Ill. 511. In Minnesota and North Carolina, the public interest in the proposed improvement must be established by proof at the hearing. Gen. Stat., 1891, Minn., § 2477; Code, 1883, N. Car., § 1945.

[4] Matter of New York Central, etc., Co., 5 Hun (N. Y.) 86; Valley Railway Co. *v.* Bohm, 34 Ohio St. 114.

[5] Atkinson *v.* Marietta, etc., R. Co., 15 Ohio St. St. 21. Commissioners appointed in pursuance to such a petition have no authority to pass upon the corporate existence of the petitioner. Schroeder *v.* Detroit, etc., R. Co., 44 Mich. 387.

thereon for the assessment of damages.[1] If only a general description is required by statute, the courts can not require more,[2] but there should always be a reasonably accurate description of the land sought to be seized.[3] That is certain which can be made certain by references contained in the petition.[4] Stating the particular eighty acres through which the road would run and the general direction it would follow, with a reference to a map filed with the petition was held a sufficient description.[5] Where a petition describes three differ-

[1] Hunt *v.* New York, etc., R. Co., 99 Ind. 593; Midland R. Co. *v.* Smith, 109 Ind. 488.

[2] Wright *v.* Wilson, 95 Ind. 408.

[3] California, etc., R. Co. *v.* Hooper, 76 Cal. 404, s. c. 18 Pac. R. 599; Chicago, etc., R. Co. *v.* Chicago, 132 Ill. 372, s. c. 23 N. E. R. 1036; Prather *v.* Jeffersonville, etc., R. Co., 52 Ind. 16; Manistee, etc., R. Co. *v.* Fowler, 73 Mich. 217, s. c. 41 N. W. R. 261; Bay City, etc., R. Co. *v.* Hitchcock, 90 Mich. 533, s. c. 51 N. W. R. 808; Ames *v.* Union Co., 17 Ore. 600, s. c. 22 Pac. R. 118, 27 Am. & Eng. Corp. Cas. 60; O'Hara *v.* Pennsylvania, etc., R. Co., 25 Pa. St. 445; Pennsylvania, etc., R. Co. *v.* Porter, 29 Pa. St. 165; Parker *v.* Fort Worth, etc., R. Co., 84 Tex. 333, s. c. 19 S. W. R. 518; Strang *v.* Beloit, etc., R. Co., 16 Wis. 635; Detroit, etc., R. Co. *v.* Gartner, 95 Mich. 318, s. c. 54 N. W. R. 946; Metropolitan, etc., R. Co. *v.* Dominick, 55 Hun 198, s. c. 8 N. Y. Supp. 151; St. Louis, etc., R. Co. *v.* Lewright, 113 Mo. 660, s. c. 21 S. W. R. 210; State *v.* Hudson, etc., R. Co., 38 N. J. Law 548; West *v.* West, etc., R. Co., 61 Miss. 536; Sheldon *v.* Minneapolis, etc., R. Co., 29 Minn. 318, s. c. 13 N. W. R. 134; Atchison, etc., R. Co. *v.* Boerner, 34 Neb. 240.

[4] Quincy, etc., R. Co. *v.* Kellogg, 54 Mo. 334; Miller *v.* Porter, 71 Ind. 521; Lewis' Em. Dom., § 350. In a petition and warrant for the assessment of damages occasioned by one railroad building its road across the road of another, the place injured was described as a "part of the land and bridge heretofore held and occupied by the petitioners, for railroad purposes, measuring about five rods in length and forty feet in width and laying a little west of the draw in their bridge from Charleston to Somerville, and nearly contiguous thereto, with a reference added to the field location and actual construction of their road. Grand Junction, etc., R. Co. *v.* County Comrs., 14 Gray (Mass.)553. See California, etc., R. Co. *v.* Southern, etc., R. Co., 67 Cal. 59, s. c. 7 Pac. R. 123; Marion, etc., R. Co. *v.* Ward, 9 Ind. 123; Cleveland, etc., R. Co. *v.* Prentice, 13 Ohio St. 373; *Ex parte* Bennett, 26 S. Car. 317, s. c. 2 S. E. R. 389; Ohio River, etc., R. Co. *v.* Harness, 24 W. Va. 511; London *v.* Sample, etc., Co., 91 Ala. 606, s. c. 8 So. R. 281.

[5] Kansas City, etc., R. Co. *v.* Story, 96 Mo. 611; Cory *v.* Chicago, etc., R. Co., 100 Mo. 282. Aiding description by reference to maps and plats. Cory *v.* Chicago, etc., R. Co., 100 Mo. 282, s. c. 13 S. W. R. 346, 44 Am. & Eng. R. Cas. 183; Kansas City, etc., R. Co. *v.* Story, 96 Mo. 611; St. Louis, etc., R. Co. *v.* Fowler, 113 Mo. 458, s. c. 20 S. W. R. 1069; *In re* New York, etc., R. Co., 70 N. Y. 191; Fremont, etc.,

ent surveys and locations of a railroad, without designating which one it seeks to condemn, it has been held to be a nullity,[1] but we doubt the soundness of this decision, for we think such proceeding could not be assailed collaterally, although the petition would be insufficient as against a direct assault. It is held that a description by reference to the map and survey on file in the county register's office is not sufficient.[2] Where the statute requires the petition to contain a description of each tract of land taken by map or definite survey, it is not sufficient to describe it simply "as staked out upon and across" a certain section.[3] Describing the land sought to be condemned as a certain number of feet on each side of the center line of the railroad, as the same is located, staked, and marked, has been held sufficient.[4] So, also, is the description of the right of way as extending diagonally through "a tract of land," from a point *near* the northeast corner to a point *near* the southwest corner."[5] A description of a right of way

R. Co. *v.* Mattheis, 35 Neb. 48, s. c. 52 N. W. R. 698; Vail *v.* Morris, etc., R. Co. 21 N. J. Law 189. Construction of statutes requiring maps, plans or profiles to be filed. Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 112 Ill. 589; Meriam *v.* Brown, 128 Mass. 391; Jacksonville, etc., R. Co. *v.* Adams, 28 Fla. 631; Morris, etc., Co. *v.* Central R. Co., 16 N. J. Eq. 419; *In re* South Brooklyn, etc., R. Co., 50 Hun 405, s. c. 2 N. Y. Supp. 613; San Francisco, etc., R. Co. *v.* Mahoney, 29 Cal. 112; Wheeling, etc., R. Co. *v.* Camden, etc., Co., 35 W. Va. 205, s. c. 13 S. E. R. 369; Chicago, etc., R. Co. *v.* Abbott, 44 Kan. 170, s. c. 24 Pac. R. 52; Lansdale *v.* Daniels, 100 U. S. 113; Johnson *v.* Towsley, 13 Wall. 72; United States *v.* McLaughlin, 30 Fed. R. 147, 127 U. S. 428; Doughty *v.* Somerville, etc., Co., 21 N. J. Law 442; Baltimore, etc., Co. *v.* Morgan's Louisiana, etc., Co., 37 La. Ann. 883; Brock *v.* Old Colony, etc., R. Co., 146 Mass. 194, s. c. 15 N. E. R. 555.

[1] Gulf, etc., R. Co. *v.* Mud Creek, etc., R. C., 1 Tex. App. Civil Cases 169.

[2] Chicago, etc., R. Co. *v.* Sanford, 23 Mich. 418. The petition must contain such a description of the land sought to be condemned as will show its location and boundaries. A defective description can not be remedied by a reference in the petition to a deed. *In re* New York, etc., R. Co., 70 N. Y. 191. But see Grand Junction, etc., R. Co. *v.* County Comrs., 14 Gray (Mass.) 553.

[3] Toledo, etc., R. Co. *v.* Munson, 57 Mich. 42.

[4] Lower *v.* Chicago, etc., R. Co., 59 Iowa 563; Cleveland, etc., R. Co. *v.* Prentice, 13 Ohio St. 373. Such a description will control other parts of the petition inconsistent therewith. Lower *v.* Chicago, etc., R. Co., 59 Iowa 563.

[5] Indianapolis, etc., R. Co. *v.* Newsom, 54 Ind. 121.

as a strip "about one hundred feet wide" extending across a quarter section "about ten rods north" of the center thereof, has been held insufficient.[1] The description should in all cases be sufficiently definite to enable one skilled in such matters to locate it on the ground.[2] The petition should show that the property is within the jurisdiction of the court.[3] Some of the courts hold that the petition must state the value of the land sought to be appropriated.[4]

§ 1030. **Title.**—After land has been condemned as the property of a defendant, the railroad company can not, without tendering an issue as to the ownership, dispute his title on appeal.[5] Where the land-owner brings the suit, he must show that he has title to the land for which damages are sought,[6] but under some statutes it has been held that the fact of his being in possession is *prima facie* sufficient proof of title,[7] and that evidence to impeach his title can only be offered by the corporation under an answer setting up want of title as a

[1] Midland R. Co. *v.* Smith, 109 Ind. 488.

[2] Spofford *v.* Bucksport, etc., R. Co., 66 Me. 26; West *v.* West, etc., R. Co., 61 Miss. 536; Mansfield, etc., R. Co. *v.* Clark, 23 Mich. 519; Chicago, etc., R. Co. *v.* Sanford, 23 Mich. 418; Toledo, etc., R. Co. *v.* Munson, 57 Mich. 42; *In re* New York, etc., R. Co., 90 N. Y. 342; Hussner *v.* Brooklyn City R. Co., 96 N. Y. 18; Quincy, etc., R. Co. *v.* Kellogg, 54 Mo. 334; Rising Sun, etc., Co. *v.* Hamilton, 50 Ind. 580; Wilkin *v.* First Division, etc., R. Co., 16 Minn. 271; Pennsylvania R. Co. *v.* Porter, 29 Pa. St. 165; Ohio River R. Co. *v.* Harness, 24 W. Va. 511; State *v.* American, etc., Co., 43 N. J. Law 381.

[3] Collins *v.* Rupe, 109 Ind. 340; Schoff *v.* Upper Conn. River, etc., Co., 57 N. H. 110; State *v.* Vanderveer, 48 N. J. Law 80.

[4] Colorado, etc., R. Co. *v.* Allen, 13 Colo. 229, s. c. 22 Pac. R. 605, 44 Am. & Eng. R. Cas. 193. But see California, etc., R. Co. *v.* Southern, etc., R. Co., 67 Cal. 59, s. c. 7 Pac. R. 123, 20 Am. & Eng. R. Cas. 309; United States *v.* Oregon, etc., R. Co., 16 Fed. R. 524.

[5] Republican Valley, etc., R. Co. *v.* Hayes, 13 Neb. 489. If the title of a defendant is found to be defective, the railroad company should dismiss the proceedings, or move to set the inquest aside because of his lack of ownership. Auditor *v.* Crise, 20 Ark. 540; Mayor *v.* Richardson, 1 Stew. & P. (Ala.) 12. Evidence of title may be given by producing record in partition proceedings. Tucker *v.* Chicago, etc., R. Co., 91 Wis. 576, 65 N. W. R. 515.

[6] Robbins *v.* Milwaukee, etc., R. Co., 6 Wis. 636; Directors *v.* Railroad Co., 7 W. & S. (Pa.) 236.

[7] Sacramento Valley R. Co. *v.* Moffatt, 7 Cal. 577.

defense.[1] In other states it is held that the corporation is bound to pay for only the title which it has taken, and that one who petitions for damages must prove the nature and extent of his ownership.[2]

§ 1031. **Effect of pendency of proceedings to condemn.**—Where a corporation begins proceedings for the condemnation of property, the immediate effect necessarily is to prevent the sale or improvement of such property until the condemnation proceedings are determined, and it would be manifestly unjust to a land-owner that a corporation should be permitted to harass him with a protracted suit or succession of suits for this purpose, and in case the assessment of damages proved to be more than the corporation cared to pay, that it should be at liberty to abandon the proceedings without repaying the costs and damages to which the land-owner has been subjected. In New York, it is held that the court may require the corporation to pay so much of the costs and expenses of the opposite party as may be equitable, as the condition upon which it may discontinue condemnation proceedings begun by it,[3] and a similar view has been intimated by a few other courts.[4] In other states where the right to discontinue is held to be absolute, the courts have intimated that the land-owner could recover by suit any damages to which the suit for condemnation may have subjected him.[5] The only cases, however, where such a recov-

[1] Daley *v.* St. Paul, 7 Minn. 390. Where the company claims title in itself by reason of a former condemnation proceeding against another claimant, the proper remedy for one asserting title to the land is an action of ejectment. Webster *v.* Southeastern R. Co., 15 Jur. (Eng.) 73.

[2] Robbins *v.* Milwaukee, etc., R. Co., 6 Wis. 636; Allyn *v.* Providence R. Co., 4 R. I. 457; East Tennessee, etc., R. Co. *v.* Love, 3 Head (Tenn.) 63; Peoria, etc., R. Co. *v.* Bryant, 57 Ill. 473; Winebiddle *v.* Pennsylvania R. Co., 2 Grant's Cas. (Pa.) 32; Directors, etc., *v.* Railroad Co., 7 W. & S. (Pa.) 236.

[3] Hudson River R. Co. *v.* Outwater, 3 Sandf. (N. Y.) 689; Matter of New York, etc., R. Co., 1 How. Pr. (N. Y.) N. S. 190; Matter of Waverly Water Works, 85 N. Y. 478.

[4] See Clarke *v.* Manchester, 56 N. H. 502; Matter of Water Comrs., 31 N. J. Law 72; Stevens *v.* Duck River Nav. Co., 1 Sneed (Tenn.) 237.

[5] North Missouri R. Co. *v.* Lackland, 25 Mo. 515; Graff *v.* Mayor, etc., of Baltimore, 10 Md. 544; Gear *v.* Dubuque, etc., R. Co., 20 Iowa 523.

ery has been sustained, so far as we have been able to ascertain, have been actions in tort for the unreasonable and culpable abuse of the power of eminent domain against the owners of property not needed by the corporation,[1] or for the occupancy of the lands to which all right has been forfeited by a dismissal of the condemnation proceedings, in which case the original entry is held to have been wrongful.[2]

§ 1032. **Dismissal of proceedings—Effect of.**—The fact that the proceedings were dismissed has been held to be an admission that the taking was not necessary, and, therefore, that the proceedings were not in good faith,[3] but we suppose that the petitioner may explain the dismissal and show that it was in good faith and for sufficient cause. We do not believe that the mere fact of dismissal is conclusive evidence that the petitioner acted in bad faith.[4] In another case, however, it is said that the question whether the corporation was guilty of such a culpable and unreasonable delay in the prosecution and abandon-

[1] Leisse *v.* St. Louis, etc., R. Co., 72 Mo. 561; Black *v.* Mayor of Baltimore, 50 Md. 235; Mayor, etc., *v.* Black, 56 Md. 333; McLaughlin *v.* Municipality, 5 La. Ann. 504. In Carson *v.* City of Hartford, 48 Conn. 68, the plaintiff sued to recover for the depreciation in value of his land between the time that the city council voted to lay a street across such land, and caused the owner's damages to be assessed, and the time when it reconsidered its former action and abandoned the improvement, a period of three and one-half years. The court said: "The allegation that the city 'did wrongfully and unnecessarily prolong the proceedings,' is too vague and general to support a judgment. It neither points to an act, nor to an omission to act for the purpose of delay, and is without suggestion as to whether the obstruction was for a day or a year. Moreover, it calls upon us to say that, of legal necessity, the intervention of three and one-half years between the first and last votes would of itself and under all circumstances subject the city to damages. This we can not do. But, while preserving to the council the privilege of considering after knowledge, we do not say that it can not abuse this privilege; nor that as a consequence of such abuse, the city may not be compelled to indemnify land-owners who have suffered loss by inexcusable delay." Stevens *v.* Danbury, 53 Conn. 9.

[2] Pittsburgh, etc., R. Co. *v.* Swinney, 97 Ind. 586; Van Valkenburgh *v.* Milwaukee, 43 Wis. 574, as explained in Feiten *v.* Milwaukee, 47 Wis. 494; Hullin *v.* Second Municipality, 11 Rob. (La.) 97.

[3] Leisse *v.* St. Louis, etc., R. Co., 72 Mo. 561; McLaughlin *v.* Municipality, 5 La. Ann. 504.

[4] Cooper *v.* Anniston, etc., R. Co., 85 Ala. 106, s. c. 4 So. R. 689, 36 Am. & Eng. R. Cas. 581.

ment of proceedings to take land for its use as to amount to actionable negligence was a question for the jury.[1] In most of the cases, however, in which it has been sought to charge a corporation with damages due to the abandonment of condemnation proceedings, the courts have denied the right to recover.[2] In several of the states, it is provided by statute that the owner may recover damages for any unreasonable delay in prosecuting or abandoning condemnation proceedings which are not promptly carried to an issue and followed by payment of the damages awarded,[3] or for damages done by cutting or grading in the construction of the road upon a location which is afterward abandoned.[4] Such damages must be sought in a separate suit,[5] unless the statute fixes the damages in some way by which they can be definitely ascertained and expressly au-

[1] Mayor, etc., of Baltimore *v.* Black, 56 Md. 333.

[2] Bergman *v.* St. Paul, etc., R. Co., 21 Minn. 533; Martin *v.* Mayor, etc., of Brooklyn, 1 Hill (N. Y.) 545; Whyte *v.* City of Kansas, 22 Mo. App. 409; Feiten *v.* City of Milwaukee, 47 Wis. 494; Carson *v.* City of Hartford, 48 Conn. 68. In the first case cited the plaintiff sought to recover for his loss of time, attorney's fees and expenses in defending a condemnation proceeding begun by the defendant and afterward abandoned. The court said: "If the plaintiff is entitled to recover, it must by virtue of some contract, express or implied, or of some positive rule of law conferring upon him a right of action, or upon the ground that defendant has been guilty of tort. Certainly there is no contract here, nor is there any positive rule of law upon which the plaintiff can base a right of action. Neither is there anything in the complaint tending to show any tortious or malicious conduct on the part of the defendant. On the contrary, defendant's proceedings are expressly admitted to have been duly and regularly taken, and there is nothing whatever to raise a suspicion that defendant's motives in instituting, conducting or dismissing the proceedings were not entirely proper. In other words the complaint does not set up a cause of action in tort, nor assume to do so."

[3] Pub. Stat. 1887, § 3465; Gen. Stat., 1878, Ch. 34, §§ 29, 31.

[4] Rev. Laws, 1880, Vt., §§ 3374, 3376; Laws 1890, N. Y. Ch. 565, § 6; Laws 1889, N. Car. Ch. 391, § 1; Dig. 1881, Fla. Ch. 39, § 21; R. S., 1890, Ohio, §§ 3276, 3278; Gen. Laws, 1888, Md. Ch. 23, § 168; Statutes, 1890, Oka., § 1040. Such damages may be recovered in the absence of any statute in states where the constitution requires the payment of damages to precede the taking, if the corporation secures possession of the property under an award which is set aside, and the proceedings are afterward discontinued. Pittsburgh, etc., R. Co. *v.* Swinney, 97 Ind. 586.

[5] Drury *v.* Boston, 101 Mass. 439.

thorizes the assessment of such damages upon dismissal of the condemnation suit.[1]

§ 1033. **Abandonment of proceedings.**—The general rule is that a railroad company may, unless restrained by statute, dismiss its proceedings to condemn land at any time before final judgment. And this it may do even though it has obtained possession of the premises pending proceedings by depositing in court a sum of money to secure the payment of the assessed damages.[2] But where the company has taken possession pending the proceedings, an abandonment of the proceedings for-

[1] Minneapolis, etc., R. Co. *v.* Woodworth, 32 Minn. 452. In this case the statute provided that if damages awarded were not paid within sixty days after the entry of final judgment the proceedings should be deemed to be abandoned, and the party in whose favor the award was made might have judgment entered against the corporation for damages at the rate of ten per cent. from the date of the award. By another statute the land-owner was permitted to recover his costs and expenses in an abandoned condemnation proceeding, including reasonable attorney's fees. The court held that an adversary proceeding by which the corporation should be allowed to dispute the amount of the attorney's fees was necessary in order to the allowance of the same, and that the allowance of a fee of $50 for the land-owner's counsel, upon a dismissal of proceedings for non-payment of the award was unwarranted, and could not be sustained.

[2] Union, etc., Co. *v.* Slee, 123 Ill. 57, s. c. 12 N. E. R. 543; Leavenworth, etc., R. Co. *v.* Whitaker, 42 Kan. 634, s. c. 22 Pac. R. 733; Manion *v.* Louisville, etc., R. Co., 90 Ky. 491, s. c. 14 S. W. R. 532, 47 Am. & Eng. R. Cas. 107; Chicago, etc., R. Co. *v.* Gates, 120 Ill. 86, s. c. 11 N. E. R. 527, 30 Am. & Eng. R. Cas. 268; Denver, etc., R. Co. *v.* Lamborn, 8 Colo. 380, s. c. 8 Pac. R. 582. See Pittsburgh, etc., R. Co. *v.* Swinney, 97 Ind. 586. In Illinois, it is held that the judgment for damages should be absolute where the company is already in possession of the premises. St. Louis, etc., R. Co. *v.* Teters, 68 Ill. 144. See Witt *v.* St. Paul, etc., R. Co., 35 Minn. 404, s. c. 29 N. W. R. 161; Kremer *v.* Chicago, etc., R. Co., 51 Minn. 15, s. c. 52 N. W. R. 977; Cape Girardeau, etc., R. Co. *v.* Dennis, 67 Mo. 438; Wilcox *v.* St. Paul, etc., R. Co., 35 Minn. 439; North Missouri R. Co. *v.* Lackland, 25 Mo. 515; Alabama, etc., R. Co. *v.* Newton, 94 Ala. 443; Drath *v.* Burlington, etc., R. Co., 15 Neb. 367, s. c. 18 N. W. R. 717; Dayton, etc., R. Co. *v.* Marshall, 11 Ohio St. 497; State *v.* Cincinnati, etc., R. Co., 17 Ohio St. 103; *In re* Syracuse, etc., R. Co., 4 Hun 311; *In re* Rhinebeck, etc., R. Co., 67 N. Y. 242; Hull *v.* Chicago, etc., R. Co., 21 Neb. 371, s. c. 32 N. W. R. 162; Crolley *v.* Minneapolis, etc., R., 30 Minn. 541, s. c. 16 N. W. R. 422, Pittsburgh, etc., R. Co. *v.* Peet, 152 Pa. St. 488, s. c. 25 Atl. R. 612.

feits its right to possession,[1] and renders the company a trespasser *ab initio* and liable as such for all damages done while it held possession.[2] The fact that the damages have been assessed does not destroy the right to abandon such proceedings, if the assessment is afterward set aside on appeal.[3] Indeed, the weight of authority holds that the effect of proceedings for condemnation is simply to fix the price at which the party condemning can take the property, unless the statute gives it some greater effect, and that the company may, within a reasonable time after the judgment or confirmation, abandon its proceedings without incurring any liability to pay the damages awarded.[4] Where, however, the company has taken possession

[1] Witt *v.* St. Paul, etc., R. Co., 35 Minn. 404. See Hastings *v.* Burlington, etc., R. Co., 38 Iowa 316; Wilcox *v.* St. Paul, etc., R. Co., 35 Minn. 439, s. c. 29 N. W. R. 148; Green *v.* Missouri, etc., R. Co., 82 Mo. 653; First National Bank *v.* West River, etc., R. Co., 49 Vt. 167; Pittsburgh, etc., R. Co. *v.* Swinney, 97 Ind. 586; Skillman *v.* Chicago, etc., R. Co., 78 Iowa 404, s. c. 43 N. W. R. 275; Hatch *v.* Cincinnati, etc., R. Co., 18 Ohio St. 92; Cincinnati, etc., R. Co. *v.* Zinn, 18 Ohio St. 417.

[2] Pittsburgh, etc., R. Co. *v.* Swinney, 97 Ind. 586; Van Valkenburgh *v.* Milwaukee, 43 Wis. 574; Lee *v.* North Western U. R. Co., 33 Wis. 222; Hullin *v.* Second Municipality, 11 Rob. La. 97. See, however, Louisville, etc., R. Co. *v.* Ryan, 64 Miss. 399. The license which the statute confers upon a railroad company to take possession of land pending proceedings, upon paying into court the damages as originally assessed by the commissioners, is upon the implied, but none the less evident condition that the company will proceed in good faith, and without unnecessary delay, to have the amount, which it will be required to pay for the land, ascertained and finally established, and that it will, within a reasonable time thereafter, pay to the owner the amount thus finally established. Lee *v.* North Western U. R. Co., 33 Wis. 222; City of Chicago *v.* Barbian, 80 Ill. 482; Pittsburgh, etc., R. Co. *v.* Swinney, 97 Ind. 586. See, generally, Leisse *v.* St. Louis, etc., R. Co., 72 Mo. 561; Centralia, etc., R. Co. *v.* Henry, 31 Ill. App. 456; Gibbons *v.* Missouri, etc., R. Co., 40 Mo. App. 146; Lohse *v.* Missouri, etc., R. Co., 44 Mo. App. 645; Lyon *v.* McDonald, 78 Texas 71, s. c. 14 S. W. R. 261, 47 Am. & Eng. R. Cas. 217; Pittsburgh, etc., R. Co. *v.* Reed, (Pa. St.) 6 Atl. R. 838, 34 Pitts. L. J. 191.

[3] Wright *v.* Wisconsin Central R. Co., 29 Wis. 341; Vail *v.* Fall Creek Turnp. Co., 32 Ind. 198. When the circuit court ordered a new appraisement of the land the award of the appraisers ceased to be of binding force upon the parties. * * * * The subsequent dismissal of the proceedings did not reinstate the award for any purpose. Pittsburgh, etc., R. Co. Swinney, 97 Ind. 586, 594.

[4] Elizabethtown, etc., R. Co. *v.* Thompson, 79 Ky. 52; Gear *v.* Dubuque, etc., R. Co., 20 Iowa 523; Will-

pending proceedings, under a statute permitting it to proceed with the construction of its road upon paying or securing the damages awarded by the commissioners, an absolute personal judgment should be rendered for the damages assessed on appeal.[1] The permission to take possession pending proceedings is necessarily upon the implied condition that the company will pay to the owner the value of the land taken as finally ascertained and determined.[2] In Nebraska, the supreme court has held that a final judgment on appeal from an assessment of damages stands on the same footing as any other judgment, and that execution may issue to collect the same, without regard to the future intentions of the company,[3] and a similar conclusion has been reached by the court of appeals of New York.[4] Where the statute provides for issuing an execution upon the award it is held that the railroad company can not avoid its liability nor defeat the land-owner's right to an exe-

iams *v.* New Orleans, etc., R. Co., 60 Miss. 689; State *v.* Cincinnati, etc., R. Co., 17 Ohio St. 103; Denver, etc., R. Co. *v.* Lamborn, 8 Colo. 380; St. Louis, etc., R. Co. *v.* Wilder, 17 Kan. 239; City of Kansas *v.* Kansas Pac. R. Co., 18 Kan. 331; Black *v.* Mayor, etc., Baltimore, 50 Md. 235; Stacey *v.* Vermont Central R. Co., 27 Vt. 39; St. Louis, etc., R. Co. *v.* Teters, 68 Ill. 144; Peoria, etc., R. Co. *v.* Rice, 75 Ill. 329; Schuylkill, etc., Nav. Co. *v.* Decker, 2 Watts (Pa.) 343; Chesapeake, etc., R. Co. *v.* Bradford, 6 W. Va. 220; Baltimore, etc., R. Co. *v.* Nesbit, 10 How. (U. S.) 395; Evansville, etc., R. Co. *v.* Miller, 30 Ind. 209; Derby *v.* Gage, 60 Mich. 1; State *v.* Mills, 29 Wis. 322; Commonwealth *v.* Blue Hill Turnp. Co., 5 Mass. 420; Oregon R. Co. *v.* Bridwell, 11 Ore. 282; State *v.* Hug, 44 Mo. 116.

[1] Peoria, etc., R. Co. *v.* Mitchell, 74 Ill. 394; St. Louis, etc., R. Co. *v.* Teters, 68 Ill. 144; Carr *v.* Boone, 108 Ind. 241; Harness *v.* Chesapeake, etc., Canal Co., 1 Md. Ch. 248; Curtis *v.* St. Paul, etc., R. Co., 21 Minn. 497; Robbins *v.* St. Paul, etc., R. Co., 24 Minn. 191. *Contra*, Denver, etc., R. Co. *v.* Lamborn, 8 Colo. 380. In Louisville, etc., R. Co. *v.* Ryan, 64 Miss. 939, it was held that the company should be left at liberty to abandon the location and become liable as a trespasser if it so desired, and that a personal judgment was erroneous. In Pennsylvania, the location of a railroad constitutes an appropriation of the land, and the right of the land-owner to the damages therefor becomes vested as soon as they are assessed, and can not be divested by a change of location made before the commissioner's report is confirmed. Beale *v.* Pennsylvania R. Co., 86 Pa. St, 509.

[2] Lee *v.* Northwestern U. R. Co., 33 Wis. 222.

[3] Drath *v.* Burlington, etc., R. Co., 15 Neb. 367; Dietrich *v.* Lincoln, etc., R. Co., 12 Neb. 225.

[4] Matter of Rhinebeck, etc., R. Co., 67 N. Y. 242.

cution by the abandonment of its location.[1] An abandonment of the proceedings may be evidenced by a failure to pay the damages awarded within a reasonable time,[2] as well as by affirmative acts done with that end in view. In some states the time within which proceedings to condemn must be abandoned and the acts which will constitute an abandonment are prescribed by statute. Thus in Missouri, the railroad company may, "within ten days from the return of the assessment, elect to abandon the proposed appropriation of the land by an instrument in writing to that effect to be filed with the clerk;"[3] and a failure to file such an instrument within ten days fixes the rights of the parties under the assessment.[4] In states where compensation is not required to precede the taking, the legislature may authorize a railroad corporation to acquire title to lands before the institution of proceedings to ascertain their value. In such case, the abandonment of proceedings subsequently brought for this purpose does not affect the landowner's right to compensation for the original taking and he may enforce payment of the value of his land although the company never actually occupies the property.[5] In Pennsylvania, it is held that the right to damages vests upon the location of a railroad, and that a change of location before the confirmation of the commissioner's report will not defeat this right.[6] The fact that proceedings for the condemnation of

[1] Neal *v.* Pittsburgh, etc., R. Co., 31 Pa. St. 19. After a railroad had been partly constructed over plaintiff's land, and after the damages therefor had been awarded, an act was passed providing that, in case the route was abandoned before the payment of damages, the owner should receive only his actual damages. It was held that the right of the owner to the damages awarded was complete before the act was passed, and was not affected by it. Smart *v.* Portsmouth, etc., R. Co., 20 N. H. 233.

[2] State *v.* Cincinnati, etc., R. Co., 17 Ohio St. 103; Bensley *v.* Mountain Lake Water Co., 13 Cal. 306. See Chicago, etc., R. Co. *v.* Chamberlain, 84 Ill. 333; Pittsburgh, etc., R. Co. *v.* Peet, 152 Pa. St. 488, s. c. 25 Atl. R. 612; Ross *v.* Pennsylvania Co., 17 Phila. 339; Mehle *v.* New York, etc., R. Co., 86 Tex. 459, s. c. 25 S. W. R. 607.

[3] Gen. Stat., 1865, § 3, p. 352.

[4] Gray *v.* St. Louis, etc., R. Co., 81 Mo. 126.

[5] Welles *v.* Cowles, 4 Conn. 182; Briggs *v.* Cape Cod S. Canal Co., 137 Mass. 71; Kimball *v.* Rockland, 71 Me. 137.

[6] Beale *v.* Pennsylvania R. Co., 86 Pa. St. 509.

property have been abandoned,[1] does not bar a new proceeding for the same purpose.[2] Where the statute provided that a failure to pay for or take possession of the land condemned for six months after the assessment of compensation should avoid the effect of the judgment, and cause a forfeiture of all the rights of the corporation in such land, it was held that after the lapse of six months, new proceedings could be instituted to take the same land.[3]

§ 1034. **Meetings of commissioners or jurors.**—If the order appointing the commissioners fixes a time and place of meeting, they must meet in obedience to the terms of such order, or their proceedings will be invalid.[4] Where the proceedings are in a court of general superior jurisdiction, holding regular terms at times designated by a public law, the parties, having proper notice, must take notice of the time of holding the terms of court and of the proceedings of the court during term.[5] Where the commissioners are allowed to fix the time and place of meeting, and are required to give notice of such meeting to the land-owner, notice must be given. After the jury or commissioners have met in obedience to the order on

[1] Corbin *v.* Cedar Rapids, etc., R. Co., 66 Iowa 73.

[2] Neither does the prosecution to final judgment of proceedings which are so defective as not to transfer the title of the property sought. State *v.* Dover, etc., R. Co., 43 N. J. Law. 528.

[3] Trustees Cincinnati So. R. Co. *v.* Haas, 42 Ohio St. 239. A failure to pay for the land taken within sixty days causes the railroad company's right to lapse in some states. Gen. Stat., 1891, Minn., § 2483; Howell's Stat., 1882, Mich., § 3329. In others for thirty days. Dig., 1884, Ark., § 5466; Comp. Laws, 1888, Utah, § 2346.

[4] State *v.* Capner, 49 N. J. Law 555; Roberts *v.* Williams, 13 Ark. 355; State *v.* Horn, 34 Kan. 556. The parties are entitled to reasonable notice of the time and place of meeting. Minneapolis, etc., R. Co. *v.* Kanne, 32 Minn. 174, s.c. 19 N. W. R. 975, 17 Am. & Eng. R. Cas. 122; Manhattan, etc., R. Co. *v.* Stroub, 68 Hun. 90, s. c. 22 N. Y. Supp. 602. See Rheiner *v.* Union, etc., R. Co., 31 Minn. 289; Chicago, etc., R. Co. *v.* Chamberlain, 84 Ill. 333; Virginia, etc., R. Co. *v.* Lovejoy, 8 Nev. 100; Gill *v.* Milwaukee, etc., R. Co., 76 Wis. 293, s. c. 45 N. W. R. 23; State *v.* Capner, 49 N. J. Law 555; Ruhland *v.* Jones, 55 Wis. 673.

[5] City of St. Louis *v.* Gleason, 15 Mo. App. 25; Board *v.* Magoon, 109 Ill. 142; Thorndike *v.* County Commissioners, 117 Mass. 566. See Matter of Exchange Alley, 4 La. Ann. 4; New Orleans, etc., R. Co. *v.* Bougere, 23 La. Ann. 803.

motion they may adjourn to such other time and place as may be reasonably necessary in pursuing their investigations, notice of such adjournment being publicly announced.[1] The adjourned meeting should be regularly convened and a further adjournment had, if necessary, that the continuity of the original meeting may not be broken.[2]

§ 1035. **Open and close.**—In New York it has been held that it rests in the discretion of the commissioners to decide which party shall open and close.[3] In some states the land-owner has been held entitled to this privilege, as having the affirmative of the issue as to the value of the land,[4] while in others this right has been held to be with whichever party brings the action.[5] There is much conflict of opinion, and a general rule can not be safely stated.[6]

[1] Goodwin *v.* Wethersfield, 43 Conn. 437; Polly *v.* Saratoga, etc., R. Co., 9 Barb. (N. Y.) 449; Leavenworth *v.* Meyer, 50 Kan. 25, s. c. 31 Pac. R. 700; Butman *v.* Fowler, 17 Ohio 101. See Memphis, etc., R. Co. *v.* Parsons, etc., 26 Kan. 503; Michigan, etc., R. Co. *v.* Probate Judge, 48 Mich. 638, s. c. 14 Am. & Eng. R. Cas. 351; Masters *v.* McHolland, 12 Kan. 17; Commonwealth *v.* County Commissioners, 8 Pick. 343; Pegler *v.* Highway Commissioners, 34 Mich. 359.

[2] State *v.* Capner, 49 N. J. Law 555; McPherson *v.* Holdridge, 24 Ill. 38.

[3] Albany, etc., R. Co. *v.* Lansing, 16 Barb. (N. Y.) 68; *In re* New York, etc., R. Co., 33 Hun 148. See, to the same effect, Charleston, etc., R. Co. *v.* Blake, 12 Rich. L. (S. Car.) 634.

[4] Minnesota Valley R. Co. *v.* Doran, 17 Minn. 188; St. Paul, etc., R. Co. *v.* Murphy, 19 Minn. 500; Charleston, etc., R. Co. *v.* Blake, 12 Rich. L. (S. Car.) 634; Evansville, etc., R. Co. *v.* Miller, 30 Ind. 209; Indiana, etc., R. Co. *v.* Cook, 102 Ind. 133; Connecticut River R. Co. *v.* Clapp, 1 Cush. (Mass.) 559; Burt *v.* Wigglesworth, 117 Mass. 302; Oregon, etc., R. Co. *v.* Barlow, 3 Ore. 311; Omaha, etc., R. Co. *v.* Umstead, 17 Neb. 459.

[5] McReynolds *v.* Burlington, etc., R. Co., 106 Ill. 152; Baltimore, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 17 W. Va. 812; Montgomery, etc., R. Co. *v.* Sayre, 72 Ala. 443; Harrison *v.* Young, 9 Ga. 359.

[6] Bellingham, etc., R. Co. *v.* Strand, 4 Wash. 311, s. c. 51 Am. & Eng. R. Cas. 608, 30 Pac. R. 144; Indiana, etc., R. Co. *v.* Cook, 102 Ind. 133; Seattle etc., R. Co. *v.* Murphine, 4 Wash. 448; Gainesville, etc., R. Co. *v.* Waples, 3 Texas App. (Civil Cases) 482; Springfield, etc., R. Co. *v.* Rhea, 44 Ark. 258; Connecticut, etc., R. Co. *v.* Clapp, 1 Cush. 559; St. Louis, etc., R. Co. *v.* North, 31 Mo. App. 345; Omaha, etc., R. Co. *v.* Walker, 17 Neb. 432, s. c. 23 N. W. R. 348; Morris, etc., R. Co. *v.* Bonnell, 34 N. J. Law 474; Oregon, etc., R. Co. *v.* Barlow, 3 Ore. 311; Burk *v.* Wigglesworth, 117 Mass. 302. See, also, "The Right to begin and reply in Special Proceedings," 25 Cent. L. J. 483.

§ 1036. **Evidence of value—Illustrative instances.**—It is held that evidence of the selling value of lands in the neigborhood may be given as tending to establish a basis from which the land-owner's damages can be assessed in cases where the land taken is not shown to have any definite market value,[1] but as a general rule where there is a definite market value that value should be taken as the basis for estimating compensation.[2] Evidence of actual sales of such lands has been held admissible in cases where the market value of the land sought to be condemned was in dispute,[3] though other authorities hold such evidence inadmissible[4] upon the ground that it is the general selling price of land in the neighborhood which is the test of its value, and not the price paid for particular pieces of property.[5] The sales proven must have been of land similar in

[1] San Diego, etc., R. Co. *v.* Neale, 78 Cal. 63, s. c. 20 Pac. R. 372, 3 L. R. A. 83; Chicago, etc., R. Co. *v.* Chicago., etc., Co., 112 Ill. 589; Concordia Cemetery Assn. *v.* Minnesota, etc., R. Co., 121 Ill. 199. See, generally, Greeley, etc., R. Co. *v.* Yount, (Colo. App.), 42 Pac. R. 1023; *In re* Condemnation for New State House (R. I.), 33 Atl. R. 523; Teele *v.* City of Boston, 165 Mass. 88, s. c. 42 N. E. R. 506; Dixon *v.* Baltimore, etc., R. Co., 1 Mackey (D. C.) 78; Pingery *v.* Cherokee, etc., R. Co., 78 Iowa 438, s. c. 43 N. W. R. 285.

[2] Missouri, etc., R. Co. *v.* Porter, 112 Mo. 361, s. c. 20 S. W. R. 568; Kansas City, etc., R. Co. *v.* Fisher, 49 Kan. 17, s. c. 30 Pac. R. 111; Little Rock, etc., R. Co. *v.* Woodruff, 49 Ark. 381, s. c. 4 Am. St. R. 51, 5 S. W. R. 792; Kiernan *v.* Chicago, etc., R. Co., 123 Ill. 188, s. c. 14 N. E. R. 18; City of Santa Ana *v.* Harlin, 99 Cal. 538; Colorado, etc., R. Co. *v.* Brown, 15 Colo. 193, s. c. 25 Pac. R. 87; Currie *v.* Waverly, etc., R. Co., 52 N. J. Law 381, s. c. 20 Atl. R. 56, 44 Am. & Eng. R. Cas. 100; Pittsburgh, etc., R. Co. *v.* Patterson, 107 Pa. St. 461.

[3] Edmands *v.* Boston, 108 Mass. 535; Boston, etc., R. Co. *v.* Old Colony, etc., R. Co., 3 Allen (Mass.) 142; Concord R. Co. *v.* Greely, 23 N. H. 237; March *v.* Portsmouth, etc., R. Co., 19 N. H. 372; King *v.* Iowa Midland R. Co., 34 Iowa 458.

[4] Stinson *v.* Chicago, etc., R. Co., 27 Minn. 284; Curtin *v.* Nittany Valley R. Co., 135 Pa. St. 20; Pittsburgh, etc., R. Co. *v.* Rose, 74 Pa. St. 362; Pennsylvania, etc., R. Co. *v.* Bunnell, 81 Pa. St. 414; Central Pacific R. Co. *v.* Pearson, 35 Cal. 247; Union R., etc., Co. *v.* Moore, 80 Ind. 458. The consideration named in deeds for contiguous land is not admissible in proof of the value of land sought to be condemned. Seefeld *v.* Chicago, etc., R. Co., 67 Wis. 96; Esch *v.* Chicago, etc., R. Co., 72 Wis. 229.

[5] A particular sale may be a sacrifice compelled by necessity, or it may be the result of mere caprice or folly. Pittsburgh, etc., R. Co. *v.* Patterson, 107 Pa. St. 461; Pittsburgh, etc., R. Co. *v.* Vance, 115 Pa. St. 325; Curtin *v.* Nittany Valley R. Co., 135 Pa. St. 20.

character and location to that condemned, and must have been made near the time of the taking.[1] But some of the cases hold that whether offered evidence is sufficient in these regards is largely in the discretion of the officer or judge presiding.[2] Such sales, to be admissible in evidence, must have been voluntary. The price paid upon condemnation of similar property,[3] or by agreement with the owner as a gross sum both for the land purchased and for damages resulting to the residue from the construction of the railroad,[4] is to be excluded as evidence.[5] We incline to doubt the soundness of the cases which hold evidence of particular sales to be competent, although we think it may be proper to test the knowledge of witnesses by asking them, on cross-examination, whether they know of such sales. It seems to us that to permit evidence in chief of particular sales is to let in collateral questions and lead to confusion and error. We believe the true rule is to confine the question to the market value.[6] The land-owner is at liberty to prove

[1] San Jose, etc., R. Co. *v.* Mayne, 83 Cal. 566. The value of the land before the location of the road may be shown preparatory to showing what it was worth after the road was constructed. Durham, etc., R. Co. *v.* Bullock Church, 104 N. Car. 525.

[2] Shattuck *v.* Stoneham Branch R. Co., 6 Allen (Mass.) 115; Presbrey *v.* Old Colony, etc., R. Co., 103 Mass. 1; Stinson *v.* Chicago, etc., R. Co., 27 Minn. 284; Montclair R. Co. *v.* Benson, 36 N. J. L. 557. For instances of the abuse of this discretion leading to a reversal of the case, Chandler *v.* Jamaica Pond, etc., Co., 122 Mass. 305; Paine *v.* Boston, 4 Allen (Mass.) 168; La Mont *v.* St. Louis, etc., R. Co., 62 Iowa 193. Where there is no similarity between the land taken and other lots in the vicinity, it is error to admit evidence of the value of such lots. Cummins *v.* Des Moines, etc., R. Co., 63 Iowa 397.

[3] Bemis *v.* Springfield, 122 Mass. 110; White *v.* Fitchburgh, etc., R. Co., 4 Cush. (Mass.) 440; Wyman *v.* Lexington, etc., R. Co., 13 Met. (Mass.) 316.

[4] Presbrey *v.* Old Colony, etc., Co., 103 Mass. 1; Cobb *v.* Boston, 112 Mass. 181.

[5] Pierce on Railroads, 225.

[6] Chicago, etc., R. Co. *v.* Bowman, 122 Ill. 595, s. c. 13 N. E. R. 814; Giesy *v.* Cincinnati, R. Co., 4 Ohio St. 308; Boom Co. *v.* Patterson, 98 U. S. 403; Harrison *v.* Young, 9 Ga. 359; Doud *v.* Mason City, etc., R. Co., 76 Iowa 438, s. c. 41 N. W. R. 65; Kansas City, etc., R. Co. *v.* Kennedy, 49 Kan. 19; Stinson *v.* Chicago, etc., R. Co., 27 Minn. 284, 6 N. W. R. 784; Kansas City, etc., R. Co. *v.* Spitlog, 45 Kan. 68; Payne *v.* Kansas, etc., R. Co., 46 Fed. R. 546; Esch *v.* Chicago, etc., R. Co., 72 Wis. 229, s. c. 36 Am. & Eng. R. Cas. 620.

every fact which he would naturally be expected to adduce as enhancing the price at a private sale.[1] On the other hand, the defendant company may offer such evidence as will put the jury in possession of all those facts about which a prudent purchaser would inquire,[2] and will usually be permitted to prove them on cross-examination of the plaintiff, where he testifies in his own behalf as to the value of his land.[3] It is held that the company may prove the price paid by the owner for his land[4] as tending to show its value. But the owner may show by way of explanation, the circumstances under which he bought, the condition of the property at the time, the improvement he has made upon it, and any general advance in prices by which the property has been benefited.[5] An offer on his part to sell the land at a fixed price, and the actual sale of a part of it may be proven as admissions of the owner as to its

[1] Chicago, etc., R. Co. *v.* Davidson, 49 Kan. 589, s. c. 31 Pac. R. 131; Ohio, Co. *v.* Kerth, 130 Ind. 314, 30 N. E. R. 298; Little Rock, etc., R. Co. *v.* Woodruff, 49 Ark. 381; Montana, etc., R. Co. *v.* Warren, 6 Mont. 275; Cincinnati, etc., R. Co. *v.* Longworth, 30 Ohio St. 108; *In re* Condemnation for New State House (R. I.), 33 Atl. R. 523. Building operations in process of completion on land at some distance from the land taken can not be shown in evidence, to increase the speculative price of the land as the possible site for buildings, in case the former venture should prove a success. Schuylkill River, etc., R. Co. *v.* Stocker, 128 Pa. St. 233. See Hooker *v.* Montpelier, etc., R. Co., 62 Vt. 47; Washburn *v.* Milwaukee, etc., R. Co., 59 Wis. 364; South Park, etc., *v.* Dunlevy, 91 Ill. 49; Sherman *v.* St. Paul, etc., R. Co., 30 Minn. 227; King *v.* Minneapolis, etc., R. Co., 32 Minn. 224, s. c. 20 N. W. R. 135. But the peculiar value attached to the land by the owner is not to be taken as basis of estimate. Mississippi, etc., Co. *v.* Ring, 58 Mo. 491. See De Buol *v.* Freeport, etc., R. Co., 111 Ill. 499.

[2] Little Rock, etc., R. Co. *v.* Woodruff, 49 Ark. 381, 4 Am. St. R. 51; Cameron *v.* Chicago, etc., R. Co., 51 Minn. 153, s. c. 53 N. W. R. 199. See, generally, Chicago, etc., R. Co. *v.* Catholic, etc., 119 Ill. 525, s. c. 10 N. E. R. 372; Stebbing *v.* Metropolitan, etc., L. R. 6 Q. B. 37; Somerville, etc., R. Co. *v.* Doughty, 22 N. J. L. 495; Pittsburgh, etc., R. Co. *v.* Vance, 115 Pa. St. 325, s. c. 8 Atl. R. 764; Dupuis *v.* Chicago, etc., R. Co., 115 Ill. 97, s. c. 3 N. E. R. 720, 23 Am. & Eng. R. Cas. 93.

[3] Edmands *v.* Boston, 108 Mass. 535; St. Louis, etc., R. Co. *v.* Smith. 42 Ark. 265.

[4] Ham *v.* Salem, 100 Mass. 350; Swan *v.* County of Middlesex, 101 Mass. 173; Sexton *v.* North Bridgewater, 116 Mass. 200; St. Louis, etc., R. Co. *v.* Smith, 42 Ark. 265.

[5] St. Louis, etc., R. Co. *v.* Smith, 42 Ark. 265; Ham *v.* Salem, 100 Mass. 350.

value.[1] It may give, as original evidence, the admissions of the owner as to the value of his land, made at or near the time it was taken.[2] Where the owner dies pending suit, his admissions may be proven against his personal representatives.[3] But a witness can not state his impressions as to what the owner has said concerning the value of his property.[4] The owner has been allowed to prove the price offered for the property a short time before its condemnation as tending to show that it has a special value above the general market value of surrounding property,[5] but most authorities hold that evidence of unaccepted offers made by third persons[6] or by the condemning

[1] East Brandywine, etc., R. Co. *v.* Ranck, 78 Pa. St. 454. The railroad company may prove that the owner sold the land in question before the action but after the railroad was located across it, and the price for which it was sold. Such evidence is admissible as an admission of the owner that the property was worth that price even with the railroad across it. Watson *v.* Milwaukee, etc., R. Co., 57 Wis. 332.

[2] Concord R. Co. *v.* Greely, 23 N. H. 237; Central Branch U. P. R. Co. *v.* Andrews, 37 Kan. 162, 641; East Brandywine, etc., R. Co. *v.* Ranck, 78 Pa. St. 454; Webber *v.* Eastern R. Co., 2 Met. (Mass.) 147; Le Roy, etc., R. Co. *v.* Butts, 40 Kan. 159; Power *v.* Savannah, etc., R. Co., 56 Ga. 471; Watson *v.* Milwaukee, etc., R. Co., 57 Wis. 332. The sworn valuation placed upon his property by a land-owner in making a return of the property to the assessor for taxation, was held not admissible as original evidence against him in fixing the value upon condemnation, though it was held admissible to discredit the owner's evidence. Virginia, etc., R. Co. *v.* Henry, 8 Nev. 165. And the same holding was made as to an assessment list signed by the land-owner, but in which the values were fixed by the assessor. San Jose, etc., R. Co. *v.* Mayne, 83 Cal. 566. So, in Arkansas, upon the ground that the valuation in the assessment for taxation was "made for a different purpose, and was not a fair criterion of the market value." Texas, etc., R. Co. *v.* Eddy, 42 Ark. 527; Springfield, etc., R. Co. *v.* Rhea, 44 Ark. 258. See Brown *v.* Providence, etc., R. Co., 5 Gray (Mass.) 35. But in Birmingham Mineral R. Co. *v.* Smith, 89 Ala. 305, the court held that the owner's sworn valuation was an admission on his part as to the value of his property, remarking: "If his unsworn declarations and admissions are admissible against him, certainly his estimate of the value, made under the solemnity of an oath is equally admissible as a declaration or admission. Such valuation is not conclusive upon him, but dependent for its weight upon the circumstances."

[3] Power *v.* Savannah, etc., R. Co., 56 Ga. 471; Central Branch U. P. R. Co. *v.* Andrews, 37 Kan. 641.

[4] Matter of New York, etc., R. Co., 33 Hun. (N. Y.) 231; Lewis' Em. Dom., § 439.

[5] Johnson *v.* Freeport, etc., R. Co., 111 Ill. 413.

[6] Selma, etc., R. Co. *v.* Keith, 53 Ga. 178; Drury *v.* Midland R. Co., 127

corporation[1] are inadmissible to fix the value of the land. Unexecuted offers and agreements for the purchase of similar lands in the neighborhood are never competent evidence for this purpose.[2] The fact that the land sold for a particular sum shortly after the railroad was laid across it is entitled to great weight in getting at its value as depreciated by the location of the road.[3]

§ 1037. **Competency of witnesses.**—It may be said generally that any competent witness acquainted with the land taken and having knowledge of the market price of such land is competent to testify as to its value.[4] Such a witness does not testify

Mass. 571; St. Joseph, etc., R. Co. *v.* Orr, 8 Kan. 419; Watson *v.* Milwaukee, etc., R. Co., 57 Wis. 332. The owner's refusal to part with the premises for an offered sum may have proceeded from a special fondness for the land or from an opinion on his part that it would some day be a profitable investment, and can not be taken as evidence of the value of the land. Pennsylvania, etc., R. Co. *v.* Cleary, 125 Pa. St. 442.

[1] Davis *v.* Charles River Branch R. Co., 11 Cush. (Mass.) 506; Upton *v.* South Reading Branch R. Co., 8 Cush. (Mass.) 600. The award of commissioners appointed to appraise the land can not be introduced as evidence of its value in the trial of an appeal from such award. Sherman *v.* St. Paul, etc., R. Co., 30 Minn. 227; Ennis *v.* Wood River, etc., Railroad, 12 R. I. 73. It is incompetent to prove that, after proceedings are commenced, the company offered and an agent of the owner agreed to accept a certain price for the property. Chicago, etc., R. Co. *v.* Catholic Bishop, 119 Ill. 525.

[2] Davis *v.* Charles River, etc., R. Co., 11 Cush. 506; Winnisimmet Co. *v.* Grueby, 111 Mass. 543; Lehmicke *v.* St. Paul, etc., R. Co., 19 Minn. 464; Concorn R. Co. *v.* Greely, 23 N. H. 237; Montclair R. Co. *v.* Benson, 36 N. J. L. 557.

[3] Watson *v.* Milwaukee, etc., R. Co., 57 Wis. 332. The necessities of the railroad company can not be proved for the purposes of augmenting damages. Virginia, etc., R. Co. *v.* Elliott, 5 Nev. 358; *In re* Boston, etc., Co., 22 Hun 176; Black River, etc., Co. *v.* Barnard, 9 Hun 104. See *In re* New York, etc., R. Co., 27 Hun 116, and DeBuol *v.* Freeport, etc., R. Co., 111 Ill. 499.

[4] Republican Valley R. Co. *v.* Arnold, 13 Neb. 485; Selma, etc., R. Co. *v.* Keith, 53 Ga. 178; Sherwood *v.* St. Paul, etc., R. Co., 21 Minn. 127; Lehmicke *v.* St. Paul, etc., R. Co., 19 Minn. 464; Dallas, etc., R. Co. *v.* Chenault, 4 Tex. App. Civ. Cases, 171, 16 S. W. R. 173; Snyder *v.* Western Union R. Co., 25 Wis. 60; Rondout, etc., R. Co., *v.* Deys, 5 Lans. 298; Pittsburgh, etc., R. Co. *v.* Rose, 74 Pa. St. 362; East Pennsylvania R. Co. *v.* Hiester, 40 Pa. St. 53; Tucker *v.* Massachusetts R. Co., 118 Mass. 546; Russell *v.* Horn Pond Branch R. Co., 4 Gray (Mass.) 607; Wyman *v.* Lexington, etc., R. Co., 13 Met. (Mass.) 316; Tate *v.* Missouri, etc., R. Co., 64 Mo. 149; Snow *v.* Bos-

as an expert having peculiar skill or scientific attainments, but as having knowledge of the value of property.[1] The weight of the testimony depends in a great degree, of course, upon the knowledge of the witness and the facts upon which his testimony is based. An owner of land taken for a right of way by a railroad company, who has resided upon and improved it for several years, and who swears that he knows what it is worth, is a competent witness,[2] but he has only the same standing as any other witness of equal knowledge, and it is error for the court by its instructions to call special attention to the land-owner's testimony.[3] A farmer living near and knowing the market value of land in the neighborhood,[4] or who has examined the land with a view of buying it,[5] or a real estate man who has been dealing in lots near those sought to be condemned,[6] or an officer who has assessed the property for

ton, etc., R. Co., 65 Me. 230; Harrison *v.* Iowa Midland R. Co., 36 Iowa 323; Henry *v.* Dubuque, etc., R. Co., 2 Iowa 288; Frankfort, etc., R. Co. *v.* Windsor, 51 Ind. 238; Evansville, etc., R. Co. *v.* Cochran, 10 Ind. 560; Cleveland, etc., R. Co. *v.* Ball, 5 Ohio St. 568; Lafayette, etc., R. Co. *v.* Winslow, 66 Ill. 219; Illinois, etc., R. Co. *v.* Von Horn, 18 Ill. 257; Troy, etc., R. Co. *v.* Northern Turnp. Co., 16 Barb. (N. Y.) 100; Troy, etc., R. Co. *v.* Lee, 13 Barb. (N. Y.) 169.

[1] Johnson *v.* Freeport, etc., R. Co., 111 Ill. 413; Diedrich *v.* Northwestern, etc., R. Co., 47 Wis. 662; Frankfort, etc., R. Co. *v.* Windsor, 51 Ind. 238; Snow *v.* Boston, etc., R. Co., 65 Me. 230; Shattuck *v.* Stoneham Branch R. Co., 6 Allen (Mass.) 115. See Uniacke *v.* Chicago, etc., R. Co., 67 Wis. 108.

[2] Burlington, etc., R. Co. *v.* Schluntz, 14 Neb. 421; Sioux City, etc., R. Co. *v.* Weimer, 16 Neb. 272; Edmands *v.* Boston, 108 Mass. 535.

[3] Jacksonville, etc., R. Co. *v.* Walsh, 106 Ill. 253.

[4] Kansas Central R. Co. *v.* Allen, 24 Kan. 33; Chicago, etc., R. Co. *v.* Cosper, 42 Kan. 561; Russell *v.* Horn Pond Branch R. Co., 4 Gray (Mass.) 607; Snyder *v.* Western U. R. Co., 25 Wis. 60; Robertson *v.* Knapp, 35 N. Y. 91; Pingery *v.* Cherokee, etc., R. Co., 78 Iowa 438; Curtin *v.* Nittany Valley R. Co., 135 Pa. St. 20; LeRoy, etc., R. Co. *v.* Ross, 40 Kan. 598; LeRoy, etc., R. Co. *v.* Hawks, 39 Kan. 638; Northeastern Nebraska R. Co. *v.* Frazier, 25 Neb. 53. *Contra*, Buffum *v.* New York, etc., R. Co., 4 R. I. 221. In Brown *v.* Providence, etc., R. Co., 12 R. I. 238, it was held that farmers were only competent to say how much land was worth for farming purposes, and not to say what it was worth generally.

[5] Pittsburgh, etc., R. Co. *v.* Reed, (Pa. St.) 28 Am. & Eng. R. Cas. 233.

[6] Central Branch U. P. R. Co. *v.* Andrews, 37 Kan. 162. Any person knowing the selling price of lots in the vicinity may express an opinion as to the value of the land taken. Pittsburgh, etc., R. Co. *v.* Robinson, 95 Pa. St. 426. And, in general, any

taxation,[1] or, in general, any person who is shown to be familiar with the value of the particular piece of land across which the railroad is being built,[2] is a competent witness as to its value.[3] The usual rule in such cases is to call a witness, and ask him, generally, if he has a knowledge of the value of the

person who has bought or sold land in the vicinity is a competent witness. Houston, etc., R. Co. *v.* Knapp, 51 Tex. 592; Snow *v.* Boston, etc., R.Co., 65 Me. 230; Curtis *v.* St. Paul, etc., R. Co., 20 Minn. 28; Swan *v.* County of Middlesex, 101 Mass. 173; Diedrich *v.* Northwestern U. R. Co., 47 Wis. 662; Carter *v.* Thurston, 58 N. H. 104.

[1] Brown *v.* Providence, etc., R. Co., 5 Gray (Mass.) 35; Oregon Cascade R. Co. *v.* Baily, 3 Ore. 164. The official return of municipal assessors fixing the value of the land for purposes of taxation is not admissible in evidence; the officer must be examined under oath. Webber *v.* Eastern R. Co., 2 Met. (Mass.) 147; Dudley *v.* Minnesota, etc., R. Co., 77 Iowa 408. See Birmingham Mineral R. Co. *v.* Smith, 89 Ala. 305; San Jose, etc., R. Co. *v.* Mayne, 83 Cal. 566.

[2] Blakeley *v.* Chicago, etc., R. Co., 25 Neb. 207; Sioux City, etc., R. Co. *v.* Weimer, 16 Neb. 272; Republican Valley R. Co. *v.* Arnold, 13 Neb. 485. Persons who have acted as commissioners in assessing damages for similar land taken for public use are competent witnesses as to its value. Webber *v.* Eastern R. Co., 2 Met. (Mass.) 147; Dickenson *v.* Fitchburg, 13 Gray (Mass.) 546. And the fact that the witness was himself a viewer to assess damages in the same case does not render him incompetent as a witness when the question of damages comes before a jury on appeal. Dorlan *v.* East Brandywine, etc., R. Co., 46 Pa. St. 520. A witness may be asked as to his having previously testified in similar proceedings, in order to test his qualifications. Chandler *v.* Jamaica Pond Aqueduct Co., 125 Mass. 544.

[3] In Winklemans *v.* Des Moines, etc., R. Co., 62 Iowa 11, the court held that the fact that a witness, examined as to the value of land, based his estimate upon what he heard others say in relation thereto, will not render him incompetent, but his knowledge may be fully tested on cross-examination, that the jury may judge of the value of his opinion. The court said: "The knowledge which qualifies a witness to testify as to values, must necessarily consist largely of hearsay. The examination of market reports, and information acquired from others, as to sales of property qualifies a witness to testify as to values." It is not necessary that the witness should himself have been upon the land. Lehmicke *v.* St. Paul, etc., R. Co., 19 Minn. 464. But in Le Roy, etc., R. Co. *v.* Ross, 40 Kan. 598, the court says: "The opinion of no farmer not living in the neighborhood of the land and not acquainted with its situation and fertility, its advantages, disadvantages, etc., ought to be received in regard to the value of the land. Farmers not employed in buying and selling real estate, and having no knowledge of the facts in issue, ought not to be permitted to give their opinions from a map of the route of the road, and upon hearsay evidence only." Le Roy, etc., R. Co. *v.* Hawk, 39 Kan. 638.

property in question, or property of that kind. If he answers that he has, he is allowed to state the value in his judgment, and on cross-examination his means of knowledge, or qualification to testify upon the subject, may be particularly inquired into. If he shows, upon the cross-examination, that his knowledge of values is limited, his testimony is still permitted to go to the jury for what it is worth.[1] But there is no presumption in favor of the competency of a witness who offers to testify as to the value of land; and where his competency is challenged it must be shown that he has some knowledge upon which to base an opinion as to its value.[2] The extent of his knowledge should be shown to enable the jury to assign to his evidence the proper weight,[3] and it is proper, within reasonable limits, for a witness in his examination in chief to give the reasons upon which his opinion is based.[4] An objection to the competent to express an opinion as to the value of the land condemned. Durham, etc., R. Co. *v.* Bullock Church, 104 N. Car. 525.

[1] Winklemans *v.* Des Moines, etc., R. Co., 62 Iowa 11; Houston, etc., R. Co. *v.* Knapp, 51 Tex. 592; Farrand *v.* Chicago, etc., R. Co., 21 Wis. 435; Diedrich *v.* Northwestern U. R. Co., 47 Wis. 662; Snow *v.* Boston, etc., R. Co., 65 Me. 230; Carter *v.* Thurston, 58 N. H. 104; Sherwood *v.* St. Paul, etc., R. Co., 21 Minn. 127; Johnson *v.* Freeport, etc., R. Co., 111 Ill. 413; Swan *v.* County of Middlesex, 101 Mass. 173. See Minnesota, etc., R. Co. *v.* Gluek, 45 Minn. 463, s. c. 48 N. W. R. 194; Wyman *v.* Lexington, etc., R. Co., 13 Metc. 316; Chicago, etc., R. Co. *v.* Woodward, 48 Kan. 599, s. c. 29 Pac. R. 1146; Birmingham, etc., R. Co. *v.* Smith, 89 Ala. 305, s. c. 7 So. R. 634.

[2] Missouri Pac. R. Co. *v.* Coon, 15 Neb. 232; Boston, etc., R. Co. *v.* Montgomery, 119 Mass. 114; Central Pac. R. Co. *v.* Pearson, 35 Cal. 247; Buffum *v.* New York, etc., R. Co., 4 R. I. 221. Where no objection was offered to the testimony of a witness in the court below, it will be presumed that he was com-

[3] McReynolds *v.* Burlington, etc., R. Co., 106 Ill. 152; Johnson *v.* Freeport, etc., R. Co., 111 Ill. 413. A witness may be interrogated on cross-examination as to the value of other real estate in the neighborhood, for the purpose of testing his competency as a judge of land values, although the land about which inquiry is made is not shown to be similar to that sought to be condemned. Uniacke *v.* Chicago, etc., R. Co., 67 Wis. 108.

[4] Snyder *v.* Western Union R. Co., 25 Wis. 60; Brown *v.* Corey, 43 Pa. St. 495; McClean *v.* Chicago, etc., R. Co., 67 Iowa 568; Sawyer *v.* Boston, 144 Mass. 470; Sexton *v.* North Bridgewater, 116 Mass. 200; Illinois, etc., R. Co. *v.* Von Horn, 18 Ill. 257; Lafayette, etc., R. Co. *v.* Winslow, 66 Ill. 219. Details as to particular sales or transactions should be given only upon cross examination. Central Pac. R.

petency of a witness must be made when he is offered, or it is waived.[1] The discretion exercised by the judge or presiding officer at the trial in accepting or rejecting a witness after learning what knowledge he claims and the sources of that knowledge, will only be interfered with in cases of palpable error.[2]

§ 1038. **Opinions of witnesses.**—Witnesses who are acquainted with the property sought to be condemned may give their opinions as to its value.[3] By some courts witnesses are also permitted to give an opinion as to the amount of damage or benefit resulting to an estate from the construction and working of the railroad.[4] This practice is rejected by other

Co. *v.* Pearson, 35 Cal. 247. See Missouri, etc., R. Co. *v.* Haines. 10 Kan. 439.

[1] Watts *v.* Derry, 22 N. H. 498.

[2] Chandler *v.* Jamaica Pond Aqueduct Co., 125 Mass. 544; Boston, etc., R. Co. *v.* Montgomery, 119 Mass. 114; Tucker *v.* Massachusetts Cent. R. Co., 118 Mass. 546.

[3] St. Louis, etc., R. Co. *v.* Chapman, 38 Kan. 307, s. c. 16 Pac. R. 695; Rumsey *v.* New York, etc., R. Co., 133 N. Y. 79, s. c. 30 N. E. R. 654; Washburn *v.* Milwaukee, etc., R. Co., 59 Wis. 364; Watson *v.* Pittsburgh, etc., R. Co., 37 Pa. St. 469; Pittsburgh, etc., R. Co. *v.* Robinson, 95 Pa. St. 426; Pennsylvania, etc., R. Co. *v.* Bunnell, 81 Pa. St. 414; Republican Valley R. Co. *v.* Arnold, 13 Neb. 485; Tingley *v.* Providence, 8 R. I. 493; Cleveland, etc. R. Co. *v.* Ball, 5 Ohio St. 568; Matter of Utica, etc., R. Co., 56 Barb. (N. Y.) 456; Troy, etc., R. Co. *v.* Northern T. Co., 16 Barb. (N. Y.) 100; Springfield, etc., R. Co. *v.* Calkins, 90 Mo. 538; Hosher *v.* Kansas City, etc., R. Co., 60 Mo. 303; Sherman *v.* St. Paul, etc., R. Co., 30 Minn. 227; Lehmicke *v.* St. Paul, etc., R. Co., 19 Minn. 464; Hawkins *v.* Fall River, 119 Mass. 94; Shattuck *v.* Stoneham Branch R. Co., 6 Allen (Mass.) 115; Snow *v.* Boston, etc., R. Co., 65 Me. 230; Central Branch U. P. R. Co. *v.* Andrews, 37 Kan. 162; Kansas Central R. Co. *v.* Allen, 24 Kan. 33; McClean *v.* Chicago, etc., R. Co., 67 Iowa 568; Winklemans *v.* Des Moines, etc., R. Co., 62 Iowa 11; Yost *v.* Conroy, 92 Ind. 464; Indianapolis, etc., R. Co. *v.* Pugh, 85 Ind. 279; Chicago, etc., R. Co. *v.* Blake, 116 Ill. 163; Johnson *v.* Freeport, etc., R. Co., 111 Ill. 413; Cincinnati, etc., R. Co. *v.* Mims, 71 Ga. 240; Central Pacific R. Co. *v.* Pearson, 35 Cal. 247; Little Rock, etc., R. Co. *v.* Woodruff, 49 Ark. 381; Texas, etc., R. Co. *v.* Kirby, 44 Ark. 103; St. Louis, etc., R. Co. *v.* Anderson, 39 Ark. 107.

[4] City of Portland *v.* Kamm, 10 Ore. 383; Snow *v.* Boston, etc., R. Co., 65 Me. 230; Cairo, etc., R. Co. *v.* Woosley, 85 Ill. 370; Jacksonville, etc., R. Co. *v.* Caldwell, 21 Ill. 75; City of Chicago *v.* McDonough, 112 Ill. 85; Brainard *v.* Boston, etc., R. Co., 12 Gray (Mass.) 407; Shattuck *v.* Stoneham Branch R. Co., 6 Allen (Mass.) 115; Nevada, etc., R. Co. *v.* DeLissa, 103 Mo. 125; Snyder *v.* Western U. R. Co., 25 Wis. 60; Diedrich *v.* Northwestern U. R. Co., 47 Wis. 662; Washburn *v.* Milwaukee,

courts because it calls upon witnesses to express an opinion upon the precise point which the issues present for the decision of the jury,[1] but they permit the witnesses to give an opinion as to the value of the property before and after the taking.[2] In some of the states where no allowance is made for benefits in the condemnation of land for railroad purposes, this rule is also rejected and the courts only permit the witness to state the value of the land before the taking, and the nature and extent of particular injuries, leaving the jury to estimate the compensation due to the land-owners on account of them,[3] but this rule is open to the grave objections that it necessarily assumes that the jury is acquainted with the value of all kinds of property subject to condemnation, and that they can, unaided by the opinions of witnesses, correctly estimate the effect upon that value of every possible injury that can be inflicted.[4]

etc., R. Co., 59 Wis. 364; Texas, etc., R. Co. *v.* Kirby, 44 Ark. 103; Lehmicke *v.* St. Paul, etc., R. Co., 19 Minn. 464; Sherwood *v.* St. Paul, etc., R. Co., 21 Minn. 127; Sherman *v.* St. Paul, etc., R. Co., 30 Minn. 227; Railroad Co. *v.* Foreman, 24 W. Va. 662; Pittsburgh, etc., R. Co. *v.* Robinson, 95 Pa. St. 426; Matter of Utica, etc., R. Co., 56 Barb. (N. Y.) 456; Hine *v.* New York, etc., R. Co., 36 Hun 293. See *contra*, Matter of New York, etc., R. Co., 29 Hun 609.

[1] Chicago, etc., R. Co. *v.* Springfield, etc., R. Co., 67 Ill. 142; Cleveland, etc., R. Co. *v.* Ball, 5 Ohio St. 568; Atlantic, etc., R. Co. *v.* Campbell, 4 Ohio St. 583; Baltimore, etc., R. Co. *v.* Johnson, 59 Ind. 247; Ohio, etc., R. Co. *v.* Nickless, 71 Ind. 271.

[2] Houston, etc., R. Co. *v.* Knapp, 51 Tex. 592; Curtis *v.* St. Paul, etc., R. Co., 20 Minn. 28; Sherwood *v.* St. Paul, etc., R. Co., 21 Minn. 127; Snow *v.* Boston, etc., R. Co., 65 Me. 230; Swan *v.* County of Middlesex, 101 Mass. 173; Farrand *v.* Chicago, etc., R. Co., 21 Wis. 435; Diedrich *v.* Northwestern U. R. Co., 47 Wis. 662; Carter *v.* Thurston, 58 N. H. 104.

[3] Evansville, etc., R. Co. *v.* Fitzpatrick, 10 Ind. 120; Baltimore, etc., R. Co. *v.* Johnson, 59 Ind. 247; Baltimore, etc., R. Co. *v.* Stoner, 59 Ind. 579. See these cases criticised and limited in Yost *v.* Conroy, 92 Ind. 464; Harrison *v.* Iowa Midland R. Co., 36 Iowa 323; Prosser *v.* Wapello County, 18 Iowa 327; Montgomery, etc., R. Co. *v.* Varner, 19 Ala. 185; Alabama, etc., R. Co. *v.* Burkett, 42 Ala. 83; Lincoln *v.* Saratoga, etc., R. Co., 23 Wend. (N. Y.) 425; Troy, etc., R. Co. *v.* Northern Turnp. Co., 16 Barb. (N. Y.) 100; Rochester, etc., R. Co. *v.* Budlong, 6 How. Pr. 467; Elizabethtown, etc., R. Co. *v.* Helm, 8 Bush (Ky.) 681; Burlington, etc., R. Co. *v.* Schluntz, 14 Neb. 421; Alabama, etc., R. Co. *v.* Burkett, 42 Ala. 83.

[4] Yost *v.* Conroy, 92 Ind. 464. In the case cited it was said: "Of what assistance to a jury composed of clergymen, merchants and bankers would be a description of the minutest accuracy, without some estimate of

In states where opinions as to the amount of the damages are held admissible, witnesses may give their opinions as to particular matters affecting the value of the land such as the capacity of the land for valuable uses different from that to which it is devoted,[1] or the extent to which the property is damaged by any of the several items of injury that the jury are called upon to consider in estimating the owner's compensation.[2] But they are not permitted to give conjectural opinions as to matters that are speculative in their character or which rest upon future possibilities.[3] The jury are not bound by the opinions of witnesses but may consider them in connection with all other facts in evidence.[4]

§ 1039. **Power of commissioners to act upon their own knowledge—Evidence.**—Upon principle no award ought to stand which is made in a case where no evidence is heard and which is based solely upon the knowledge of the jurors or commissioners. We very much doubt whether the question of a citizen's right to compensation can be made to depend upon the judgment of jurors or commissioners acting upon their own knowledge or information, for in such cases there is no hearing. But some of the courts have indicated a different doctrine.[5] Other courts hold that they are at liberty to hear

values by competent witnesses? Possibly, it would enable such a jury to form a crude conjecture; it could do but little more."

[1] Chandler *v.* Jamaica Pond Aqueduct Co., 125 Mass. 544.

[2] Winona, etc., R. Co. *v.* Waldron, 11 Minn. 515; Tucker *v.* Massachusetts Cent. R. Co., 118 Mass. 546; Milwaukee, etc., R. Co. *v.* Eble, 4 Chand. (Wis.) 72; Rockford, etc., R. Co. *v.* McKinley, 64 Ill. 338; Hayes *v.* Ottawa, etc., R. Co., 54 Ill. 373; Webber *v.* Eastern R. Co., 2 Met. (Mass.) 147; Pittsburgh, etc., R. Co. *v.* Rose, 74 Pa. St. 362; Selma, etc., R. Co. *v.* Knapp, 42 Ala. 480. See *ante*, §§ 995, 996. A grazier may give his opinion as to the effect upon cattle of their being disturbed by the operation of a railroad through the pasture where they are kept. Baltimore, etc., R. Co. *v.* Thompson, 10 Md. 76.

[3] Boston, etc., R. Co. *v.* Old Colony, etc., R. Co., 3 Allen (Mass.) 142; Central Pac. R. Co. *v.* Pearson, 35 Cal. 247; Elizabethtown, etc., R. Co. *v.* Helm, 8 Bush (Ky.) 681; Troy, etc., R. Co. *v.* Northern T. Co., 16 Barb. (N. Y.) 100; Gardner *v.* Brookline, 127 Mass. 358; Fairbanks *v.* Fitchburg, 110 Mass. 224.

[4] Green *v.* Chicago, 97 Ill. 370; Town of Princeton *v.* Gieske, 93 Ind. 102.

[5] Columbia Delaware Bridge Co. *v.* Geisse, 35 N. J. Law 474, 36 N. J. L.

evidence if they choose, or to assess the damages from their own knowledge gained by a view of the premises.[1] In some states it is held that the jury or commissioners may base their assessment upon the knowledge gained by a view of the premises, even in opposition to the testimony which has been given before them.[2] The general doctrine is that where the statute provides for the introduction of evidence, legal evidence only can be admitted,[3] but it has been said that the court will not set aside the award for technical errors in accepting or rejecting evidence where no substantial injustice has been done.[4] The

537. The action of the commissioners in receiving *ex parte* communications from one of the parties in the absence of the other party touching the merits of the controversy, has been held to vitiate their award. Lennox *v.* Knox, etc., R. Co., 62 Me. 322; Harris *v.* Woodstock, 27 Conn. 567.

[1] St. Paul, etc., R. Co. *v.* Covell, 2 Dak. 483; Pennsylvania R. Co. *v.* Keiffer, 22 Pa. St. 356; Matter of Rondout, etc., R. Co. *v.* Deyo, 5 Lans. (N. Y.) 298; Kramer *v.* Cleveland, etc., R. Co., 5 Ohio St. 140. It has been held that the commissioners have no right to hear witnesses unless the statute so provides. Clarksville, etc., Turnp. Co. *v.* Atkinson, 1 Sneed (Tenn.) 426; Vanwickle *v.* Camden, etc., R. Co., 14 N. J. Law 162; Coster *v.* New Jersey R., etc., Co., 24 N. J. Law 730. In Washington, etc., R. Co. *v.* Switzer, 26 Gratt. 661, it was held that the provision that commissioners should hear the parties made it their duty to hear the testimony of witnesses produced by the parties.

[2] Peoria, etc., R. Co. *v.* Sawyer, 71 Ill. 361; Chicago, etc., R. Co. *v.* Hopkins, 90 Ill. 316; Peoria, etc., R. Co. *v.* Barnum, 107 Ill. 160; Omaha, etc., R. Co. *v.* Walker, 17 Neb. 432; Evansville, etc., R. Co. *v.* Cochran, 10 Ind. 560. Overruled in Heady *v.* Vevay, etc., Turnpike Co., 52 Ind. 117; City of Kansas *v.* Butterfield, 89 Mo. 646; Lehigh Valley Coal Co. *v.* Chicago, 26 Fed. R. 415. They may take into account such facts as they have learned by viewing the property, in deciding whether the construction of the improvement will permanently depreciate or increase the market value of the property. Culbertson, etc., Co. *v.* Chicago, 111 Ill. 651. Where the jury viewed the premises and the case was submitted to them without other evidence, it was held, on appeal, that the court could not disturb the verdict since the evidence upon which they acted was not in the record. Peoria, etc., R. Co. *v.* Barnum, 107 Ill. 160. And even where other evidence was offered, it was held that, not having a knowledge of what the jury learned from a view of the property, the supreme court could not disturb the verdict on the evidence. Evansville, etc., R. Co. *v.* Cochran, 10 Ind. 560.

[3] Rochester, etc., R. Co. *v.* Budlong, 6 How. (N. Y.) Pr. 467; Central Pac. R. Co. *v.* Pearson, 35 Cal. 247. The Matter of New York Central R. Co., 15 Hun 63, 64 N. Y. 60.

[4] Michigan Air Line R. Co. *v.* Barnes, 44 Mich. 222; Port Huron, etc., R. Co. *v.* Voorheis, 50 Mich. 506; California Pacific R. Co. *v.* Frisbie, 41 Cal. 356. See, also, Bennet *v.* Camden, etc., R. Co., 14 N. J. Law 145; New

parties are, however, entitled to a hearing,[1] and the denial to them of this right is sufficient cause for setting aside the award.[2]

§ 1040. View.—Where the statute provides that the commissioners shall view the premises, the general rule is that a view is an essential part of the proceedings.[3] If the statute is silent

Jersey R. Co. *v.* Suydam, 17 N. J. Law 25; Hannibal, etc., R. Co. *v.* Muder, 49 Mo. 165; Kansas City, etc., R. Co. *v.* Campbell, 62 Mo. 585; Virginia, etc., R. Co. *v.* Elliott, 5 Nev. 358; Eastern R. Co. *v.* Concord, etc., R. Co., 47 N. H. 108. In some cases this ruling is put upon the ground that as the jury are presumed to form their opinion largely from their own view of the premises, their report should not be set aside for errors in the admission of evidence unless there is strong evidence that the parties' interest was prejudiced thereby. Troy, etc., R. Co. *v.* Lee, 13 Barb. (N. Y.) 169; Troy, etc., R. Co. *v.* Northern Turnpike Co., 16 Barb. (N. Y.) 100; Willing *v.* Baltimore R. Co., 5 Whart. (Pa.) 460; Western Pac. R. Co. *v.* Reed, 35 Cal. 621; Chicago, etc., R. Co. *v.* Hopkins, 90 Ill. 316. For instances where the award was set aside for errors committed in receiving or rejecting testimony see Matter of New York, etc., R. Co., 35 Hun (N. Y.) 260; Goodwin *v.* Milton, 25 N. H. 458.

[1] Weimer *v.* Bunbury, 30 Mich. 201; Stuart *v.* Palmer, 74 N. Y. 183; Inhabitants of Readington *v.* Dilley, 24 N. J. L. 209; Harness *v.* Chesapeake, etc., Canal Co., 1 Md. Ch. 248; Zimmerman *v.* Canfield, 42 Ohio St. 463; Gamble *v.* McCrady, 75 N. Car. 509.

[2] Washington, etc., R. Co. *v.* Switzer, 26 Gratt. (Va.) 661; Central Pacific R. Co. *v.* Pearson, 35 Cal. 247; Jones *v.* Goffstown, 39 N. H. 254; *In re* Hawley, etc., 2 De G. & S. 33. Where the owner has been prevented by accident or mistake from being present at the hearing, and the award is clearly unjust to him, a rehearing should be granted unless such owner has been guilty of laches, by which his rights have been forfeited. Matter of New York, etc., R. Co., 63 How. (N. Y.) Pr. 265; Matter of New York Central, etc., R. Co., 64 N. Y. 60; Matter of New York, etc., R. Co., 93 N. Y. 385, 29 Hun 602; Bourgeois *v.* Mills, 60 Tex. 76.

[3] Kankakee, etc., R. Co. *v.* Straut, 102 Ill. 666; Galena, etc., R. Co. *v.* Haslam, 73 Ill. 494; Charleston, etc., R. Co. *v.* Comstock, 36 W. Va. 263, s. c. 15 S. E. R. 69; Matter of New York, etc., R. Co., 33 Hun (N. Y.) 148; Western Pacific R. Co. *v.* Reed, 35 Cal. 621. Under the New York statute, it was held that a view must be had and the report must show the fact. Albany, etc., R. Co. *v.* Lansing, 16 Barb. (N. Y.) 68. See, generally, Fort Street, etc., R. *v.* Backus, 92 Mich. 33, s. c. 52 N. W. R. 790; Gurney *v.* Minneapolis, etc., R. Co., 41 Minn. 223, s. c. 43 N. W. R. 2; Mitchell *v.* Illinois, etc., R. Co., 85 Ill. 566; Grand Rapids, etc., R. Co. *v.* Chesebro, 74 Mich. 466, s. c. 42 N. W. R. 66; Brakken *v.* Minneapolis, etc., R. Co., 29 Minn. 41, s. c. 11 N. W. R. 124. Photographic view has been held sufficient where an actual inspection of the property was impracticable. Omaha, etc., R. Co. *v.* Beeson, 36 Neb. 361, s. c. 54 N. W. R. 557.

on the subject the court may grant a view or not, in its discretion.[1] The better opinion is that the object of the view is to enable the jury the better to understand and apply the evidence, and so to more intelligently and fairly perform their duties,[2] but some of the courts hold that the jury may act on their own judgment formed from an inspection of the premises.[3] While the jury may resort to their own general knowledge of the elements which affect the assessment, in order to determine the relative weight of conflicting testimony, their assessment must be supported by the testimony, or it can not stand.[4]

§ 1041. **Report of commissioners.**—In many of the states the report must be confirmed by the court by which the com-

[1] King *v.* Iowa, etc., R. Co., 34 Iowa 458; Harper *v.* Lexington, etc., R. Co., 2 Dana (Ky.) 227; Clayton *v.* Chicago, etc., R. Co., 67 Iowa 238, s. c. 25 N. W. R. 150; Snow *v.* Boston, etc., R. Co., 65 Me. 230; Galena, etc., R. Co. *v.* Haslam, 73 Ill. 494; Clayton *v.* Chicago, etc., R. Co., 67 Iowa 238; Dearborn *v.* Boston, etc., R. Co., 24 N. H. 179; Hopkins *v.* Atlantic, etc., R. Co., 36 N. H. 9; Traut *v.* New York, etc., R. Co., 22 W. N. C. 540, 15 Atl. R. 678; Coughlen *v.* Chicago, etc., R. Co., 36 Kan. 422, s. c. 13 Pac. R. 813, 30 Am. & Eng. R. Cas. 330; Snow *v.* Boston, etc., R. Co., 65 Me. 230; Bellingham, etc., R. Co. *v.* Strand, 4 Wash. 311, s. c. 30 Pac. R. 144, 51 Am. & Eng. R. Cas. 608.

[2] Washburn *v.* Milwaukee, etc., R. Co., 59 Wis. 364, 18 N. W. R. 328; Munkwitz *v.* Chicago, etc., R. Co., 64 Wis. 403; Seefeld *v.* Chicago, etc., R. Co., 67 Wis. 96; Jeffersonville, etc., R. Co. *v.* Bowen, 40 Ind. 545; Close *v.* Samm, 27 Iowa 503; Hoffman *v.* Bloomsburg, etc., R. Co., 143 Pa. St. 503, s. c. 22 Atl. R. 823; Gorgas *v.* Philadelphia, etc., R. Co., 144 Pa. St. 1, s. c. 22 Atl. R. 715; Laflin *v.* Chicago, etc., R., 33 Fed. R. 415; Peoria, etc., Co. *v.* Peoria, etc., R. Co., 146 Ill. 372, s. c. 34 N. E. R. 550; Atchison, etc., R. Co. *v.* Schneider, 127 Ill. 144, s. c. 2 L. R. A. 422. See Chicago, etc., R. Co. *v.* Parsons, 51 Kan. 408, s. c. 32 Pac. R. 1083; City of Topeka *v.* Martineau, 42 Kan. 387; Seefield *v.* Chicago, etc., R. Co., 67 Wis. 96.

[3] Toledo, etc., R. Co. *v.* Dunlap, 47 Mich. 456; Remy *v.* Municipality, 12 La. Ann. 500. See Kiernan *v.* Chicago, etc., R. Co., 123 Ill. 188, s. c. 14 N. E. R. 18; Parks *v.* Boston, 15 Pick. 198, 209; Harper *v.* Lexington, etc., R. Co., 2 Dana (Ky.) 227.

[4] Washburn *v.* Milwaukee, etc., R. Co., 59 Wis. 364. An award, which is clearly against the evidence, will be set aside. Fitchburg R. Co. *v.* Eastern R. Co., 6 Allen (Mass.) 98; Wilson *v.* Rockford, etc., R. Co., 59 Ill. 273. But an award will not, as a rule, be set aside where the evidence is conflicting. Western, etc., R. Co. *v.* Reed, 35 Cal. 621; Virginia, etc., R. Co. *v.* Henry, 8 Nev. 165; McReynolds *v.* Burlington, etc., R. Co., 106 Ill. 152; Omaha, etc., R. Co. *v.* Walker, 17 Neb. 432.

missioners were appointed,[1] and it has been held that even though the statute does not expressly so provide, the report of a tribunal appointed by a court in proceedings under the right of eminent domain, may be accepted or rejected by the court, as justice may require.[2] A report may be set aside for fraud or misconduct of the commissioners, even though the statute

[1] Stimson's Am. Stat., (1892) § 8749a. Where confirmation of the report was not asked until three years after it was made, the court refused to confirm it and held it to be invalid. Stearns *v.* Deerfield, 51 N. H. 372. Where several tracts of lands owned by different persons are included in one proceeding under a statute permitting it damages should be assessed to each owner, and it is erroneous to award damages in gross and direct payment to treasurer to be distributed. Convers *v.* Atchison, etc., R. Co., 142 U. S. 671, s. c. 12 Sup. Ct. R. 351. Citing Bowman *v.* Venice, etc., Railway Co., 102 Ill. 459; Johnson *v.* Freeport, etc., R. Co., 116 Ill. 521, s. c. 6 N. E. R. 211; Suver *v.* Chicago, etc., Railroad Co., 123 Ill. 293, s. c. 14 N. E. R. 12.

[2] Hingham, etc., Turnp. Co. *v.* County of Norfolk, 6 Allen (Mass.) 353; Pueblo, etc., R. Co. *v.* Rudd, 5 Colo. 270; State *v.* MacDonald, 26 Minn. 445; Troy, etc., R. Co. *v.* Northern Turnp. Co., 16 Barb. (N. Y.) 100; Bennet *v.* Camden, etc., R. Co., 14 N. J. Law 145. Where the tribunal proceeded upon erroneous principles the report should be set aside. Matter of New York, etc., R. Co., 33 Hun. (N. Y.) 639, 98 N. Y. 447, 102 N. Y. 704; Van Wickle *v.* Camden, etc., R. Co., 14 N. J. Law 162; Swayze *v.* New Jersey Midland R. Co., 36 N. J. Law 295; Beckett *v.* Midland R. Co., L. R. 1 C. P. 241. If the damages awarded are so grossly excessive or so palpably inadequate as to lead to the irresistible conclusion that the commissioners or the jury were swayed by prejudice or passion the award will be set aside. Van Wickle *v.* Camden, etc., R. Co., 14 N. J. Law 162; New Orleans, etc., R. Co. *v.* Zeringue, 23 La. Ann. 521; Kansas City, etc., R. Co. *v.* Campbell, 62 Mo. 585; Clarksville, etc., Turnp. Co. *v.* Atkinson, 1 Sneed (Tenn.) 426; Rheiner *v.* Stillwater R., etc., Co., 29 Minn. 147; Mutual Union Tel. Co. *v.* Katkamp, 103 Ill. 420; *In re* Commissioners of Central Park, 51 Barb. (N. Y.) 277. See Houston, etc., R. Co. *v.* Milburn, 34 Tex. 224. But ordinarily the testimony of witnesses called to impeach the report as to the value of the property should be given less weight than the official report of the commissioners. Eastern R. Co. *v.* Concord, etc., R. Co., 47 N. H. 108. But where the evidence is conflicting the award will not be disturbed if any portion of it taken alone would sustain the verdict. City of Kansas *v.* Kansas City, etc., R. Co., 84 Mo. 410; Selma, etc., R. Co. *v.* Gammage, 63 Ga. 604; Virginia, etc., R. Co. *v.* Elliott, 5 Nev. 358; Texas, etc., R. Co. *v.* Eddy, 42 Ark. 527; Little Rock Junction R. Co. *v.* Woodruff, 49 Ark. 381; Hastings, etc., R. Co. *v.* Ingalls, 15 Neb. 123; Colvill *v.* St Paul, etc., R. Co., 19 Minn. 283; Illinois, etc., R. Co. *v.* Von Horn, 18 Ill. 257; Chicago, etc., R. Co. *v.* Blake, 116 Ill. 163; Western Pac. R. Co. *v.* Reed, 35 Cal. 621; Railroad Co. *v.* Gesner, 20 Pa. St. 240; Kyle *v.* Miller, 108 Ind. 90.

provides that it shall be final and conclusive.[1] The report of the commissioners must be in writing, and in some states should set forth facts showing their jurisdiction of the matter to which their finding relates.[2] The report should, of course, be duly signed.[3] The property sought to be appropriated should be described with reasonable certainty.[4] It may be said generally that matters required by the statute to be set forth must

[1] Matter of Buffalo, etc., R. Co., 32 Hun. (N. Y.) 289; Thompson *v.* Conway, 53 N. H. 622; Central Pacific R. Co. *v.* Pearson, 35 Cal. 247; *In re* New York, etc., R. Co., 64 N. Y. 60; *In re* Prospect Park, etc., R. Co., 24 Hun 199; *In re* New York, etc., R. Co., 5 Hun 105. See, *In re* Staten Island R. Co., 41 Hun. 392, 104 N. Y. 680. It is held that it is not illegal for commissioners to make an agreement with the company whose duty it is to pay for the services of commissioners, for a fair compensation. State *v.* Dover, etc., R. Co., 43 N. J. Law 528, s. c. 14 Am. & Eng. R. Cas. 87. But we suppose that such an agreement is to be carefully scrutinized and that it must be shown to be entirely fair and reasonable.

[2] State *v.* Yauger, 29 N. J. Law 384.

[3] Quayle *v.* Missouri, etc., R. Co., 63 Mo. 465; Rochester, etc., R. Co. *v.* Beckwith, 10 How. Pr. 168. In Hanes *v.* North Carolina, etc., R. Co., 109 N. Car. 490, s. c. 13 S. E. R. 896, it was held that a provision requiring the report to be under seal was merely directory.

[4] Missouri, etc., R. Co. *v.* Carter, 85 Mo. 448, s. c. 28 Am. & Eng. R. Cas. 249; Northern, etc., R. Co. *v.* Concord, etc., R. Co., 27 N. H. 183; Hunt *v.* Smith, 9 Kan. 137; Kansas City, etc., R. Co. *v.* Story, 96 Mo. 611, s. c. 10 S. W. R. 203; St. Louis, etc., R. Co. *v.* Fowler, 113 Mo. 458; Cory *v.* Chicago, etc., R. Co., 100 Mo. 282, s. c. 13 S. W. R. 346; State *v.* Hudson, etc., R. Co., 38 N. J. Law 548; Strang *v.* Beloit, etc., R. Co., 16 Wis. 635; Morgan's Appeal, 39 Mich. 675; Matter of New York, etc., R. Co., 21 How. (N. Y.) Pr. 434; Smith *v.* Connelly's Heirs, 1 T. B. Mon. (Ky.) 58. Where the statute requires the report to contain a description of the property, such a description is indispensable. Vail *v.* Morris, etc., R. Co., 21 N. J. Law 189; Missouri Pac. R. Co. *v.* Carter, 85 Mo. 448; Chesapeake, etc., Canal Co. *v.* Union Bank, 4 Cranch C. C. 75. A description of a certain number of feet on each side of the center line of a railroad, as located, staked, and marked, was held sufficient. Lower *v.* Chicago, etc., R. Co., 59 Iowa 563. The quantity of land is sufficiently shown by stating the dimensions, so that the quantity can be computed. Pennsylvania R. Co. *v.* Bruner, 55 Pa. St. 318. The description must be such that a person conversant with such matters can locate the part taken or it will be void for uncertainty. But it is sufficient if the description can be gathered from the whole report. Northern R. Co. *v.* Concord, etc., R. Co., 27 N. H. 183; St. Paul, etc., R. Co. *v.* Matthews, 16 Minn. 341. It has been held sufficient to refer to a description in the warrant or petition. Ohio River R. Co. *v.* Harness, 24 W. Va. 511; Chesapeake, etc., Canal Co. *v.* Binney, 4 Cranch C. C. 68.

appear in the report,[1] and that a failure to find upon any question which the statute requires the commissioners to pass upon is sufficient ground for setting the report aside.[2] Where several pieces of property are taken or damaged, or the interests of several owners are separately affected, the report should contain an explicit finding as to each tract and each party[3], awarding damages to each owner by name.[4] But where several persons have joint interests in one tract, a single award may be made covering the interests of all.[5] Objections to the report

[1] O'Hara *v.* Pennsylvania R. Co., 25 Pa. St. 445; Pierce *v.* County Comrs., 63 Me. 252; Missouri Pac. R. Co. *v.* Carter, 85 Mo. 448; Central Pacific R. Co., 35 Cal. 247; Leavenworth, etc., R. Co. *v.* Meyer, 50 Kan. 25, s. c. 31 Pac. R. 700; Lewis *v.* St. Paul, etc., R. Co., 5 S. Dak. 148, s. c. 58 N. W. R. 580, 57 Am. & Eng. R. Cas. 612; Parker *v.* Fort Worth, etc., R. Co., 84 Tex. 333, s. c. 19 S. W. R. 518. See Omaha, etc., R. Co. *v.* Menk, 4 Neb. 21.

[2] Philadelphia, etc., R. Co. *v.* Cake, 95 Pa. St. 139; Pueblo, etc., R. Co. *v.* Rudd, 5 Colo. 270; Martin *v.* Rushton, 42 Ala. 289; Bryant *v.* Glidden, 36 Me. 36; Matter of New York, etc., R. Co., 35 Hun (N. Y.) 232; Damrell *v.* Board of Supervisors, 40 Cal. 154.

[3] Chicago, etc., R. Co. *v.* Sanford, 23 Mich. 418; Fitzpatrick *v.* Pennsylvania R. Co., 10 Phila. (Pa.) 107; Dolphin *v.* Pedley, 27 Wis. 469; Sharp *v.* Johnson, 4 Hill (N. Y.) 92. Where the jury is simply required to ascertain the land-owner's damages, a general award is sufficient, without stating the items of injury. Michigan, etc., R. Co. *v.* Barnes, 44 Mich. 222; Ohio, etc., R. Co. *v.* Wallace, 14 Pa. St. 245. See Illinois, etc., R. Co. *v.* Mayrand, 93 Ill. 591. A substantial compliance with the statute as to stating the items of damages is sufficient where they are required to be given. California Pac. R. Co. *v.* Frisbie, 41 Cal. 356. Damages should be awarded separately for each estate or interest in a tract of land in which several persons hold distinct estates. Harris *v.* Howes, 75 Me. 436; Rentz *v.* Detroit, 48 Mich. 544; Chesapeake, etc., Canal Co. *v.* Hoye, 2 Gratt. (Va.) 511; Lewis' Em. Dom., § 515.

[4] Rusch *v.* Milwaukee, etc., R. Co., 54 Wis. 136; Honenstine *v.* Vaughan, 7 Blkf. (Ind.) 520; State *v.* Brands, 45 N. J. Law 332. An award to "the estate of A" is bad. Neal *v.* Knox, etc., R. Co., 61 Me. 298; State *v.* Fisher, 43 N. J. Law 377. If the name is unknown the award should so state. Commonwealth *v.* Great Berrington, 6 Mass. 492.

[5] Pittsburgh, etc., R. Co. *v.* Hall, 25 Pa. St. 336; East Saginaw, etc., R. Co. *v.* Benham, 28 Mich. 459. But see Ruppert *v.* Chicago, etc., R. Co., 43 Iowa 490. A single owner of several lots or tracts of land may be awarded damages in gross for all. Sherwood *v.* St. Paul, etc., R. Co., 21 Minn. 122; Kankakee, etc., R. Co. *v.* Chester, 62 Ill. 235. In some states, it is held that the interests of tenants in common should be assessed at a gross sum. Southern Pac. R. Co. *v.* Wilson, 49 Cal. 396; Chicago, etc., R. Co. *v.* Hurst, 30 Iowa 73. By the statutes of some states, tenants in common are allowed to proceed either jointly or severally to recover damages for in-

which do not go to the jurisdiction of the tribunal, may be waived, and a failure to offer such objections at the time and in the manner prescribed by statute is such a waiver.[1] Objections for lack of jurisdiction, however, may generally be made at any time.[2]

§ 1042. Report of commissioners—Requisites of—Illustrative cases.—The report, award or verdict should be reasonably

juries done to their real estate. Hibbard *v.* Foster, 24 Vt. 542; Webber *v.* Merrill, 34 N. H. 202; Hobbs *v.* Hatch, 48 Me. 55.

[1] Matter of Application of Cooper, etc., 93 N. Y. 507; Chesapeake, etc., R. Co. *v.* Pack, 6 W. Va. 397; Thayer *v.* Burger, 100 Ind. 262; Morgan Civil Township *v.* Hunt, 104 Ind. 590; Matter of Clear Lake Water Co., 48 Cal. 586. Where the parties agree to a confirmation of the report before the expiration of the time allowed for filing objections, they will be considered as having waived all right to afterward offer objections. *In re* Kensington, etc., Turnp. Co., 97 Pa. St. 260. The acceptance by the property owner of the damages awarded is a waiver of irregularities and defects in the proceedings. Quincy, etc., R. Co. *v.* Kellogg, 54 Mo. 334; Troy, etc., R. Co. *v.* Potter, 42 Vt. 265; Kile *v.* Yellowhead, 80 Ill. 208; Karber *v.* Nellis, 22 Wis. 215; Hawley *v.* Harrall, 19 Conn. 142. The occupation by the corporation of the land condemned estops it to object to the validity of the proceedings. Wilmington, etc., R. Co. *v.* Condon, 8 Gill. & J. (Md.) 443. And the payment of the damages awarded has been held to estop the corporation to object to the report or the proceedings. Marquette, etc., R. Co. *v.* Probate Judge, 53 Mich. 217. The fact that the commissioner's report understated the amount of land taken by a fraction of an acre was held not to invalidate their report, where damages were assessed for injuries to the whole tract. Morgan *v.* Chicago, etc., R. Co., 39 Mich. 675.

[2] Wilkinson *v.* Mayo, 3 Hen. & Mun. (Va.) 565; Hughes *v.* Sellers, 34 Ind. 337. Upon motion to confirm the commissioners' report, the supreme court of New York has power to set aside a default entered at the hearing before commissioners and order a new hearing for any sufficient cause for which the commissioners might have set the default aside. In the matter of New York, etc., R. Co., 93 N. Y. 385. The commissioners have no authority to condemn land not covered by the description in the petition, and an assessment of damages for land not embraced in such description is void for lack of jurisdiction. Spofford *v.* Bucksport, etc., R. Co., 66 Me. 26. Proceedings were had to condemn land, which were regular except that the commissioners awarded a gross sum to all of six lot owners who held in severalty, without specifying the sum to which each was entitled. The company paid the money into court, and nothing further was done in the proceeding. It was held that the condemnation proceeding being ended, so that it was no longer possible to correct it at the instance of either party, it must be held to be void and wholly without effect upon the rights of either party. Rusch *v.* Milwaukee, etc., R. Co., 54 Wis. 136.

certain and explicit in its statements of what was done and decided;[1] that is, it should state all material matters with such certainty as will enable the parties to fully understand the decision, but it is not necessary to state all that was done in full detail. It is not necessary, unless required by statute, to itemize the damages.[2] The report should show that the commissioners met at the appointed time and place.[3] An award, report or verdict in the alternative or upon condition is insufficient.[4] The commissioners or jury have no authority to award damages in anything else than money.[5] If the question whether the proposed taking is necessary for public use is submitted by statute to the commissioners their failure to find upon this

[1] Reitenbaugh *v.* Chester Valley R. Co., 21 Pa. St. 100; Connecticut River R. Co. *v.* Clapp, 1 Cush. (Mass.) 559. See Illinois, etc., R. Co. *v.* Mayrand, 93 Ill. 591; Connecticut, etc., R. Co. *v.* Clapp, 1 Cush. 559.

[2] Michigan, etc., R. Co. *v.* Barnes, 44 Mich. 222, s. c. 6 N. W. R. 651; Matter of Campbell, 1 N. Y. S. R. 768; Flint, etc., R. Co. *v.* Detroit, etc., R. Co., 64 Mich. 350, s. c. 31 N. W. R. 281; American, etc., R. Co. *v.* Huntington, etc., R. Co., 130 Ind. 98, s. c. 29 N. E. R. 566; Port Huron, etc., R. Co. *v.* Voorheis, 50 Mich. 506; Wilmington, etc., R. Co. *v.* Smith, 99 N. Car. 131, s. c. 5 S. E. R. 237; Packard *v.* Bergen, etc., Co., 54 N. J. Law 553, s. c. 25 Atl. R. 506. But there may be cases where items should be separately stated. Chesapeake, etc., R. Co. *v.* Hoye, 2 Gratt. 511; Sanford *v.* Chicago, etc., R.Co., 2 Mich. N. P. 132 (Supp.). See, generally, Sherwood *v.* St. Paul, etc., R. Co., 21 Minn. 127; Albany, etc., R. Co. *v.* Dayton, 10 Abb. Pr. (N. S.) 182; Pittsburgh, etc., R. Co. *v.* Hall, 25 Pa. St. 336; Pennsylvania R. Co. *v.* Bruner, 55 Pa. St. 318.

[3] Central Pacific R. Co. *v.* Pearson, 35 Cal. 247.

[4] Chesapeake, etc., R. Co. *v.* Halstead, 7 W. Va. 301; New Orleans Pac. R. C. *v.* Murrell, 34 La. Ann. 536; Toledo, etc., R. Co. *v.* Munson, 57 Mich. 42. Some cases hold that the verdict may contain conditions requiring the company to remove buildings, etc. Dwight *v.* Springfield, 6 Gray (Mass.) 442; Omaha R. Co. *v.* Menk, 4 Neb. 21. And others hold that by agreement of the parties a verdict imposing conditions may be rendered. Hill *v.* Mohawk R. Co., 7 N. Y. 152; Central, etc., R. Co. *v.* Holler, 7 Ohio St. 220; Chesapeake R. Co. *v.* Patton, 6 W. Va. 147; Chicago, etc., R. Co. *v.* Melville, 66 Ill. 329.

[5] New Orleans Pacific R. Co. *v.* Murrell, 34 La. Ann. 536; Chesapeake, etc., R. Co. *v.* Halstead, 7 W. Va. 301; Pennsylvania, etc., R. Co. *v.* Reichert, 58 Md. 261. The performance of other acts by the petitioners, such as making crossings, building fences, constructing culverts, etc., can not be prescribed as a partial compensation for the landowner's damages. Toledo, etc., R. Co. *v.* Munson, 57 Mich. 42; Chicago, etc., R. Co. *v.* Melville, 66 Ill. 329. See Hill *v.* Mohawk, etc., R. Co., 7 N. Y. 152; Chesapeake, etc., R. Co. *v.* Patton, 6 W. Va. 147; Central Ohio, etc., R. Co. *v.* Holler, 7 Ohio St. 220.

question will make their report invalid.[1] The finding must be in substantial compliance with the requirements of the statute,[2] but ordinarily a literal compliance is not essential, and a clearly immaterial deviation will not invalidate the report.[3]

§ 1043. **Time within which report must be made.**—The general rule is that if a limited time is allowed to the commissioners by statute in which to make their report, it must be made within the time, or it will be ineffective.[4] It has been held that the parties can not extend the time by agreement, but this we regard as a very doubtful decision, for we believe that it is competent for the parties to agree to an extension of time.[5] Where the time for filing the report is fixed by the court, it may be extended by an order made before the expiration of that time.[6] The statutes of many of the states require

[1] Bass *v.* Elliott, 105 Ind. 517; Mansfield, etc., R. Co. *v.* Clark, 23 Mich. 519. If a finding is made the court is bound by such finding and must give judgment accordingly. Wilmington, etc., R. Co. *v.* Dominguez, 50 Cal. 505.

[2] Hunter *v.* Mayor of Newport, 5 R. I. 325; Inhabitants of Cushing *v.* Gay, 23 Me. 9; McClary *v.* Hartwell, 25 Mich. 139.

[3] Technical errors which do not prejudice the substantial interests of the parties will be disregarded. *In re* New York, etc., Co., 61 Hun. 625, s.c. 15 N. Y. Supp. 909; Troy, etc., R. Co. *v.* Lee, 13 Barb. 169; Matter of New York, etc., R. Co., 27 Hun. 116; Hunt *v.* Smith, 9 Kan. 137; Oregon, etc., R. Co. *v.* Bridwell, 11 Ore. 282, s. c. 3 Pac. R. 684; Pacific, etc., R. Co. *v.* Porter, 74 Cal. 261, s. c. 15 Pac. R. 774, 33 Am. & Eng. R. Cas. 167; Detroit, etc., R. Co. *v.* Crane, 50 Mich. 182, s. c. 15 N. W. R. 73. Presumption is in favor of discharge of duty. Orange, etc., R. Co. *v.* Craver, 32 Fla. 28, s. c. 13 So. R. 444; New Orleans, etc., Co. *v.* Frank, 39 La. Ann. 707, s. c. 2 So. R. 310, 30 Am. & Eng. R. Cas. 275. But fraud or misconduct may, of course, be shown. Orange, etc., *v.* Craver, *supra*; Marquette, etc., R. Co. *v.* Probate Judge, 53 Mich. 217; Ortman *v.* Union, etc., R. Co., 32 Kan. 419, s. c. 4 Pac. R. 858, 17 Am. & Eng. R. Cas. 136; Cadmus *v.* Central, etc., R. Co., 31 N. J. Law 179.

[4] Anderson *v.* Pemberton, 89 Mo. 61; Metzler & Hugde's Road, 62 Pa. St. 151; Claybaugh *v.* Baltimore, etc., R. Co., 108 Ind. 262.

[5] City of Belfast, 53 Me. 431.

[6] McMullen *v.* State, 105 Ind. 334. But after the time has elapsed the court has no authority to make an order extending the time for filing the commissioners' report. *In re* Road in Salem Township, 103 Pa. St. 250; Baldwin and Snowden Road, 3 Grant's (Pa.) Cas. 62. Where the report was left in the proper office within the time limited, but the officer failed to mark it filed, it was held to be valid. Reed *v.* Acton, 120 Mass. 130.

the report to be recorded and it has been held that under such a statute the report will have no binding force until this is done.[1]

§ 1044. **Objections to report.**—The appropriate mode of objecting to a report is by a written motion or petition stating the specific grounds of objection. Where the objections appear upon the face of the report there is neither necessity nor reason for resorting to extrinsic evidence. Objections based upon matters not apparent upon the face of the record may be proved by affidavits,[2] or by oral evidence,[3] at the discretion of the court.[4] It has been held proper to receive the affidavits or

[1] Burns *v.* Multnomah R. Co., 8 Sawyer (U. S.) 543.

[2] New Jersey, etc., R. Co. *v.* Suydam, 17 N. J. Law 25; Marquette, etc., etc., R. Co. *v.* Probate Judge, 53 Mich. 217. Where the evidence is part of the report objections may be founded on the evidence. Western, etc., R. Co. *v.* Reed, 35 Cal. 621. See, generally, Washington, etc., Co. *v.* Switzer, 26 Gratt. 661; Southern, etc., R. Co. *v.* Wilson, 49 Cal. 396. Time of objecting to report, see Washington, etc., R. Co. *v.* Switzer, 26 Gratt. 661; Baltimore, etc., R. Co. *v.* Canton Co., 70 Md. 405, s. c. 17 Atl. R. 394; Chicago, etc., R. Co. *v.* Eubanks, 32 Mo. App. 184; Tracy *v.* Elizabethtown, etc., R. Co., 80 Ky. 259; Harper *v.* Lexington, etc., R. Co., 2 Dana (Ky.) 227; Burlington, etc., *v.* Dobson, 17 Neb. 450, s. c. 23 N. W. R. 353. The objections must be presented to the court having control of the proceedings. Burr *v.* Bucksport, etc., R. Co., 64 Me. 130.

[3] Clarksville, etc., Turnp. Co. *v.* Atkinson, 1 Sneed. (Tenn.) 425; St. Louis, etc., R. Co. *v.* Almeroth, 62 Mo. 343; Sullivan *v.* Lafayette Co., 61 Miss. 271; Chesapeake, etc., Canal Co. *v.* Mason, 4 Cranch C. C. 123. *Contra*, Rondout, etc., R. Co. *v.* Field, 38 How. (N. Y.) Pr. 187. It has been held that affidavits of commissioners are admissible to impeach their report. Marquette, etc., R. Co. *v.* Probate Judge, 53 Mich. 217, s. c. 18 N. W. R. 788, 14 Am. & Eng. R. Cas. 355. But see Rochester, etc., R. Co. *v.* Beckwith, 10 How. Pr. 168. A report is generally held to be *prima facie* correct and the burden is on the party who assails it. Crawford *v.* Valley R. Co., 25 Gratt. 467.

[4] Marquette, etc., R. Co. *v.* Probate Judge, 53 Mich. 217. The fact that "since the report of the viewers" it had altered its route through the land of some of the property-holders was held to be no ground for an exception by the company to so much of the report as assessed damages to them, since under the Pennsylvania statute, the location of its line by the company was an appropriation of the land; and after the assessment of the damages, the right thereto was vested in the owners, and could not be divested by a subsequent change of route. Beale *v.* Pennsylvania R. Co., 86 Pa. St. 509. As to what evidence will authorize an order setting aside a report see, Coster *v.* New Jersey, etc., R. Co., 23 N. J. Law 227; North Hudson, etc., R. Co. *v.* Booraem, 28 N. J. Eq. 450.

testimony of the commissioners either to impeach or support their report.[1]

§ 1045. **Confirmation or rejection of report—Modification.**—The rule sustained by the weight of authority is that the court must confirm or reject the report as a whole,[2] but under some statutes it has been held proper to amend or modify the report in minor particulars, and confirm it as amended.[3] Where the property of several owners is included in a single assessment of damages but the tracts are assessed separately, it is held that the court may confirm the report as to part of such tracts and reject it as to others.[4] The practice upon setting aside a commissioner's report is governed by the statute, and varies in the different states. But ordinarily the report is recommitted to the same or to other commissioners for review or correction.[5]

[1] Marquette, etc., R. Co. *v.* Probate Judge, 53 Mich. 217; New Jersey, etc., R. Co. *v.* Suydam, 17 N. J. Law 25; Canal Bank *v.* Mayor of Albany, 9 Wend. (N. Y.) 244; Newport Highway, 48 N. H. 433.

[2] Town of Winchester *v.* Hinsdale, 12 Conn. 88; Inhabitants of Brunswick, Appellants, 37 Me. 446; Application for Widening Roffignac Street, 4 Rob. (La.) 357; Matter of Claiborne St., 4 La. Ann. 7; Mississippi River Bridge Co. *v.* Ring, 58 Mo. 491; Rochester Water Works Co. *v.* Wood, 60 Barb. (N. Y.) 137, 41 How. Pr. 53; Herr's Mill Road, 14 S. & R. (Pa.) 204; *In re* Public Road in Benzinger Township, 115 Pa. St. 436; Hanes *v.* North Carolina R. Co., 109 N. C. 490, s. c. 13 S. E. R. 896; St. Louis, etc., R. Co. *v.* Richardson, 45 Mo. 466; Missouri Pacific R. Co. *v.* Wernwag, 35 Mo. App. 449. See Matter of New York, etc., R. Co., 93 N. Y. 385, s. c. 14 Am. & Eng. R. Cas. 402; Matter of New York, etc., R. Co., 64 N. Y. 60; Central Pacific R. Co. *v.* Pearson, 35 Cal. 247; Northern, etc., R. Co. *v.* Concord, etc., R. Co., 27 N. H. 183.

[3] Matter of New York Cent., etc., R. Co., 35 Hun (N. Y.) 306. See Hannibal Bridge Co. *v.* Schaubacker, 49 Mo. 555; Stockton, etc., R. Co. *v.* Galgiani, 49 Cal. 139; State *v.* Gibbs, 44 N. J. Law 169; Greenville, etc., R. Co., *v.* Nunnamaker, 4 Rich. L. (S. Car.) 107.

[4] Anthony *v.* County Comrs., 14 Pick. (Mass.) 189. Where the statute provided that the condemning company or any defendant could move to set aside the proceedings as to any tract of land, it was held that a motion to set aside the report as to an undivided half interest in the lands taken could not be entertained. Southern Pac. R. Co. *v.* Wilson, 49 Cal. 396. See Beale *v.* Pennsylvania R. Co., 86 Penn. St. 509.

[5] See Coleman *v.* Andrews, 48 Me. 562; Hannibal, etc., R. Co. *v.* Rowland, 29 Mo. 337; George's Creek, etc., Co. *v.* New Central Coal Co., 40 Md. 425; *In re* Commissioners of Central Park, 61 Barb. (N. Y.) 40; McArthur *v.* Morgan, 49 Conn. 347; Stinson *v.* Dunbarton, 46 N. H. 385; State *v.* Cruser, 14 N. J. Law 401; Potts' Ap-

The order confirming the award should be definite and certain,[1] and must conform to the provisions of the statute by which confirmation is required.[2] Where the court acts in its judicial capacity in confirming the report, it has the same authority to set aside the order of confirmation during the term at which it was made that it has to set aside its other judgments.[3]

§ 1046. **Misconduct of jurors or commissioners.**—Improper behavior on the part of the commissioners, such as receiving entertainment at the expense of one of the parties,[4] or accepting favors at his hands,[5] is sufficient to vitiate their award. But an improper motive or a tendency toward an improper influence must be shown.[6] The fact that the commissioners

peal, 15 Pa. St. 414; Coleman *v.* Andrews, 48 Me. 562.

[1] Portland, etc., R. Co. *v.* County Comrs., 65 Me. 292; Yeamans *v.* County Comrs., 16 Gray (Mass.) 36.

[2] Indianapolis, etc., R. Co. *v.* Smythe, 45 Ind. 322; Terre Haute, etc., R. Co. *v.* Crawford, 100 Ind. 550; State *v.* Cincinnati, etc., R. Co., 17 Ohio St. 103; Reynolds *v.* Reynolds, 15 Conn. 83; State *v.* Dover, 10 N. H. 394; Fort Worth, etc., R. Co. *v.* Lamphear, 1 Tex. App. Civ. Cas. 127; Snoddy *v.* County of Pettis, 45 Mo. 361; Oregonian, etc., Co. *v.* Hill, 9 Ore. 377. See, generally, Wagner *v.* New York, etc., R. Co., 38 Ohio St. 32, s. c. 10 Am. & Eng. R. Cas. 380; State *v.* Lubke, 15 Mo. App. 152; *Ex parte* Reynolds, 52 Ark. 330, s. c. 44 Am. & Eng. R. Cas. 60; Dietrichs *v.* Lincoln, etc., R. Co., 12 Neb. 225, s. c. 14 N. W. R. 718; Ennis *v.* Wood, etc., R. Co., 12 R. I. 73; Provolt *v.* Chicago, etc., R. Co., 69 Mo. 633; Drath *v.* Burlington, etc., R. Co., 15 Neb. 367, s. c. 18 N. W. R. 717; St. Louis, etc., R. Co. *v.* Wilder, 17 Kan. 239; Kansas City, etc., R. Co. *v.* Kennedy, 49 Kan. 19, s. c. 30 Pac. R. 126; Oregon, etc., R. Co. *v.* Bridwell, 11 Ore. 282, 3 Pac. R. 684. Form of judgment. Peoria, etc., R. Co. *v.* Peoria, etc., R. Co., 66 Ill. 174.

[3] Matter of New York Central, etc., R. Co., 64 N. Y. 60; Reiff *v.* Conner, 10 Ark. 241.

[4] Central Pacific R. Co. *v.* Pearson, 35 Cal. 247; Petition for a Highway, etc., 48 N. H. 433; Matter of Buffalo, etc., R. Co., 32 Hun (N. Y.) 289. It is held, however, that where there is no improper motive, or where the entertainment was furnished with the consent of the opposing party, the award will stand. Beardsley *v.* Washington, 39 Conn. 265; State *v.* Dover, etc., R. Co., 43 N. J. Law 528; *In re* Staten Island R. Co., 41 Hun 392. See, generally, *In re* New York, etc., R. Co., 64 N. Y. 60; *In re* New York, etc., R. Co., 5 Hun 105; Douglass *v.* Byrnes, 63 Fed. R. 16.

[5] New York, etc., R. Co. *v.* Townsend, 36 Hun (N. Y.) 630.

[6] Hayward *v.* Bath, 40 N. H. 100. Where the counsel for one of the parties sent a paper to the commissioners, on which were certain computations which he had given orally at the hearing, this was held insufficient cause for setting aside the award. New York, etc., R. Co. *v.* Church, 31 Hun (N. Y.) 440.

agreed with the condemning company as to the amount of their compensation is not cause for setting aside their award, where no definite compensation is fixed by law, and the agreement was openly made after the award had been filed, and the sum agreed upon as compensation was not excessive.[1] An agreement between the commissioners to make a verdict for the quotient to be obtained by dividing the sum of their estimates of the damages by the number of commissioners will invalidate a report based on the result of such a proceeding.[2] And the report may be set aside for gross errors of the commissioners in the principles upon which they acted in making the assessment or in calculating the values.[3]

§ 1047. **Waiver of objections.**—The doctrine of waiver applies to proceedings under the power of eminent domain, and the general rule is that if a party has knowledge of the facts and an opportunity to present them he must avail himself of the opportunity or he will be regarded as having waived the objections. Defects in a notice may be waived,[4] and so may defects in petitions.[5] The authorities which hold that defects in

[1] State *v.* Dover, etc., R. Co., 43 N. J. Law 528; Matter of Staten Island R. T. Co., 41 Hun (N. Y.) 392.

[2] Kansas City, etc., R. Co. *v.* Campbell, 62 Mo. 585; Donner *v.* Palmer, 23 Cal. 40. See Marquette, etc., R. Co. *v.* Probate Judge, 53 Mich. 217; Forbes *v.* Howard, 4 R. I. 364.

[3] Reitenbaugh *v.* Chester R. Co., 21 Pa. St. 100; Van Wickle *v.* Camden, etc., R. Co., 14 N. J. Law 162; Coster *v.* New Jersey R. Co., 24 N. J. Law 730; Swayze *v.* New Jersey, etc., R. Co., 36 N. J. Law 295; Chesapeake, etc., R. Co. *v.* Pack, 6 W. Va. 397; *In re* New York, etc., R. Co., 33 Hun (N. Y.) 639, 98 N. Y. 447. The mere fact that there is a mistake in the amount of the damages awarded is not sufficient cause for setting aside the award. Such objection must be remedied by an appeal. Seal *v.* Northern, etc., R. Co., 1 Pears. (Pa.) 108.

[4] Seifert *v.* Brooks, 34 Wis. 443; Damp *v.* Town of Dane, 29 Wis. 419; Langford *v.* County Commissioners, 16 Minn. 375; Parrish *v.* Gilmanton, 11 N. H. 293; Barre, etc., Co. *v.* Appleton, 2 Pick. 430; Town of Windsor *v.* Field, 1 Conn. 279; Tingley *v.* Providence, 9 R. I. 388; Onken *v.* Riley, 65 Tex. 468; Rheiner *v.* Union, etc., R. Co., 31 Minn. 289, s. c. 17 N. W. R. 623, 14 Am. & Eng. R. Cas. 373; Minneapolis, etc., R. Co. *v.* Kanna, 32 Minn. 174; Swinney *v.* Fort Wayne, etc., R. Co., 59 Ind. 205, 219; Atchison, etc., R. Co. *v.* Patch, 28 Kan. 470; East Saginaw, etc., R. Co. *v.* Benham, 28 Mich. 459; Cruger *v.* Hudson River Co., 12 N. Y. 190.

[5] Wells *v.* Rhodes, 114 Ind. 467; Palmer *v.* Clement, 49 Mich. 45; Bacheler *v.* New Hampton, 60 N. H. 207.

notices and petitions may be waived by failure to seasonably interpose objections clearly support the conclusion that objections to the report or to any of the proceedings will be regarded as waived unless opportunely and appropriately made.[1]

§ 1048. **Remedies to enforce payment of compensation.**—Where payment of compensation is required to precede the taking and the corporation has obtained possession of the land before payment has actually been made, its further occupation of the land may be enjoined until the damages are paid,[2] unless the owner has, by acquiescence in the occupancy of his land until the rights of the public have intervened,[3] estopped himself to enjoin its further occupation.[4] In states which per-

[1] Mills' Eminent Domain (2d ed.), § 224; Lewis on Eminent Domain, §§ 362, 407; Randolph on Eminent Domain, § 388; Elliott on Roads and Streets, pp. 246, 257. See upon the general subject Chowan, etc., R. Co. *v.* Parker, 105 N. Car. 246, s. c. 11 S. E. R. 328; Norfolk, etc., R. Co. *v.* Ely, 101 N. Car. 8; Chicago, etc., R. Co. *v.* Randolph, etc., 103 Mo. 451, s. c. 15 S. W. R. 437; Mansfield, etc., R. Co. *v.* Clark, 23 Mich. 519; Gage *v.* Chicago, 141 Ill. 642, s. c. 31 N. E. R. 163.

[2] Sturtevant *v.* Milwaukee, etc., R. Co., 11 Wis. 63; Gilman *v.* Sheboygan, etc., R. Co., 40 Wis. 653; Kendall *v.* Missisquoi, etc., Railroad Co., 55 Vt. 438; Kittell *v.* Missisquoi R. Co., 56 Vt. 96; Evans *v.* Missouri, etc., R. Co., 64 Mo. 453; Provolt *v.* Chicago, etc., R. Co., 69 Mo. 633; White *v.* Nashville, etc., R. Co., 7 Heisk. (Tenn.) 518; Lohman *v.* St. Paul, etc., R. Co., 18 Minn. 174; Stewart *v.* Raymond R. Co., 7 S. & M. (Miss.) 568; Elwell *v.* Eastern R. Co., 124 Mass. 160; Freeholders of Monmouth Co. *v.* Red Bank, etc., Co., 18 N. J. Eq. 91; Harness *v.* Chesapeake, etc., Canal Co., 1 Md. Ch. 248; Ray *v.* Atchison, etc., R. Co., 4 Neb. 439; Irish *v.* Burlington, etc., R. Co., 44 Iowa 380; Richards *v.* Des Moines, etc., R. Co., 18 Iowa 259; Young *v.* Harrison, 6 Ga. 130; Gammage *v.* Georgia Southern R. Co., 65 Ga. 614. A vendee or lessee of the company may be enjoined from using the land until compensation is made. Ray *v.* Atchison, etc., R. Co., 4 Neb. 439; Gilman *v.* Sheboygan, etc., R. Co., 40 Wis. 653; Hibbs *v.* Chicago, etc., R. Co., 39 Iowa 340; Kittell *v.* Missisquoi R. Co., 56 Vt. 96; Provolt *v.* Chicago, etc., R. Co., 69 Mo. 633.

[3] Where the land was taken *without the consent of the owner*, the public can acquire no rights therein until payment has been made therefor. Evans *v.* Missouri, etc., R. Co., 64 Mo. 453; Stretton *v.* Great Western, etc., R. Co., 40 L. J. Eq. 50.

[4] Forward *v.* Hampshire, etc., Canal Co., 22 Pick. (Mass.) 462; Pettibone *v.* LaCrosse, etc., R. Co., 14 Wis. 443; Mooers *v.* Kennebec, etc., R. Co., 58 Me. 279; Remshart *v.* Savannah, etc., Railroad Co., 54 Ga. 579; Griffin *v.* Augusta, etc., R. Co., 70 Ga. 164; Hentz *v.* Long Island, etc., R. Co., 13 Barb. (N. Y.) 646; Reisner *v.* Strong, 24 Kan. 410; Goodin *v.* Cincinnati, etc., R. Co., 18 Ohio St. 169; Ross *v.*

mit the corporation to acquire title to land before the damages are paid, but which do not authorize the issuing of an execution upon the judgment awarding damages it is generally held that the award may be enforced by an independent suit.[1] And where the company neglects to have the damages assessed for lands of which it has taken possession, the English courts hold that a bill in equity may be filed by the land-owner to compel it to do so.[2] It has been held that property taken *in invitum* is taken subject to an obligation to make compensation therefor, and that this obligation constitutes a vendor's lien upon the land taken, and can be enforced as such in a court of equity.[3] And in states where this view is held, as well as in those whose courts hold that no title passes until compensation is made,[4] it is also held that those holding under the condemn-

Elizabethtown, etc., R. Co., 2 N. J. Eq. 422; Wood *v.* Charing Cross, etc., R. Co., 33 Beav. (Eng.) 290.

[1] In states in which the law requires security to be given before land is taken, the security may be proceeded against to recover the award. And in Pennsylvania it has been held that the land-owner can not claim any rights in the land as against a mortgagee of the railroad company, but must look to the personal responsibility of the company and the sureties on its bond. Fries *v.* Southern Pennsylvania R. Co., 85 Pa. St. 73. A suit may be brought directly on the award, although a bond was given to secure its payment. The bond is simply an additional security and does not destroy nor suspend other remedies. Fisher *v.* Warwick R. Co., 12 R. I. 287.

[2] Adams *v.* London and Blackwall R. Co., 18 L. J. Ch. N. S. 357; Inge *v.* Birmingham, etc., R. Co., 3 DeG. McN. & G. 658; Mason *v.* Stokes Bay Pier, etc., R. Co., 32 L. J. Ch. 110. And see Adams *v.* London, etc., Blackwall R. Co., 2 McN. & G. 118; Hedges *v.* Metropolitan R. Co., 28 Beav. 109; Red River Bridge Co. *v.* Clarksville, 1 Sneed. 176; Lewis' Em. Dom. § 615.

[3] Mims *v.* Macon, etc., R. Co., 3 Ga. 333; Dayton, etc., R. Co. *v.* Lewton, 20 Ohio St. 401; Kendall *v.* Missisquoi, etc., Railroad Co., 55 Vt. 438; Gillison *v.* Savannah, etc., R. Co., 7 S. Car. 173; Provolt *v.* Chicago, etc., R. Co., 69 Mo. 633; Walker *v.* Ware, etc., R. Co., 35 L. J. Eq. 94; Earl St. Germans *v.* Crystal Palace R. Co., L. R. 11 Eq. Cas. 568.

[4] This doctrine obtains in all states in which compensation is required to precede the taking, and also in others in which the constitution simply requires that compensation shall be made. Gilman *v.* Sheboygan, etc., R. Co., 40 Wis. 653; Western Pennsylvania R. Co. *v.* Johnston, 59 Pa. St. 290; Buffalo, etc., R. Co. *v.* Harvey, 107 Pa. St. 319; Hatry *v.* Painesville, etc., R. Co., 1 Ohio Cir. Ct. 426; Kittell *v.* Missisquoi R. Co., 56 Vt. 96; Bridgman *v.* St. Johnsbury, etc., R. Co., 58 Vt. 198; White *v.* Nashville, etc., R. Co., 7 Heisk. (Tenn.) 518.

ing company by mortgage, lease or otherwise, take the lands subject to the right of the owner to enforce payment of his damages.[1] In many of the states a suit at common law may be maintained upon the implied promise to pay a just compensation for the lands taken.[2] And for any taking or injury for which the statute does not provide a remedy, the land-owner may sue at common law.[3] Some of the courts hold that even though the original taking was wrongful, the land-owner may affirm the taking and sue for compensation,[4] and a recovery in

[1] In some of the states, it is held that the acceptance and use by the grantee of a corporation of lands for which the corporation has failed to make compensation as required by law, renders the grantee personally liable for the payment of such compensation. Western Pennsylvania R. Co. *v.* Johnston, 59 Pa. St. 290; Buffalo, etc., R. Co. *v.* Harvey, 107 Pa. St. 319; Gilman *v.* Sheboygan, etc., R. Co., 37 Wis. 317; Lake Erie, etc., R. Co. *v.* Griffin, 92 Ind. 487. But the new corporation may refuse to accept property to which the old corporation has failed to acquire title, and may proceed to condemn it in its own name. Adams *v.* St. Johnsbury, etc., R. Co., 57 Vt. 240.

[2] Welsh *v.* Chicago, etc., R. Co., 19 Mo. App. 127; Allen *v.* Wabash, etc., R. Co., 84 Mo. 646; Donald *v.* St. Louis, etc., R. Co., 52 Iowa 411; Gulf Coast, etc., R. Co. *v.* Donahoo, 59 Tex. 128; International, etc., R. Co. *v.* Benitos, 59 Tex. 326; Wichita, etc., R. Co. *v.* Fechheimer, 36 Kan. 45; Bentonville R. Co. *v.* Baker, 45 Ark. 252; Bailey *v.* New Orleans, 19 La. Ann. 271; Mayor, etc., of Rome *v.* Perkins, 30 Ga. 154. Where an express promise to pay is made in order to induce the land-owner to discontinue proceedings for the assessment of damages such promise may be made the basis of an action. Plott *v.* Western N. Car. R. Co., 65 N. Car. 74.

[3] Indiana Central R. Co. *v.* Boden, 10 Ind. 96; Cogswell *v.* Essex Mill Corp., 6 Pick. (Mass.) 94. Where consequential damage results to property which is not taken within the meaning of the statute for assessment of damages, but for which the constitution requires that compensation shall be made the land-owner may recover damages in a common law action. Burlington, etc., R. Co. *v.* Reinhackle, 15 Neb. 279; Railroad Co. *v.* Hambleton, 40 Ohio St. 496; Protzman *v.* Indianapolis, etc., R. Co., 9 Ind. 467; Johnson *v.* Parkersburg, 16 W. Va. 402; Taylor *v.* Metropolitan El. R. Co., 50 N. Y. Supr. Ct. 311; Grafton *v.* Baltimore, etc., R. Co., 21 Fed. R. 309.

[4] Evansville, etc., R. Co. *v.* Nye, 113 Ind 223; Indiana, etc., R. Co. *v.* Allen, 113 Ind. 581. Or he may sue in trespass, in which case the recovery is limited to the damages accrued when the action was brought, and another suit may be prosecuted for a continuance of the trespass. Carl *v.* Sheboygan, etc., R. Co., 46 Wis. 625; Gulf, etc., R. Co. *v.* Helsley, 62 Tex. 593; Uline *v.* New York Central, etc., Co., 101 N. Y. 98; Dickson *v.* Chicago, etc., R. Co., 71 Mo. 575; Ford *v.* Santa Cruz R. Co., 59 Cal. 290.

such a suit vests the right to the lands in the defendant.[1] It is generally held, however, that where the statute authorizing a railroad company to take the lands and other property of private individuals provides a mode by which the owner may enforce payment of his damages, this remedy is exclusive of all others.[2] The general rule is that if the statute authorizes the company alone to have the damages assessed under its pro-

[1] Gulf Coast, etc.,R.Co. *v.* Danahoo, 59 Tex. 128; Wichita, etc., R. Co. *v.* Fechheimer, 36 Kan. 45; Jamison *v.* Springfield, 53 Mo. 224. All damages, past, present and future, shall be included in the verdict in such an action. Stodghill *v.* Chicago, etc., R. Co., 53 Iowa 341; Van Orsdol *v.* Burlington, C. R. & N. R. Co., 56 Iowa 470; Miller *v.* Keokuk, R. Co., 63 Iowa 680; Town of Troy *v.* Cheshire R. Co., 23 N. H. 83; Chicago, etc., R. Co. *v.* Maher, 91 Ill. 312; Chicago, etc., R. Co. *v.* Loeb, 118 Ill. 203; Fowle *v.* New Haven, etc., Co., 112 Mass. 334; Kansas Pac. R. Co. *v.* Mihlman, 17 Kan. 224; Central Branch U. P. R. Co. *v.* Andrews, 26 Kan. 702; Baldwin *v.* Chicago, etc., R. Co., 35 Minn. 354; Elizabethtown, etc., R. Co. *v.* Combs, 10 Bush. (Ky.) 382; Jeffersonville, etc., R. Co. *v.* Esterle, 13 Bush. (Ky.) 667; Texas, etc., R. Co. *v.* Long, 1 Tex. App. Civ. Cas. 281.

[2] LaFayette, etc., R. Co. *v.* Smith, 6 Ind. 249; Leviston *v.* Junction R. Co., 7 Ind. 597; Mason *v.* Kennebec, etc., R. Co., 31 Me. 215; Williams *v.* Camden, etc., R. Co., 79 Me. 543; Knori *v.* Germantown R. Co., 5 Wharton (Pa.)256; Cumberland Valley R. Co. *v.* McLanahan, 59 Pa. St. 23; Fehr *v.* Schuylkill Nav. Co., 69 Pa. St. 161; Brown *v.* Beatty, 34 Miss. 227; Stevens *v.* Proprietors Middlesex Canal, 12 Mass. 466; Hazen *v.* Essex Co., 12 Cush. (Mass.) 475; Brickett *v.* Haverhill Aqueduct Co., 142 Mass. 394; Aldrich *v.* Cheshire R. Co., 21 N. H. 359; Hurniker *v.* Contoocook Valley R. Co., 29 N. H. 146; Mitchell *v.* Franklin, etc., Turnp. Co., 3 Humph. (Tenn.) 456; Colcough *v.* Nashville, etc., Co., 2 Head (Tenn.) 171; McLaughlin *v.* Charlotte, etc., R. Co., 5 Rich. L.(S.Car.)583; Land *v.* Wilmington,etc.,R.Co., 107 N.C. 72,s. c. 12 S.E. R. 125; Allen *v.* Wilmington, etc., R. Co., 102 N. C. 381, s. c. 9 S. E. R. 4; Johnson *v.* St. Louis, etc., R. Co., 32 Ark. 758; Cairo, etc., R. Co. *v.* Turner, 31 Ark. 494; Little Miami, etc., R. Co. *v.* Whitacre, 8 Ohio St. 590; Ohio, etc., R. Co. *v.* Thillman, 143 Ill. 127, s. c. 32 N. E. R. 529; Hueston *v.* Eaton, etc., R. Co., 4 Ohio St. 685. But where there is no remedy provided by statute or the injury is caused by negligence the common law remedy may be invoked. Indiana, etc., R. Co. *v.* Boden,10 Ind. 96; Hall *v.* Pickering, 40 Me. 548; Drady *v.* DesMoines, etc., R. Co., 57 Iowa 393, s. c. 10 N. W. R. 754, 14 Am. & Eng. R. Cas. 130; Atlantic, etc., R. Co. *v.* Fuller, 48 Ga. 423; Kansas, etc., R. Co. *v.* Hopkins, 18 Kan. 494. See Cohen *v.* St. Louis, etc., R. Co., 34 Kan. 158, s. c. 55 Am. R. 242, 8 Pac. R. 138; Grand Rapids, etc., R. Co. *v.* Heisel, 47 Mich. 393, s. c. 11 N. W. R. 212; Ohio, etc., R. Co. *v.* Wachter, 123 Ill. 440, s. c. 15 N. E. R. 279, 34 Am. & Eng. R. Cas. 194; St. Louis, etc., R. Co. *v.* Brown, 34 Ill. App. 552.

visions, or makes it the duty of the company so to do, a land-owner may bring an action for any damages that are not presented to the commissioners for assessment within a reasonable time.[1] Under the constitution of many of the states the corporation is required to procure an assessment of the damages, and to pay or tender the same before it acquires any rights in the land taken by condemnation other than those of a mere trespasser. But where the land-owner waives the condition precedent and permits the corporation to construct its road under a parol license, the rule is that he can afterward only maintain an action for the damages that should have been awarded.[2]

§ 1049. **Remedies of land-owner.**—The general rule is that where the remedy by appeal from the proceedings is provided all questions which could be litigated on such appeal must be so litigated,[3] but there are many questions which do not arise on appeal. Thus an action for ejectment may be maintained where the railroad company obtains possession pending an appeal by depositing the damages awarded by the commission-

[1] Denslow *v.* New Haven, etc., R. Co., 16 Conn. 98; Kansas Pacific R. Co. *v.* Streeter, 8 Kan. 133; Pettibone *v.* LaCrosse, etc., R. Co., 14 Wis. 443; Sherman *v.* Milwaukee, etc., R. Co., 40 Wis. 645; Eward *v.* Lawrenceburgh, etc., R. Co., 7 Ind. 711; Nichols *v.* Somerset, etc., R. Co., 43 Me. 356; Gowen *v.* Penobscot R. Co., 44 Me. 140; Cairo, etc., R. Co. *v.* Trout, 32 Ark. 17; Bentonville, R. Co. *v.* Baker, 45 Ark. 252. And where damage is done for which the statute fails to provide an assessment of compensation the land-owner may be allowed his common law remedy. Williams *v.* Camden, etc., R. Co., 79 Me. 543; Clapp *v.* Manter, 78 Me. 358; Dean *v.* Colt, 99 Mass. 480; Halsey *v.* Lehigh Valley R. Co., 45 N. J. Law 26; Cator *v.* Board of Works, etc., 34 L. J. Q. B. 74; Imperial Gas-Light, etc., Co. *v.* Broadbent, 7 H. L. Cases 600.

[2] Conger *v.* Burlington, etc., R. Co., 41 Iowa 419; Baltimore, etc., R. Co. *v.* Algire, 63 Md. 319, 65 Md. 337; Sherman *v.* Milwaukee, etc., R. Co., 40 Wis. 645. See, *ante*, §§ 948, 1008.

[3] An injunction will not be granted to restrain the railroad company from taking possession of land by authority of proceedings that were erroneous. Such errors must be corrected by an appeal or writ of *certiorari*. Phifer *v.* Carolina Central R. Co., 72 N. C. 433; Brown *v.* Beatty, 34 Miss. 227; Tharp *v.* Witham, 65 Iowa 566. This doctrine has been applied where condemnation proceedings of which the land-owner was duly notified resulted in no damages at all being awarded to him. Powell *v.* Clelland, 82 Ind. 24; Frevert *v.* Finfrock, 31 Ohio St. 621.

ers, but fails to pay an additional sum awarded by the jury on appeal,[1] for that matter is not involved in the appeal from the proceeding, or in any other case where the company entered without the owner's consent and holds possession without right.[2] In some cases the owner's consent has been held to be immaterial, where it was given in return for promises which the railroad company has failed to fulfill,[3] but many cases hold that where a land-owner consents to the construction of valuable public works on his land, he is estopped to sue for the recovery of the land, and is limited to a proceeding to recover damages.[4] The fact that the property has passed into

[1] Lake Erie, etc., R. Co. *v.* Kinsey, 87 Ind. 514; Levering *v.* Philadelphia, etc., R. Co., 8 W. & S. (Pa.) 459; St. Joseph, etc., R. Co. *v.* Callender, 13 Kan. 496; White *v.* Wabash, etc., R. Co., 64 Iowa 281; Kanne *v.* Minneapolis, etc., R. Co., 30 Minn. 423. Where the company abandons the proceedings pending an appeal, and after it has obtained possession, an action of ejectment will lie. Kiecher *v.* Killbuck Turnp. Co., 33 Ind. 333.

[2] The owner of the full equitable title is not bound by proceedings against the holder of the naked legal title. Kansas Pac. R. Co. *v.* McBratney, 12 Kan. 1. A railroad company holding under a lease may be ejected upon the expiration or forfeiture of the lease. Green *v.* Missouri, etc., R. Co., 82 Mo. 653; Horton *v.* New York Central, etc., R. Co., 12 Abb. N. Cas. (N. Y.) 30. See Bradley *v.* Missouri Pac. R. Co., 91 Mo. 493.

[3] Hooper *v.* Columbus, etc., R. Co., 78 Ala. 213; Philadelphia, etc., R. Co. *v.* Cooper, 105 Pa. St. 239. Some courts have held that execution on a judgment of ejectment against a railroad company for lands necessary in its operation should be stayed a reasonable time to enable the corporation to acquire the land by condemnation, and that a court of equity may interfere by injunction to compel such stay. Pittsburgh, etc., R. Co. *v.* Jones, 59 Pa. St. 433; Justice *v.* Nesquehoning V. R. Co., 87 Pa. St. 28; Pittsburgh, etc., R. Co. *v.* Bruce, 102 Pa. St. 23; Conger *v.* Burlington, etc., R. Co., 41 Iowa 419.

[4] Provolt *v.* Chicago, etc., R. Co., 57 Mo. 256; Kanaga *v.* St. Louis, etc., R. Co., 76 Mo. 207; Taylor *v.* Chicago, etc., R. Co., 63 Wis. 327; New York, etc., R. Co. *v.* Stanley, 34 N. J. Eq. 55; Paterson, etc., R. Co. *v.* Kamlah, 42 N. J. Eq. 93; McAulay *v.* Western Vt. R. Co., 33 Vt. 311; Tompkins *v.* Augusta, etc., R. Co., 21 S. Car. 420; Evansville, etc., R. Co. *v.* Nye, 113 Ind. 223; Indiana, etc., R. Co. *v.* McBroom, 114 Ind. 198; Texas, etc., R. Co. *v.* Jarrell, 60 Tex. 267. See Robinson *v.* Pittsburg R. Co., 57 Cal. 417. If the owner, with full knowledge of the taking, makes no objection, but permits the railroad company to locate its road across his land, and to expend large sums of money in the construction thereof, he will be estopped to eject it for non-payment of compensation. New Orleans, etc., R. Co. *v.* Jones, 68 Ala. 48; St. Julien *v.* Morgan's La., etc., R. Co., 35 La. Ann. 924; McAulay *v.* Western Vt. R. Co.,

the hands of another company than that by which the wrongful entry was made does not preclude the land-owner from recovering in ejectment, where he has not estopped himself by acquiescence, since the second company can acquire no rights in the land superior to those of its grantor.[1] Nor does the fact that title is held subject to an easement deprive the land-owner of his action. Ejectment may be maintained by the owner of the fee against a railroad company which lays its tracks in a street in which his interest has not been condemned, and the fact that the public authorities granted the company permission to use the street for its purposes is no defense to the action.[2] Any one having a vested interest in land unlawfully

33 Vt. 311; Strickler *v.* Midland R. Co., 125 Ind. 412; Bravard *v.* Cincinnati, etc., R. Co., 115 Ind. 1. But see Walker *v.* Chicago, etc., R. Co., 57 Mo. 275; Crosby *v.* Dracut, 109 Mass. 206. The fact that a railroad company is actually occupying a right of way across land and constructing or operating its road thereon, is constructive notice of its rights therein, sufficient to bind a subsequent purchaser of the land. Indiana, etc., R. Co. *v.* McBroom, 114 Ind. 198; Detroit, etc., R. Co. *v.* Brown, 37 Mich. 533. Where the defendant answered claiming title to all the land sued for and disclaiming title to no part thereof, it was held immaterial that the evidence showed it to be in possession of only a small part thereof. Colorado Central R. Co. *v.* Smith, 5 Col. 160. Acceptance by the land-owner of the damages deposited pending an appeal, will estop him to prosecute an action of ejectment to recover the land, even though the proceedings are reversed on appeal. St. Paul, etc., R. Co. *v.* Karnes, 101 Ill. 402.

[1] Lake Erie, etc., R. Co. *v.* Griffin, 92 Ind. 487; Gilman *v.* Sheboygan, etc., R. Co., 37 Wis. 317; Pfeifer *v.* Sheboygan, etc., R. Co., 18 Wis. 155. Where the receiver of an insolvent railroad corporation unlawfully appropriates land to the use of the corporation, and, after the discharge of the receiver, the corporation resumes control of the railroad, and retains possession of and uses the land, the owner can mantain an action to recover and for damages. Bloomfield, etc., R. Co. *v.* Van Slike, 107 Ind. 480. Where an execution, issued on a judgment for damages for land condemned by a railroad was returned "no property found," but the company entered upon the land and constructed its road without objection from the owner, and afterward leased it to another company, it was held that the land-owner could not maintain an action to recover the land from the lessee company without notice to quit. Chicago, etc., R. Co. *v.* Knox College, 34 Ill. 195.

[2] Lozier *v.* New York, etc., R. Co., 42 Barb. (N. Y.) 465; Carpenter *v.* Oswego, etc., R. Co., 24 N. Y. 655; Wager *v.* Troy Union R. Co., 25 N. Y. 526; Weyl *v.* Sonoma V. R. Co., 69 Cal. 202. But in Edwardsville R. Co. *v.* Sawyer, 92 Ill. 377, it was held that its occupation of a public street is a matter between the railroad company and the public authorities, and can not be questioned by the land-owner in ejectment.

taken by a railroad company is entitled to sue in trespass. A lessee,[1] or a mortgagee holding the legal title,[2] may maintain trespass for an injury to his rights although the railroad company has acquired title from the owner of the fee. Where the railroad encroaches upon land adjoining that which it has condemned,[3] or occupies a street or highway without making compensation,[4] it is liable in trespass to the owner of the fee in such land.[5] Where the railroad company took possession of lands under proceedings which were subsequently declared void for want of proper notice, and immediately after the first judgment was set aside it proceeded to condemn the lands in a lawful manner, it was held that the railroad company was not liable to the land-owner in a suit for trespass for the damage done prior to the second judgment of condemnation, but that the assessment of damages covered all injuries to the defendant's possession.[6] It is held that where the entry of the railroad company was clearly wrongful, the fact that the lands were subsequently condemned is no bar to an action for the trespass, even though damages for the trespass were erroneously included

[1] Pennsylvania R. Co. *v.* Eby, 107 Pa. St. 166; Baltimore, etc., R. Co. *v.* Thompson, 10 Md. 76.

[2] Wilson *v.* European, etc., R. Co., 67 Me. 358.

[3] Brigham *v.* Agricultural Branch R. Co., 1 Allen (Mass.) 316; Hazen *v.* Boston, etc., R. Co., 2 Gray (Mass.) 574; Eaton *v.* European, etc., R. Co., 59 Me. 520. See New Orleans, etc., R. Co. *v.* Brown, 64 Miss. 479.

[4] Trustees *v.* Auburn, etc., R. Co., 3 Hill (N. Y.) 567; Mahon *v.* New York Central, etc., R. Co., 24 N. Y. 658; Sherman *v.* Milwaukee, etc., R. Co., 40 Wis. 645; Blesch *v.* Chicago, etc., R. Co., 43 Wis. 183; Starr *v.* Camden, etc., R. Co., 24 N. J. Law 592; Indianapolis, etc., R. Co. *v.* Hartley, 67 Ill. 439.

[5] But see reasoning of the court in Edwardsville R. Co. *v.* Sawyer, 92 Ill. 377.

[6] Dunlap *v.* Toledo, etc., R. Co., 50 Mich. 470. Where the railroad company took possession under an erroneous order permitting it to occupy the land before making compensation as required by the constitution, it was held that the entry was justifiable and did not subject the railroad company to an action for trespass. Walker *v.* Likens, 24 Mo. 298. Where the owner, at the the time of the entry and construction of the railroad under authority of a void condemnation proceeding, sold the land to another in whose hands it was afterward condemned, the land-owner was held entitled to recover from such purchaser the compensation paid on such second condemnation, since the purchaser must be held to have taken the land subject to the damage already done at the time of his purchase. McFadden *v.* Johnson, 72 Pa. St. 335.

in the award of compensation.[1] It has also been held that the measure of damages in an action of trespass against a railroad company for unlawfully constructing its road upon land belonging to another is his damages already accrued, and punitive damages in case the circumstances warrant it.[2] Injunction is often an appropriate remedy for the protection of the land-owner against wrongful proceedings conducted under color of the power of eminent domain. It may be said at the outset that injunction does not lie in cases where there is a right of appeal except where the proceedings are void. But where there is no adequate remedy at law and the proceedings are void for the reason that there was no jurisdiction, injunction is held by many of the courts to be an appropriate remedy. The rule sanctioned by authority is that even if the proceedings are void a complainant will not be granted an injunction unless he shows equity.[3] Where a railroad or other corporation threatens to take possession of lands and construct its road thereon without having perfected its right of entry in the manner provided

[1] Pierce *v.* Worcester, etc., R. Co., 105 Mass. 199; Harrington *v.* St. Paul, etc., R. Co., 17 Minn. 215; Central R. Co. *v.* Hetfield, 29 N. J. Law 206. Damages arising from a former trespass are no part of the damages for which compensation must be made in proceedings to condemn land. Proetz *v.* St. Paul, etc., R. Co., 17 Minn. 163; McClinton *v.* Pittsburgh, etc., R. Co., 66 Pa. St. 404; Selma, etc., R. Co. *v.* Keith, 53 Ga. 178; Missouri, etc., R. Co. *v.* Ward, 10 Kan. 352; Blodgett *v.* Utica, etc., R. Co., 64 Barb. (N. Y.) 580. And the fact that a recovery has been had for the trespass does not lessen the damages to which the land-owner is entitled in a suit to condemn the land. Leber *v.* Minneapolis, etc., R. Co., 29 Minn. 256; Oregon R. Co. *v.* Barlow, 3 Ore. 311; Blodgett *v.* Utica R. Co., 64 Barb. (N. Y.) 580; Chicago, etc., R. Co. *v.* Davis, 86 Ill. 20. The mere pendency of a suit to condemn lands is no defense to an action for a former trespass. Coburn *v.* Pacific Lumber Co., 46 Cal. 31.

[2] Anderson, etc., R. Co. *v.* Kernodle, 54 Ind. 314. A railroad company which takes possession of land after the owner has obtained possession thereto pursuant to a judgment in action of trespass *quare clausum fregit* against the company, is liable in an action of trespass for the second entry. Illinois, etc., R. Co. *v.* Cobb, 82 Ill. 183. It is held that the value of the land itself can only be recovered by proceedings under the statute.

[3] Jones *v.* Cullen, 142 Ind. 335, s. c. 40 N. E. R. 124; Stokes *v.* Knarr, 11 Wis. 389; Williams *v.* Hitzie, 83 Ind. 303; Woods *v.* Brown, 93 Ind. 164; Lininger *v.* Glenn, 33 Neb. 187; Wilson *v.* Shipman, 34 Neb. 573, s. c. 52 N. W. 576; Hamer *v.* Sears, 81 Ga. 288; White *v.* Hinton, 3 Wyo. 753, 17 L. R. A. 66, 30 Pac. R. 953.

by law, it may be restrained by injunction at the suit of the owner.[1] This relief is frequently granted in states which require the payment of compensation to precede the taking of property where the corporation neglects or refuses to pay or deposit the just compensation as required by law.[2] And it is a proper remedy in cases where the corporation seeks to obtain possession of private property under color of eminent domain proceedings which, for any reason, are void.[3] A property owner is entitled to protection in his property rights as against those who would devote to public use property not legally taken for that purpose, and should not be driven to an action

[1] Jarden *v.* Philadelphia, etc., R.Co., 3 Whart. (Pa.) 502; Mettler *v.* Easton, etc., R. Co., 25 N. J. Eq. 214; Chicago, etc., Bridge Co. *v.* Pacific, etc., Co., 36 Kan. 113; Piedmont, etc., R. Co. *v.* Speelman, 67 Md. 260; Wagner *v.* Railway Co., 38 Ohio St. 32; Warner *v.* Railroad Co., 39 Ohio St. 70; Field *v.* Carnarvon, etc., R. Co., L. R. 5 Eq. Cas. 190: Bolton *v.* McShane, 67 Iowa 207; Lohman *v.* St. Paul, etc., R. Co., 18 Minn. 174. Where the use of a street by a railway company is not an additional servitude, entitling abutters to compensation, it has been held that the latter can not maintain a bill to enjoin the operation of the railway on the ground that the company has transcended its authorized powers, since it is amenable for an excessive exercise of power only to the state. Rafferty *v.* Central Traction Co., 147 Pa. St. 579.

[2] Young *v.* Harrison, 6 Ga. 130; Chambers *v.* Cincinnati, etc., R. Co., 69 Ga. 320; Stewart *v.* Raymond R. Co., 7 S. & M. (Miss.) 568; Cameron *v.* Board, etc., 47 Miss. 264; Appeal of Borough of Verona, 108 Pa. St. 83; Shepardson *v.* Milwaukee, etc., R.Co., 6 Wis. 605; Bohlman *v.* Green Bay, etc., R. Co., 30 Wis. 105; Bohlman *v.* Green Bay, etc., R. Co., 40 Wis. 157; Ray *v.* Atchison, etc., R. Co., 4 Neb. 439; Shute *v.* Chicago, etc., R. Co., 26 Ill. 436; Cobb *v.* Illinois, etc., R.Co., 68 Ill. 233; Western, etc., R. Co. *v.* Owings, 15 Md. 199; New Central Coal Co. *v.* George's Creek, etc., Co., 37 Md. 537; Mason City, etc., Co. *v.* Mason, 23 W. Va. 211; Ross *v.* Elizabethtown, etc., R. Co., 2 N. J. Eq. 422; Redman *v.* Philadelphia, etc., R. Co., 33 N. J. Eq. 165; Parker *v.* East Tennessee, etc., R. Co., 13 Lea (Tenn.) 669; Kirkendall *v.* Hunt, 4 Kan. 514; Cox *v.* Louisville, etc., R. Co., 48 Ind. 178; Northern Pac. R. Co. *v.* St. Paul, etc., R. Co., 1 McCrary (U. S.) 302. An injunction will issue to prevent the continued occupation of land wrongfully taken. Cox *v.* Louisville, etc., R. Co., 48 Ind. 178; Gay *v.* New Orleans Pacific R. Co., 32 La. Ann. 277.

[3] Lohman *v.* St. Paul, etc., R. Co., 18 Minn. 174; Erwin *v.* Fulk, 94 Ind. 235; Frizell *v.* Rogers, 82 Ill. 109; Piedmont, etc., R. Co. *v.* Speelman, 67 Md. 260; McMillan *v.* Baker, 20 Kan. 50; Wren *v.* Walsh, 57 Wis. 98; Rhine *v.* McKinney, 53 Tex. 354. Where the power of the corporation to condemn land has been exhausted, it will be enjoined from a subsequent entry upon other lands. Moorhead *v.* Little Miami R. Co., 17 Ohio 340.

at law to obtain redress.[1] Any property rights in lands,[2] bonds,[3] or water-courses,[4] or franchises,[5] may be protected by injunction from invasion under color of the eminent domain power. But where the corporation has taken possession in good faith, under an agreement with the owner, its further occupation of

[1] Western, etc., R. Co. *v.* Owings, 15 Md. 199; Browning *v.* Camden, etc., R. Co., 4 N. J. Eq. 47; Cobb *v.* Illinois, etc., R. Co., 68 Ill. 233; Pennsylvania R. Co.'s Appeal, 115 Pa. St. 514; Bolton *v.* McShane, 67 Iowa 207. In many of the cases it is said that such an interference with his rights would work a great and irreparable injury to the property-owner, in that it is not a mere temporary and fugitive trespass, but is a permanent appropriation of the property. Erwin *v.* Fulk, 94 Ind. 235; Carpenter *v.* Grisham, 59 Mo. 247; Bonaparte *v.* Camden, etc., R. Co., 1 Bald. C. C. 205; 2 Story Eq., § 928; 3 Pomeroy Eq., § 1357. But where, for any reason, it would be inequitable to enjoin a further occupation of the land, the owner will be left to his remedy at law. Chesapeake, etc., R. Co. *v.* Patton, 5 W. Va. 234; Nicholas *v.* Sutton, 22 Ga. 369.

[2] Sidener *v.* Norristown, etc., Turnp. Co., 23 Ind. 623; Mettler *v.* Easton, etc., R. Co., 25 N. J. Eq. 214; Bohlman *v.* Green Bay, etc., R. Co., 30 Wis. 105. In those states in which it is held that an owner of abutting property is entitled to compensation for the construction of a railroad in the street in front of his property, it is also held that he may enjoin any interference with this right in the same manner that he could enjoin the occupation of his land. Cox *v.* Louisville, etc., R. Co., 48 Ind. 178; Williams *v.* New York Central R. Co., 16 N. Y. 97; Washington Cemetery Co. *v.* Prospect Park, etc., R. Co., 68 N. Y. 591; Henderson *v.* New York Central R. Co., 78 N. Y. 423; Columbus, etc., R. Co. *v.* Witherow, 82 Ala. 190; Schurmeier *v.* St. Paul, etc., R. Co., 10 Minn. 82; Harrington *v.* St. Paul, etc., R. Co., 17 Minn. 215; Ford *v.* Chicago, etc., R. Co., 14 Wis. 609.

[3] Garwood *v.* New York, etc., R. Co., 17 Hun (N. Y.) 356; Higgins *v.* Flemington Water Co., 36 N. J. Eq. 538; Lux *v.* Haggin, 69 Cal. 255.

[4] Waterman *v.* Buck, 58 Vt. 519; Mayor, etc., of Baltimore *v.* Warren, etc., Co., 59 Md. 96; Middleton *v.* Flat River Booming Co., 27 Mich. 533; Holyoke, etc., Co. *v.* Connecticut River Co., 22 Blatch. (U. S.) 131.

[5] Boston, etc., R. Co. *v.* Salem, etc., R. Co., 2 Gray (Mass.) 1; Enfield Toll Bridge Co. *v.* Hartford, etc., R. Co., 17 Conn. 40; Gifford *v.* New Jersey R. Co., 10 N. J. Eq. 171; Denver, etc., R. Co. *v.* Denver City R. Co., 2 Col. 673; Hudson, etc., Co. *v.* New York, etc., R. Co., 9 Paige (N. Y.) 323; St. Louis, etc., R. Co. *v.* Northwestern, etc., R. Co., 69 Mo. 65. One railroad will be enjoined from crossing another until the law authorizing such crossing has been complied with. Central Vermont R. Co. *v.* Woodstock R. Co., 50 Vt. 452; Pennsylvania R. Co.'s Appeal, 93 Pa. St. 150. A failure on its part to make compensation is sufficient reason for enjoining a railroad from crossing another railroad. Grand Rapids, etc., R. Co. *v.* Grand Rapids, etc., R. Co., 35 Mich. 265; Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 15 Ill. App. 587; Chicago, etc., R. Co. *v.* Englewood, etc., R. Co., 17 Ill. App. 141.

the land will not be enjoined for a subsequent violation of the agreement unless the owner's legal remedies are shown to be inadequate.[1] Some of the cases hold that an injunction will not be granted where the plaintiff's title to the land is in dispute.[2] Where land has been regularly condemned, an encroachment upon adjoining property not covered by the condemnation proceedings may be enjoined.[3]

§ 1050. **Possession pending appeal.**—In some states having constitutions silent as to the time of making compensation, statutes providing that the railroad company shall have possession of the land without other security than that afforded by a definite mode of ascertaining and obtaining judgment for its value have been upheld,[4] but, as elsewhere said, we believe this doctrine to be unsound. Where, however, damages are assessed and tendered or paid into court, then we think it clearly competent for the legislature to provide that the company may enter into possession although there is an appeal. It is held that the right of the railroad company to take possession pending an appeal depends wholly upon the authority of the statute,

[1] Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 411; Provolt *v.* Chicago, etc., R. Co., 69 Mo. 633; Irish *v.* Burlington, etc., R. Co., 44 Iowa 380; Sturtevant *v.* Milwaukee, etc., R. Co., 11 Wis. 63.

[2] Lanterman *v.* Blairstown R. Co.,28 N. J. Eq. 1; Chesapeake, etc., R. Co. *v.* Young, 3 Md. 480. Where the railroad company entered in good faith by the consent of the supposed owner, its further occupation will not be enjoined at the suit of another who claims title to the land, but he must establish his title by suit for trespass or ejectment. Erie R. Co. *v.* Delaware, etc., R. Co., 21 N. J. Eq. 283; Pickert *v.* Ridgefield Park R.Co.,25 N. J. Eq. 316.

[3] Sidener *v.* Norristown, etc., Turnp. Co., 23 Ind. 623; Deere *v.* Cole, 118 Ill. 165; State *v.* Armell, 8 Kan. 288. Or the land-owner may have his action for damages. Eaton *v.* European, etc., R. Co., 59 Me. 520; New Orleans, etc., R. Co. *v.* Brown, 64 Miss. 479.

[4] Raleigh, etc., R. Co. *v.* Davis, 2 Dev. & B. L. (N. Car.) 451;McIntire *v.* Western N. C. R. Co., 67 N. Car. 278; Nichols *v.* Somerset, etc., R. Co., 43 Me. 356; Tuckahoe Canal Co. *v.* Tuckahoe, etc., R. Co., 11 Leigh. (Va.) 42; Hazen *v.* Essex Co., 12 Cush. (Mass.) 475. See Petition of Mount Washington Road Co., 35 N. H. 134. Similar statutes have been upheld in other states in which the constitutions have since been changed. New Albany, etc., R. Co. *v.* Connelly, 7 Ind. 32; Prather *v.* Jeffersonville, etc., R. Co., 52 Ind. 16; Bates *v.* Cooper, 5 Ohio 115; Compton *v.* Susquehanna R. Co., 3 Bland Ch. 386; Harness *v.* Chesapeake, etc., Canal Co., 1 Md. Ch. 248.

and a tender of the damages awarded confers no rights upon the company not granted by express provision of law.[1] The fact that it has not been finally determined what amount of compensation shall be made for the property taken does not invalidate a law permitting the railroad company to take possession pending appeal upon paying the amount of the commissioner's award or depositing the same in court for the benefit of the land-owner, even in states which require payment of the compensation to precede the taking.[2] The general rule is that the railroad company may, notwithstanding such appeal, enter upon the land and proceed to construct its road upon paying or tendering the damages assessed below.[3] But if the

[1] Browning *v.* Camden, etc., R. Co., 4 N. J. Eq. 47; Colvill *v.* Langdon, 22 Minn. 565.

[2] Cooper *v.* Chester R. Co., 19 N. J. Eq. 199; Mercer, etc., R. Co. *v.* Delaware, etc., R. Co., 26 N. J. Eq. 464; Central Branch U. P. R. Co. *v.* Atchison, etc., R. Co., 28 Kan. 453; Railroad Co. *v.* Foreman, 24 W.Va. 662; St. Louis, etc., R. Co. *v.* Evans, etc., Co., 85 Mo. 307; Hastings *v.* Burlington, etc., R. Co., 38 Iowa 316; Downing *v.* Des Moines, etc., R. Co., 63 Iowa 177; Arnold *v.* Covington, etc., Bridge Co., 1 Duvall (Ky.) 372; Schuler *v.* Northern Liberties, etc., R. Co., 3 Wharton (Pa.) 555; Baltimore, etc., R. Co. *v.* Johnson, 84 Ind. 420; Lake Erie, etc., R. Co. Kinsey, 87 Ind. 514; Matter of New York Central, etc., R. Co., 60 N. Y. 116; Matter of New York, etc., R. Co., 98 N. Y. 12. In order to be effectual in giving the railroad company the right to take possession, the deposit must be unconditional, and subject to the absolute control of the land-owner. Kanne *v.* Minneapolis, etc., R. Co., 30 Minn. 423; Arnold *v.* Covington, etc., Bridge Co., 1 Duvall (Ky.) 372. Where the railroad company has appealed from the award, but has deposited the damages awarded and taken possession, the land-owner is entitled to such damages upon proper demand made upon the clerk of the court. Meyer *v.* State, *ex rel.*, Day, 125 Ind. 335. A law which permits the railroad company to take possession upon paying into court the amount of the award but provides that the money shall not be paid to the land-owner until the result of the appeal is known, is opposed to a constitutional provision that the payment of compensation must precede the taking. Meily *v.* Zurmehly, 23 Ohio St. 627. A land-owner who accepts the amount of the award is himself estopped to prosecute an appeal. Baltimore, etc., R. Co. *v.* Johnson, 84 Ind. 420; Mississippi, etc., R. Co. *v.* Byington, 14 Iowa 572; Whittlesey *v.* Hartford, etc., R. Co., 23 Conn. 421; Burns *v.* Milwaukee, etc., R. Co., 9 Wis. 450; Kile *v.* Town of Yellowhead, 80 Ill. 208; Felch *v.* Gilman, 22 Vt. 38.

[3] Stimson's Am. Stat., (1892) § 8750. In most of the states in which payment of the compensation is required to precede the taking, a tender of payment or its equivalent is held to be necessary before possession can be taken. Graham *v.* Columbus, etc., R. Co., 72 Ind.

damages are increased on appeal, the railroad company must pay the additional sum awarded, or it will be held liable as a trespasser *ab initio*, and may be dispossessed by an action of ejectment.

§ 1051. Tender.—Where the statute requires a tender before entering upon the land, a tender is, of course, essential, but

260; Cox *v.* Louisville, etc., R. Co., 48 Ind. 178; Thompson *v.* Grand Gulf R. Co., 3 Howard (Miss.) 240; Stewart *v.* Raymond R. Co., 7 S. & M. (Miss.)568; Memphis, etc., R. Co. *v.* Payne, 37 Miss. 700; Evansville, etc., R. Co. *v.* Grady, 6 Bush. (Ky.) 144; O'Hara *v.* Lexington, etc., R. Co., 1 Dana (Ky.) 232; Shepardson *v.* Milwaukee, etc., R. Co., 6 Wis. 605; Loop *v.* Chamberlain, 20 Wis. 135; Kennedy *v.* Milwaukee, etc., R. Co., 22 Wis. 581; Bohlman *v.* Green Bay, etc., R. Co., 30 Wis. 105; Ray *v.* Atchison R. Co., 4 Neb. 439; Gear *v.* Dubuque, etc., R. Co., 20 Iowa 523; Richards *v.* Des Moines, etc., R. Co., 18 Iowa 259; Walther *v.* Warner, 25 Mo. 277; Levering *v.* Philadelphia, etc., R. Co., 8 Watts & S. (Pa.) 459; McClinton *v.* Pittsburgh, etc., R. Co., 66 Pa. St. 404; Cushman *v.* Smith, 34 Me. 247; New Orleans, etc., R. Co. *v.* Lagarde, 10 La. Ann. 150; Ferris *v.* Bramble, 5 Ohio St. 109; Blodgett *v.* Utica, etc., R. Co., 64 Barb. (N. Y.) 580; San Mateo W. W. *v.* Sharpstein, 50 Cal. 284; Sanborn *v.* Belden, 51 Cal. 266; Vilhac *v.* Stockton, etc., R. Co., 53 Cal. 208. A law providing that the court, before which the proceedings to condemn land for a railroad right of way are pending, may make an order allowing the company to continue in possession, if possession has been taken, and if not, to take and keep possession of the land sought to be condemned until the proceedings are ended, upon paying into court a sufficient sum, or executing a bond to secure the payment of whatever compensation shall be legally assessed, is opposed to a constitutional provision that the payment of damages shall precede the taking of property. Davis *v.* San Lorenzo R. Co., 47 Cal. 517; Redman *v.* Philadelphia, etc., R. Co., 33 N. J. Eq. 165; Morris, etc., R. Co. *v.* Hudson Tunnel R. Co., 25 N. J. Eq. 384; Browning *v.* Camden, etc., R. Co., 4 N. J. Eq. 47; St. Joseph, etc., R. Co. *v.* Callender, 13 Kan. 496; Blackshire *v.* Atchison, etc., R. Co., 13 Kan. 514; Harness *v.* Chesapeake, etc., Canal Co., 1 Md. Ch. 248; Walther *v.* Warner, 25 Mo. 277; Evans *v.* Missouri, etc., R. Co., 64 Mo. 453; Richards *v.* DesMoines Valley R. Co., 18 Iowa 259; Hibbs *v.* Chicago, etc., R. Co., 39 Iowa 340; Conger *v.* Burlington, etc., R. Co., 41 Iowa 419; White *v.* Wabash, etc., R. Co., 64 Iowa 281; Levering *v.* Philadelphia, etc., R. Co., 8 Watts & S. (Pa.) 459; McClinton *v.* Pittsburgh, etc., R. Co., 66 Pa. St. 404; Nichols *v.* Somerset, etc., R. Co., 43 Me. 356; Enfield, etc., Co. *v.* Hartford, etc., R. Co., 17 Conn. 40; Loop *v.* Chamberlain, 20 Wis. 135; Fox *v.* Western Pacific R. Co., 31 Cal. 538; Lake Erie, etc., R. Co. *v.* Kinsey, 87 Ind. 514; Dater *v.* Troy, etc., R. Co., 2 Hill (N. Y.) 629; Blodgett *v.* Utica, etc., R. Co., 64 Barb. (N. Y.) 580.

if the damages have been ascertained by a judicial proceeding and a tender is made and refused, the company may lawfully enter into possession. A valid tender, made after the compensation has been fixed by a competent tribunal, is effective although the land-owner may refuse to accept it and appeal from the award or judgment.[1] In order to entitle the company to possession it must tender the entire amount assessed, and it is not sufficient to tender the sum the company claims to be the proper one.[2] It is held that the tender of the amount awarded must be made before the owner appeals,[3] but we think that a tender promptly made should be regarded as sufficient although the owner does appeal, unless the statute requires the tender to be made before an appeal is taken. In some jurisdictions the rule is that a tender of the amount awarded does not preclude the company from litigating the question of the amount on appeal.[4] The tender must be made in money,[5] and must be made in the mode prescribed by the statute. Where payment into court is required or a deposit is provided for the tender will

[1] Johnson *v.* Baltimore, etc., R. Co., 45 N. J. Eq. 454, 17 Atl. R. 574, 39 Am. & Eng. R. Cas. 101; Pomona, etc., R. Co. *v.* Camden, etc., Co., (N. J.) 20 Atl. R. 350, 44 Am. & Eng. R. Cas. 179; Oliver *v.* Union, etc., R. Co., 83 Ga. 257, s. c. 9 S. E. R. 1086.

[2] Mettler *v.* Easton, etc., R. Co., 25 N. J. Eq. 214.

[3] Johnson *v.* Baltimore, etc., R. Co., 45 N. J. Eq. 454, s. c. 17 Atl. R. 574, 39 Am. & Eng. R. Cas. 101.

[4] Indianapolis, etc., Co. *v.* Brower, 12 Ind. 374. See Baltimore, etc., R. Co. *v.* Johnson, 84 Ind. 420, s. c. 10 Am. & Eng. R. Cas. 408.

[5] Where a tender is relied upon, it must be a tender of money in order to be valid. Isom *v.* Mississippi R. Co., 36 Miss. 300; Brown *v.* Beatty, 34 Miss. 227; Hayes *v.* Ottawa, etc., R. Co., 54 Ill. 373; Railroad Co. *v.* Halstead, 7 W. Va. 301; Oregon Central R. Co. *v.* Wait, 3 Ore. 91; Henderson, etc., R. Co. *v.* Dickerson, 17 B. Mon. (Ky.) 173; Elizabethtown R. Co. *v.* Helm, 8 Bush (Ky.) 681; Jones *v.* Wills Valley R. Co., 30 Ga. 43; Buffalo Bayou, etc., R. Co. *v.* Ferris, 26 Tex. 588; Alabama R. Co. *v.* Burkett, 42 Ala. 83; Woodfolk *v.* Nashville, etc., R. Co., 2 Swan (Tenn.) 422; New Orleans, etc., R. Co. *v.* Lagarde, 10 La. Ann. 150. A land-owner's right to insist on having his damages first assessed and paid is waived by acquiescence on his part in the construction and operation of the road across his land; and he can not thereafter maintain ejectment to recover the land, but is limited to his action for the value of the land. McAulay *v.* Western, etc., R. Co., 33 Vt. 311; Provolt *v.* Chicago R. Co., 57 Mo. 256; Strickler *v.* Midland R. Co., 125 Ind. 412; Smart *v.* Portsmouth R. Co., 20 N. H. 233.

be ineffective unless such requirements are complied with by the company.[1] The authorities declare that the statute which authorizes the condemning party to take possession pending the appeal upon depositing the sum awarded in court and that the sum shall not be paid to the land-owner until the appeal is determined is unconstitutional.[2]

§ 1052. **Acceptance of damages—Estoppel.**—The land-owner may be estopped from questioning the proceedings in condemnation cases by such acts or conduct as makes it inequitable for him to deny the validity of such proceedings. The rule that parties will not be permitted to occupy inconsistent positions applies to such cases. The acceptance, by the land-owner, of the damages awarded estops him to question the award by appeal.[3] A right to payment or tender of damages

[1] *Ex parte* Reynolds, 52 Ark. 330, s. c. 12 S. W. R. 570; St. Joseph, etc., R. Co. *v.* Callender, 13 Kan. 496; Gulf, etc., R. Co. *v.* Donahoo, 59 Tex. 128; Powers *v.* Bears, 12 Wis. 214; Shepardson *v.* Milwaukee, etc., R. Co., 6 Wis. 605; Leavenworth, etc., R. Co. *v.* Whitaker, 42 Kan. 634, 22 Pac. R. 733; Chicago, etc., R. Co. *v.* Watkins, 43 Kan. 50, s. c. 22 Pac. R. 985, 40 Am. & Eng. R. Cas. 499; Republican Valley, etc., R. Co. *v.* Fink, 18 Neb. 82, s. c. 24 N. W. R. 439. See, generally, Ackerman *v.* Huff, 71 Tex. 317, s. c. 9 S. W. R. 236, 36 Am. & Eng. R. Cas. 589. A deposit on condition is not sufficient. Kanne *v.* Minneapolis, etc., R. Co., 30 Minn. 423, s. c. 15 N. W. R. 871. The deposit is held to be at the risk of the company. Blackshire *v.* Atchison, etc., R. Co., 13 Kan. 514; Toledo, etc., R. Co. *v.* Dunlap, 47 Mich. 456, s. c. 11 N. W. R. 271.

[2] Consumers' Gas., etc., Co. *v.* Harless, 131 Ind. 446; Meily *v.* Zurmehly, 23 Ohio St. 627; State *v.* Lubke, 15 Mo. App. 152; St. Louis, etc., R. Co. *v.* Evans, etc., B. Co., 85 Mo. 307; Matter of New York, etc., R. Co., 98 N.Y. 12.

[3] Mississippi, etc., R. Co. *v.* Byington, 14 Iowa 572; Baltimore, etc., R. Co. *v.* Johnson, 84 Ind. 420; Rentz *v.* Detroit, 48 Mich. 544; Challiss *v.* Atchison, etc., R. Co., 16 Kan. 117; Burns *v.* Milwaukee, etc., R. Co., 9 Wis. 450; Moore *v.* Roberts, 64 Wis. 538; Kile *v.* Town of Yellowhead, 80 Ill. 208; St. Louis, etc., R. Co. *v.* Karnes, 101 Ill. 402; Hunter *v.* Jones, 13 Minn. 307; Whittlesey *v.* Hartford, etc., R. Co., 23 Conn. 421; Hitchcock *v.* Danbury, etc., R. Co., 25 Conn. 516; Marling *v.* Burlington, etc., R. Co., 67 Iowa 331; Hatch *v.* Hawkes, 126 Mass. 177; Brooklyn Park Co. *v.* Amstrong, 45 N. Y. 234; Chatterton *v.* Parrott, 46 Mich. 432; Logan *v.* Vernon, etc., R. Co., 90 Ind. 552; Felch *v.* Gilman, 22 Vt. 38. And taking possession of the premises has been held to estop the party condemning from denying the validity of the condemnation proceedings in a suit to recover the amount of the award. Corwith *v.* Hyde Park, 14 Ill. App. 635; State *v.* Lubke, 15 Mo. App. 152.

may be waived by conduct as well as by express contract.[1] Where credit is given the condemning party the land-owner will be estopped.[2] It is to be noted that there is a clear distinction between cases of conduct estopping a land-owner from claiming the land itself and cases of conduct estopping him from claiming compensation, for it by no means follows that one who does acts estopping him from claiming the land thereby estops himself from claiming compensation.[3]

§ 1053. **Appeal.**—The right of appeal where the proceedings are conducted in a judicial tribunal is a statutory right.[4] The legislature may regulate the mode of taking and prosecuting appeals, and may deny an appeal, except in those states where a trial by jury is given in all cases by the constitution. In some states, where the original assessment is by a jury or judicial body, it is held that the appeal may be taken directly to the supreme court, but as a rule the case goes first into a trial

[1] Snyder *v.* Chicago, etc., R. Co., 112 Mo. 527, s. c. 20 S. W. R. 885; Manchester, etc., R. Co. *v.* Keene, 62 N. H. 81.

[2] New Orleans, etc., Co. *v.* Jones, 68 Ala. 48, s. c. 2 Am. & Eng. R. Cas. 425. See Payne *v.* Morgan's, etc., R. Co., 43 La. Ann. 981, 10 So. R. 10; Rio Grande, etc., R. Co. *v.* Ortiz, 75 Tex. 602, s. c. 12 S. W. R. 1129; Northern Pac. R. Co. *v.* Burlington, etc., Co., 4 Fed. R. 298.

[3] Webster *v.* Kansas City, etc., R. Co., 116 Mo. 114, s. c. 22 S. W. R. 474. Estoppel by pleadings. Oregon, etc., R. Co. *v.* Baily, 3 Ore. 164; Pennsylvania, etc., R. Co. *v.* Bunnell, 81 Pa. St. 414.

[4] Reeves *v.* Grottendick, 131 Ind. 107; Kundinger *v.* City of Saginaw, 59 Mich. 355; City of Minneapolis *v.* Wilkin, 30 Minn. 140; La Croix *v.* County Commissioners, 50 Conn. 321; Cake *v.* Philadelphia, etc., R. Co., 87 Pa. St. 307; Hill *v.* Salem, etc., Co., 1 Rob. (Va.) 263; Chesapeake, etc., Co. *v.* Hoye, 2 Gratt. 511; *Ex parte* McCardle, 7 Wall. 506; State *v.* Slevin, 16 Mo. App. 541; Huntington County *v.* Kauffman, 126 Pa. St. 305, s. c. 17 Atl. 595; Matter of State Reservation, 102 N. Y. 734; Norfolk Southern, etc., R. Co. *v.* Ely, 95 N. Car. 77; Sims *v.* Hines, 121 Ind. 534, s. c. 23 N. E. R. 515; Appeal of Houghton, 42 Cal. 35. But there is conflict of authority upon this point for there are cases affirming that the right of appeal can not be denied. Coon *v.* Mason County, 22 Ill. 666. The right of appeal is favored and the courts generally so construe statutes as to give the right when it is possible to do so. Howard *v.* Drainage Comrs., 126 Ill. 53, s. c. 18 N. E. R. 313; Proprietors of, etc., Bridge *v.* New Hampton, 47 N. H. 151; Hamilton *v.* Fort Wayne, 73 Ind. 1; Yelton *v.* Addison, 101 Ind. 58; Lawrenceburgh, etc., Co. *v.* Smith, 3 Ind. 253; Elliott's Roads and Streets, 271.

court and is there tried.[1] In states where the proceedings originate in a court of superior jurisdiction, from all of whose final orders judgments and decrees an appeal lies, an appeal from the judgment in such proceedings may be prosecuted to the proper appellate court.[2] In such cases appeal may be had from the final judgment in the case, but not, as a rule, from interlocutory orders.[3] There is a difference between an appeal to a trial

[1] Mississippi, etc., Co. *v.* Rosseau, 8 Iowa 373; York Co. *v.* Fewell, 21 S. Car. 106; Dunlap *v.* Mt. Sterling, 14 Ill. 251; Blize *v.* Castlio, 8 Mo. App. 290; Miller *v.* Prairie Du Chien, etc., R. Co., 34 Wis. 533; Hardy *v.* McKinney, 107 Ind. 364. See, generally, Cooper *v.* Anniston, etc., R. Co., 85 Ala. 106, s. c. 4 So. R. 689, 36 Am. & Eng. R. Cas. 581; Postal, etc., Co. *v.* Alabama, etc., R. Co., 92 Ala. 331, s. c. 9 So. R. 555. Such an appeal is generally held to lie where the appeal from the award of the commissioners is docketed in the superior court as a civil action. St. Louis, etc., R. Co. *v.* Evans, etc., Co., 85 Mo. 307; Rice *v.* Danville, etc., Turnpike Co., 7 Dana (Ky.) 81; Tracy *v.* Elizabethtown, etc., R. Co., 78 Ky. 309; San Francisco, etc., R. Co. *v.* Mahoney, 29 Cal. 112; *In re* St. Paul, etc., R. Co., 34 Minn. 227; Morris *v.* Chicago, 11 Ill. 650; Lewis' Em. Dom., § 550. A statute giving an appeal to the supreme court in any "action or special proceeding" was held to apply to condemnation cases. Sacramento, etc., R. Co. *v.* Harlan, 24 Cal. 334; Raleigh, etc., R. Co. *v.* Jones, 1 Ired. L. (N. Car.) 24; Wilmington, etc., R. Co. *v.* Condon, 8 G. & J. (Md.) 443.

[2] St. Louis, etc., R. Co. *v.* Lux, 63 Ill. 523. The action of the court in *sustaining* exceptions to the commissioner's report is not an order from which an appeal may be taken. Tucker *v.* Massachusetts Cent. R. Co., 116 Mass. 124. Neither is the refusal to dismiss an appeal to the district court, in which case it is to be tried *de novo*. Minnesota Cent. R. Co. *v.* Peterson, 31 Minn. 42.

[3] Hendrick *v.* Carolina, etc., R. Co., 98 N. Car. 431, s. c. 4 S. E. R. 184; Baltimore, etc., R. Co. *v.* Pittsburgh, etc., R. Co., 17 W. Va. 812; California, etc., R. Co. *v.* Southern, etc., R. Co., 65 Cal. 295, s. c. 4 Pac. R. 13; North Missouri R. Co. *v.* Reynal, 25 Mo. 534; McNamara *v.* Minnesota, etc., R. Co., 12 Minn. 388; St. Louis, etc., R. Co. *v.* Evans, etc., B. Co., 85 Mo. 307; Jacksonville, etc., R. Co. *v.* Adams, 29 Fla. 260, s. c. 11 So. R. 169; *In re* St. Paul, etc., R. Co., 34 Minn. 227; Denver, etc., R. Co. *v.* Jackson, 6 Colo. 340; Tracy *v.* Elizabethtown, etc., R. Co., 78 Ky. 309; San Francisco, etc., R. Co. *v.* Mahoney, 29 Cal. 112; Johnson *v.* Freeport, etc., R. Co., 116 Ill. 521. In some of the states a writ of error lies from a court in which the proceedings are conducted according to the common law. Peck *v.* Whitney, 6 B. Mon. 117. See Peoria, etc., Co. *v.* Peoria, etc., R. Co., 105 Ill. 110; Odum *v.* Rutledge., etc., Co., 94 Ala. 488, s. c. 10 So. R. 222; Wilmington, etc., Co. *v.* Condon, 8 Gill & J. 443. As to what orders may be appealed from, see Spaulding *v.* Milwaukee, etc., R. Co., 57 Wis. 304, s. c. 14 N. W. R. 368; San Francisco, etc., R. Co. *v.* Mahoney, 29 Cal. 112; Beale *v.* Pennsylvania R. Co., 86 Pa. St. 509; Esch *v.* Chicago, etc., R. Co., 72 Wis. 229,

court and an appeal to a court of errors, for in the latter case the general rule is that only questions of law will be considered, while in the former the case is tried *de novo*. It is the rule in many jurisdictions that where the case has been tried *de novo* in the court to which the commissioners' award was taken for review, the supreme court will not consider matters which arose before the case reached the court in which such trial was had.[1] As the right to appeal is statutory the legislature may regulate the mode of taking appeals and provide what questions shall be considered on appeal.[2] An award of damages for land taken for public purposes does not constitute a contract within the meaning of the section of the federal constitution forbidding a state to pass laws impairing the validity of contracts.[3] And provision for the review of such procedings may be made by the legislature even after the termination of the proceedings.[4] If an appeal is given and no mode is prescribed for ex-

s. c. 39 N. W. R. 129; Rensselaer, etc., R. Co. *v.* Davis, 43 N. Y. 137; Cumberland, etc., R. Co. *v.* Pennsylvania R. Co., 57 Md. 267; Warren *v.* First Division, etc., 18 Minn. 384; Wisconsin, etc., R. Co. *v.* Cornell, etc., 52 Wis. 537, s. c. 8 N. W. R. 491; Eureka, etc., R. Co. *v.* McGrath, 74 Cal. 49, s. c. 15 Pac. R. 360.

[1] Patton *v.* Clark, 9 Yerg. (Tenn.) 268; Williamson *v.* County of Cass, 84 Ill. 361. No appeal lies from an order of the court confirming an inquisition condemning lands for the construction of a railroad unless the court exceeds its jurisdiction in passing such order. George's Creek Coal Co. *v.* New Central Coal Co., 40 Md. 425; Cumberland, etc., R. Co. *v.* Pennsylvania R. Co., 57 Md. 267.

[2] Reeves *v.* Grottendick, 131 Ind. 107; Oliver *v.* Union, etc., R. Co., 83 Ga. 257, s. c. 9 S. E. R. 1086; Central Branch, etc., R. Co. *v.* Atchison, etc., R. Co., 28 Kan. 453, s. c. 10 Am. & Eng. R. Cas. 528; Norfolk, etc., R. Co. *v.* Ely, 95 N. Car. 77; Skinner *v.* Nixon, 7 Jones, L. (N. Car.) 342; Raleigh, etc., R. Co. *v.* Jones, 1 Ired. L. (N. Car.) 24. See Rothan *v.* St. Louis, etc., R. Co., 113 Mo. 132.

[3] Garrison *v.* New York, 21 Wall. 196.

[4] Baltimore, etc., R. Co. *v.* Nesbit, 10 How. (U. S.) 395; Henderson, etc., R. Co. *v.* Dickerson, 17 B. Mon. 173. Although an irrepealable charter gives a right of appeal to a designated tribunal the legislature may alter the charter by providing for appeal to a different court from that designated. State *v.* Weldon, 47 N. J. Law 59, s. c. 23 Am. & Eng. R. Cas. 134; Railroad Co. *v.* Hecht, 95 U. S. 168. We do not believe that it is within the power of the legislature to contract that cases shall be tried in a specified court, since the power to establish courts and regulate practice therein is a governmental power which can not be bargained away.

ercising the right, the court will adopt the practice in similar proceedings, so far as they can be made applicable.[1] Ordinarily, however, the manner of taking the appeal is prescribed by statute, in which case the provisions of the statute must be substantially complied with or the appeal will be ineffective.[2] An appeal is usually given to either party,[3] and this includes both the condemning corporation and any owner of a distinct interest in the property,[4] who is made a party to the record.[5]

[1] Peters *v.* Hastings, etc., R. Co., 19 Minn. 260; Dubuque, etc., R. Co. *v.* Crittenden, 5 Iowa 514; Twombly *v.* Madbury, 27 N. H. 433; West *v.* McGurn, 43 Barb. (N. Y.) 198; Lewis' Em. Dom., § 537. Where the statute simply provided that either party might take an appeal from the award of the commissioners to the district court within a limited time, it was held that filing a transcript in the district court constituted taking an appeal. Gifford *v.* Republican Valley, etc., R. Co., 20 Neb. 538.

[2] Klein *v.* St. Paul, etc., R. Co., 30 Minn. 451, s. c. 16 N. W. R. 265; Hartman *v.* Belleville, etc., R. Co., 64 Ill. 24; Nebraska, etc., R. Co. *v.* Storer, 22 Neb. 90; Jamison *v.* Burlington, etc., R. Co., 69 Iowa 670. See Kasson *v.* Brocker, 47 Wis. 79; Curtis *v.* Jackson, 23 Minn. 268.

[3] Lee *v.* Northwestern U. R. Co., 33 Wis. 222; People *v.* May, 27 Barb. (N. Y.) 238. The corporation can not appeal from an order apportioning the damages among the several owners of the estate taken. Haswell *v.* Vermont Central R. Co., 23 Vt. 228; Spaulding *v.* Milwaukee, etc., R. Co., 57 Wis. 304. See Chicago, etc., R. Co. *v.* Grovier, 41 Kan. 685, s. c. 21 Pac. R. 779, 39 Am. & Eng. R. Cas. 146; Troy, etc., R. Co. *v.* Northern, etc., Co., 16 Barb. 100; Chicago, etc., R. Co. *v.* Easley, 46 Kan. 337, s. c. 26 Pac. R. R. 731; Connable *v.* Chicago, etc., R. Co., 60 Iowa 27, s. c. 14 N. W. R. 75; Cedar Rapids, etc., R. Co. *v.* Chicago, etc., R. Co., 60 Iowa 35, s. c. 14 N. W. R. 76; Michigan, etc., R. Co. *v.* Barnes, 40 Mich. 383; Chicago, etc., R. Co. *v.* Ellis, 52 Kan. 41 and 48, s. c. 33 Pac. R. 478, 34 Pac. R. 352.

[4] Washburn *v.* Milwaukee, etc., R. Co., 59 Wis. 379; Wilkin *v.* St. Paul, etc., R. Co., 22 Minn. 177. The owner of any distinct interest in property in which others also hold an estate may appeal separately. Lance *v.* Chicago, etc., R. Co., 57 Iowa 636. In this case, the owner and the mortgagee were proceeded against jointly and it was held that the owner could appeal from the award without joining the mortgagee. One joint owner can not prosecute a separate appeal, but all must unite in a single appeal. Watson *v.* Milwaukee, etc., R. Co., 57 Wis. 332; Chicago, etc., R. Co. *v.* Hurst, 30 Iowa 73. Separate appeals by landlord and tenant can not be consolidated. Ortman *v.* Union Pacific R. Co., 32 Kan. 419.

[5] Appeals by tenants in common, see Ruppert *v.* Chicago, etc., R. Co., 43 Iowa 490. It has been held that where the land in controversy is conveyed before the expiration of the time limited for appealing the grantee may appeal. Carli *v.* Stillwater, 16 Minn. 260. See Trogden *v.* Winona, etc., R. Co., 22 Minn. 198; Blackshire *v.* Atchison, etc., R. Co., 13 Kan. 514;

Where notice of an appeal is required by statute it must be given in the manner and within the time prescribed,[1] but in many jurisdictions parties in court must take notice of the appeal. In some jurisdictions, issues formed in the court below are passed upon in the same manner as if the action were originally brought in the appellate court.[2] The general rule is that questions not made in the court of original jurisdiction will not be considered on appeal.[3] If an appeal is taken from an award of damages covering more than one tract of land, the order may be reversed as to one of the tracts and affirmed as to another.[4] In some jurisdictions the effect of an appeal is to

McIntyre *v.* Easton, etc., R. Co., 26 N. J. Eq. 425.

[1] Neff *v.* Chicago, etc., R. Co., 14 Wis. 370; Klein *v.* St. Paul, etc., R. Co., 30 Minn. 451; Maxwell *v.* La Brune, 68 Iowa 689. Where notices of the appeal was required to be served on the opposite party, it was held insufficient to serve notice on the attorney of the railroad company. Hartman *v.* Belleville, etc., R. Co., 64 Ill. 24. See *Contra*, Hahn *v.* Chicago, etc., R. Co., 43 Iowa 333. But where the land-owner was authorized to serve notice of appeal upon an agent of the railroad company, service upon the civil engineer employed to survey and locate its route was held good. Jamison *v.* Burlington, etc., R. Co., 69 Iowa 670. Under the Wisconsin statute, notice of the appeal need not be served on the opposite party. Weyer *v.* Milwaukee, etc., R. Co., 57 Wis. 329. Objections to the jurisdiction for this cause are not waived by the appearance of the defendant in obedience to a summons to testify as a witness. People *v.* Osborn, 20 Wend. (N. Y.) 186. Nor by a special appearance on his part to move to dismiss the appeal for lack of jurisdiction. Klein *v.* St. Paul, etc., R. Co., 30 Minn. 451.

[2] Phifer *v.* Carolina Central R. Co., 72 N. C. 433; Schermeely *v.* Stillwater, etc., Co., 16 Minn. 506; Breitweiser *v.* Fuhrman, 88 Ind. 28; Hord *v.* Nashville, etc., R. Co., 2 Swan (Tenn.) 497. In some states the appellate court must proceed according to the practice prescribed for the commissioners. Gold *v.* Vermont Central R. Co., 19 Vt. 478.

[3] Secombe *v.* Railroad Co., 23 Wall. 108; Baltimore, etc., R. Co. *v.* Pittsburgh, etc., Co., 17 W. Va. 812; Booker *v.* Venice, etc., R. Co., 101 Ill. 333, s. c. 5 Am. & Eng. R. Cas. 357; Webster *v.* Kansas City, etc., R. Co., 116 Mo. 114, s. c. 22 S. W. R. 474; Fitchburg R. Co. *v.* Boston, etc., Co., 3 Cush. 58.

[4] Stockton, etc., R. Co. *v.* Galgiani, 49 Cal. 139; Chicago, etc., R. Co. *v.* Hildebrand, 136 Ill. 467, s. c. 27 N. E. R. 69. The objection that several tracts of land were improperly joined in a single joint assessment can not be made for the first time on appeal. Kankakee, etc., R. Co. *v.* Chester, 62 Ill. 235. Where a single owner takes several appeals as to different tracts of land for which the damages were assessed in a single proceeding the appeals may be consolidated. Washburn *v.* Milwaukee, etc., R. Co., 59 Wis. 364. See, generally, upon the subject of reversing in part, Wiscon-

vacate the proceedings appealed from,[1] but in other jurisdictions a different rule prevails.[2]

§ 1054. **Certiorari.**—In some jurisdictions an appropriate mode of reviewing proceedings in cases involving the exercise of the power of eminent domain is by *certiorari*.[3] In some of the states, in cases where the court has failed to acquire jurisdiction of the defendant's person, a writ of *certiorari* is the proper remedy.[4] This is a common law writ which is usually granted only in cases where an appeal is not available,[5] upon

sin, etc., R. Co. *v.* Cornell, etc., 49 Wis. 162, s. c. 5 N. W. R. 331.

[1] City of Kansas *v.* Kansas Pacific R. Co., 18 Kan. 331; Pool *v.* Breese, 114 Ill. 594. Where the land-owner appeals, a discontinuance of the proceeding by the railroad company will permanently vacate the award. Wright *v.* Wisconsin Central R. Co., 29 Wis. 341.

[2] Lake Erie, etc., R. Co. *v.* Kinsey, 87 Ind. 514, s. c. 14 Am. & Eng. R. Cas. 309. See, generally, Peterson *v.* Ferreby, 30 Iowa 327; Corbin *v.* Cedar Rapids, etc., R. Co., 66 Iowa 73, s. c. 23 N. W. R. 270; New York, etc., R. Co. *v.* Townsend, 36 Hun 630; City of Sedalia *v.* Missouri, etc., R. Co., 17 Mo. App. 105; Jersey City, etc., R. Co. *v.* Central R. Co., 48 N. J. Eq. 379, s. c. 22 Atl. R. 728.

[3] Willson *v.* Gifford, 42 Mich. 454; Adams *v.* Newfane, 8 Vt. 271; Chicago, etc., R. Co. *v.* Young, 96 Mo. 39; State *v.* Mayor, etc., of Ashland, 71 Wis. 502; Freeman *v.* Ogden, 40 N. Y. 105.

[4] Dunlap *v.* Toledo, etc., R. Co., 46 Mich. 190; Bixby *v.* Goss, 54 Mich. 551; South Wales R. Co. *v.* Richards, 6 Eng. Railw. & Canal Cas. 197. It is said that, ordinarily, the court will refuse to grant a writ of *certiorari* where the lack of jurisdiction appears on the face of the proceedings, but will leave the party to his action for trespass. Baltimore, etc., R. Co. *v.* Northern, etc., R. Co., 15 Md. 193; Reg. *v.* Bristol, etc., Ry., 11 Ad. & Ell. 202, s. c. 2 Eng. Railw. & Canal Cas. 99. One against whom it is sought to enforce a judgment although he was not a party, may apply for a *certiorari*. Clary *v.* Hoagland, 5 Cal. 476. A writ of *certiorari* has been granted to review proceedings in which an order was made which the court had no jurisdiction to make, when the petitioner was about to proceed under this void order, to commit a trespass on the land concerning which it was made. California Pac. R. Co. *v.* Central Pac. R. Co., 47 Cal. 528.

[5] Boston, etc., R. Co. *v.* Folsom, 46 N. H. 64; Dunlap *v.* Toledo, etc., R. Co., 46 Mich. 190; Cedar Rapids, etc., R. Co. *v.* Whelan, 64 Iowa 694. The granting of a writ of *certiorari* is largely in the discretion of the court, and it will not be granted to review technical errors where substantial justice has been done. Boston, etc., R. Co. *v.* Folsom, 46 N. H. 64; Board *v.* Magoon, 109 Ill. 142; Keys *v.* Board, etc., 42 Cal. 252. For other cases in which *certiorari* has been granted see Delaware, etc., R. Co. *v.* Burson, 61 Pa. St. 369; Central R. Co. *v.* Pennsylvania R. Co., 31 N. J. Eq. 475; State *v.* Montclair R. Co., 35 N. J. Law 328; Fitch-

petition stating a sufficient cause[1] and properly supported by affidavit.[2] Upon the return of the writ, the proceedings of the inferior tribunal, as shown by the record,[3] are examined, and

burg, R. Co. *v.* Boston, etc., R. Co., 3 Cush. (Mass) 58; Worcester R. Co. *v.* Railroad Commissioners, 118 Mass. 561. After the time for an appeal has been suffered to elapse the court will not grant a writ of *certiorari* to review the proceedings unless some good excuse for the delay is shown. Dunlap *v.* Toledo, etc., R. Co., 46 Mich. 190. An error in the amount of damages awarded can not be corrected by *certiorari*. The proper course is to appeal. Detroit, etc., R. Co. *v.* Graham, 46 Mich. 642.

[1] Some injury must be shown to have resulted from the errors complained of. Boston, etc., R. Co. *v.* Folsom, 46 N. H. 64; Pagels *v.* Oaks, 64 Iowa 198; Pickford *v.* Mayor, etc., of Lynn, 98 Mass. 491. A timely application for the writ must be made or it will be refused. Wilder *v.* Hubbell, 43 Mich. 487; Spofford *v.* Bucksport, etc., R.Co., 66 Me. 26. Where the writ was asked to review the action of the county commissioners in dismissing the petition to revise the award, because of a failure to prosecute the same, it was held that the provisions of the statute directing the dismissal of such a petition if the party failed to prosecute it at the next regular term after it was filed, unless good cause for delay was shown, conferred upon the commissioners authority to decide whether the excuse offered for the delay was sufficient, and that the supreme court would not revise that decision. Portland, etc., Co. *v.* County Commissioners, 64 Me. 505. Where the record of the proceedings of a board of commissioners in locating railroad crossings, and altering the courses of roads, were so defective as to be unintelligible without the aid of parol evidence, it was held proper to grant a writ of *certiorari* to review them. Portland, etc., R. Co. *v.* County Commissioners, 65 Me. 292. In many of the states a party who shows equity may have an injunction in cases where the proceedings are void because jurisdiction does not exist.

[2] State *v.* Little, 49 N. J. Law 182; Chambers *v.* Lewis, 9 Iowa 583. Counter affidavits are admissible to show the waiver of the alleged irregularities. Spofford *v.* Bucksport, etc., R. Co., 66 Me. 26; Bresler *v.* Ellis, 46 Mich. 335. The fact that improper items of injury were considered in estimating the damages may be shown by affidavit. *In re* Penny, 7 Ell. & Bl. 660. The affidavits must show positively that the errors have been committed. Reg *v.* Manchester, etc., R. Co., 8 Ad. & Ell. 413.

[3] Philadelphia, etc., R. Co. *In re*, 6 Wharton (Pa.) 25; Church *v.* Northern Central R. Co., 45 Pa. St. 339. It is held that the return to the writ is conclusive. Traverse City, etc., R. Co. *v.* Seymour, 81 Mich. 378, s. c. 45 N. W. R. 826; Forbes *v.* Delashmutt, 68 Iowa 164, s. c. 26 N. W. R. 56. As to requisites of return, see Palmer *v.* Forsyth, 4 Barn. & C. 401; Stone *v.* New York, 25 Wend. 157; Starr *v.* Rochester, 6 Wend. 565. As to what questions may be considered on the hearing, see Schroeder *v.* Detroit, etc., R. Co., 44 Mich. 387, s. c. 6 N. W. R. 872; New Jersey, etc., R. Co. *v.* Suydam, 17 N. J. Law 25; Chambers, etc., R. Co. *v.* Carteret, etc., R. Co., 54 N. J. Law 85, s. c. 22 Atl. R. 995; Church *v.* Northern, etc., R. Co., 45 Pa. St. 339.

its judgment affirmed or set aside, as the proceedings are shown to have been authorized by law and conducted in accordance with correct principles or not.[1] No question which did not properly come before the commissioners can be considered on *certiorari* to review their action. If they are found to have had jurisdiction, the court will only inquire whether their proceedings have been legally conducted.[2]

§ 1055. **Company a trespasser where proceedings are void.** —It is held in a number of cases that unless it has pursued the statutory method for acquiring property, a railroad company which takes possession of property without the consent of the land-owner is a trespasser.[3] But in our opinion the company should not be regarded as a naked trespasser where it acts in good faith and enters into possession under color and claim of right. Where there is good faith and color of right the company ought, as we believe, to be held to pay just compensation and damages, but should not be compelled to lose the improvements it has made.[4] As we have elsewhere shown, the adjudged cases declare that a company that enters, without right, may be ousted by an action of ejectment,[5] but we think this rule

[1] Questions of law only are considered on *certiorari*. Schroeder *v.* Detroit, etc., R. Co., 44 Mich. 387. *In re* Germantown Avenue, 99 Pa. St. 479; Low *v.* Galena, etc., R. Co., 18 Ill. 324; Everett *v.* Cedar Rapids, etc., R. Co., 28 Iowa 417.

[2] Crandell *v.* Taunton, 110 Mass. 421; Commissioners *v.* Supervisors, 27 Ill. 140; McAllilley *v.* Horton, 75 Ala. 491. Commissioners to assess damages for land taken by a railroad company have no authority to decide as to its corporate existence and right to take land *in invitum*, and a writ of *certiorari* to review their action brings no such question before the court. Schroeder *v.* Detroit, etc., R. Co., 44 Mich. 387.

[3] Bothe *v.* Dayton, etc., R. Co., 37 Ohio St. 147; Hull *v.* Chicago, etc., R. Co., 21 Neb. 371; Kanne *v.* Minneapolis, etc., R. Co., 33 Minn. 419; Memphis, etc., R. Co. *v.* Parsons Town Co., 26 Kan. 503; Adams *v.* Saratoga, etc., R. Co., 10 N. Y. 328; Ells *v.* Pacific R.Co., 51 Mo. 200; Moses *v.* St. Louis Sectional Dock Co., 84 Mo. 242; Harris *v.* Marblehead, 10 Gray (Mass.) 40; Blaisdell *v.* Winthrop, 118 Mass. 138; Smith *v.* Chicago, etc., R. Co., 67 Ill. 191; Peoria, etc., R. Co. *v.* Schertz, 84 Ill. 135; Ewing *v.* St. Louis, 5 Wall. (U. S.) 413.

[4] *Ante*, §§ 997, 998.

[5] McClinton *v.* Pittsburgh, etc., R. Co., 66 Pa. St. 404; Justice *v.* Nesquehoning Valley R. Co., 87 Pa. St. 28; Wilmington, etc., R. Co. *v.* High, 89 Pa. St. 282; Daniels *v.* Chicago, etc., R. Co., 35 Iowa 129; Conger *v.* Burlington etc., R. Co., 41 Iowa 419; Jones *v.* New Orleans, etc., R. Co., 70 Ala.

does not apply where there is an estoppel or unexcused acquiescence, but that there should be full compensation for the property taken and the injury inflicted.[1] Where the entry is without right the land-owner is entitled to full compensation for the loss suffered by him, and, according to the weight of authority, may, if there is no element of estoppel, proceed against the company as a trespasser.[2] It seems to us that

227; Smith *v.* Inge, 80 Ala. 283; Walker *v.* Chicago, etc., R. Co., 57 Mo. 275; Stewart *v.* Camden, etc., R. Co., 33 N. J. Law 115; Graham *v.* Columbus, etc., R. Co., 27 Ind. 260; Cox *v.* Louisville, etc., R. Co., 48 Ind. 178; Robinson *v.* Pittsburgh R. Co., 57 Cal. 417; Gilman *v.* Sheboygan R. Co., 40 Wis. 653; Rusch *v.* Milwaukee, etc., R. Co., 54 Wis. 136; Galveston, etc., R. Co. *v.* Pfeuffer, 56 Tex. 66; St. Joseph, etc., R. Co. *v.* Callender, 13 Kan. 496; Harrington *v.* St. Paul, etc., R. Co., 17 Minn. 215; Baker *v.* Long Island R. Co., 1 How. (N. Y.) Pr. 214; Lozier *v.* New York Cent. R. Co., 42 Barb. (N. Y.) 465. In states where the compensation is not required to precede the taking, a mere entry is held not to be a trespass. Louisville, etc., R. Co. *v.* Quinn, 14 Lea (Tenn.) 65; Turrell *v.* Norman, 19 Barb. (N. Y.) 263. But if compensation is not made within a reasonable time the corporation may be held liable as a trespasser *ab initio*. Cushman *v.* Smith, 34 Me. 247. Where the owner consented to an entry in reliance upon a promise of the company to make compensation, it was held that, upon its failure to fulfill this promise, the land-owner could sue in trespass. Evansville, etc., R. Co. *v.* Grady, 6 Bush (Ky.) 144. If the consent of the owner was upon condition, all conditions must be shown to have been fulfilled before the land-owner will be enjoined from prosecuting an action of trespass for the damage done by the construction of the railroad and operation of its trains across his land. Baltimore, etc., R. Co. *v* Algire, 65 Md. 337. Where a land-owner has expressly forbidden a railroad company to enter upon her land, mere acquiescence on her part in the subsequent construction of the road across her land will not estop her to sue in trespass for damages. Currie *v.* Natchez, etc., R. Co., 61 Miss. 725, 62 Miss. 506.

[1] *Ante*, §§ 1048, 1049.

[2] Mueller *v.* St. Louis, etc., R. Co., 31 Mo. 262; Jones *v.* New Orleans, etc., R. Co., 70 Ala. 227; Hursh *v.* First Division St. Paul, etc., R. Co., 17 Minn. 439; Schroeder *v* De Graff, 28 Minn. 299; Hooker *v.* New Haven, etc., R. Co., 14 Conn. 146; Baltimore, etc., R. Co. *v.* Boyd, 63 Md. 325; Atchison, etc., R. Co. *v.* Weaver, 10 Kan. 344; President, etc., Crawfordsville, etc., R. Co., *v.* Wright, 5 Ind. 252; Anderson, etc., R. Co. *v.* Kernodle, 54 Ind. 314; Smart *v.* Portsmouth, etc., R. Co., 20 N. H. 233; Eaton *v.* Boston, etc., R. Co., 51 N. H. 504; Potter *v.* Ames, 43 Cal. 75; Buffalo Bayou, etc., R. Co. *v.* Ferris, 26 Tex. 588; Loop *v.* Chamberlain, 20 Wis. 135; Rusch *v.* Milwaukee, etc., R. Co., 54 Wis. 136; Terpening *v.* Smith, 46 Barb. (N. Y.) 208; Secomb *v.* Milwaukee, etc., R. Co., 49 How. (N. Y.) Pr. 75; Blodgett *v.* Utica, etc., R. Co., 64 Barb. (N. Y.) 580; Memphis, etc., R. Co. *v.* Payne, 37 Miss. 700; Pres-

where there is good faith and color of right, the company may, on payment or tender of full compensation, hold the land in cases where it has constructed its road, but that in order to give it this right, payment or tender should be made within a reasonable time.

cott *v.* Patterson, 44 Mich. 525; Wamesit, etc., Co. *v.* Allen, 120 Mass. 352; Warren *v.* Spencer Water Co., 143 Mass. 9; Murray *v.* Fitchburg R. Co., 130 Mass. 99; Storer *v.* Hobbs, 52 Me. 144; Henry *v.* Dubuque, etc., R. Co., 10 Iowa 540; Birge *v.* Chicago, etc., R. Co., 65 Iowa 440; Taylor *v.* Marcy, 25 Ill. 518; Capers *v.* Augusta, etc., R. Co., 76 Ga. 90; Whitehead *v.* Arkansas Central R. Co., 28 Ark. 460; Ramsden *v.* Manchester,etc.,R. Co., 1 Exch. 723.

CHAPTER XLI.

CONSTRUCTION.

§ 1056. Duty to construct—Authority and care required in construction.
1057. Liability for injuries caused by construction — Consequential damages.
1058. Construction contracts.
1059. Engineers' estimates and certificates.
1060. Extra work.
1061. Subcontractors.
1062. Breach of contract — Remedies.
1063. Liability of the company for injuries resulting from negligence of contractor or his servants.
§ 1064. Liability of contractor—Joint liability.
1065. Rights of laborers.
1066. Mechanics' liens — General laws do not include railroads.
1067. Statutes authorizing liens.
1068. For what lien may be obtained.
1069. Upon what lien may be acquired.
1070. Who may acquire lien.
1071. Mode of acquiring lien.
1072. Priority of liens.
1073. Assignability of lien.
1074. Enforcement of lien.
1075. Waiver of lien.

§ 1056. **Duty to construct—Authority and care required in construction.**—Many of the specific subjects which we have already considered, or will hereafter consider, are intimately connected with the general subject of this chapter. Some of them, indeed, are parts of the same great subject; but, because of their importance and their completeness in themselves, it has been deemed advisable to treat them separately. Thus, the subject of the construction of crossings and that of the construction of fences will be hereafter considered in separate chapters. So, the duty of railroad companies to construct their roads,[1] the time within which they must be constructed,[2]

[1] See *ante*, §§ 635, 638, 639. It has been held that words of mere permission in a charter do not *per se* make it obligatory upon the company to construct a road. York, etc., R. Co. *v.* Reg., 1 El. & B. 858; Rex *v.* Birmingham, etc., Nav., 2 W. Black. 708.

[2] As to when the road or its con-

in order to obtain a conditional subscription, or public aid, or to prevent a forfeiture, and the like, are matters that have already been considered. The duty to construct their roads may not only extend to the construction of road beds and tracks, but may also include the establishment of stations or depots. This is frequently required by statute, and, as we have already seen, there are some authorities which hold that this is a common law duty which may be enforced by mandamus, even in the absence of any statute upon the subject.[1] The company must, however, have authority to construct its road as located, must keep clearly within the bounds of the authority granted by the legislature,[2] and must use due care in the construction.[3] If it constructs a road without authority or in an unauthorized place and manner it may thus subject itself to liability as for a nuisance.[4]

§ 1057. Liability for injuries caused by construction—Consequential damages.—It is a general rule that the rightful and

struction is to be deemed to have been commenced, see State *v.* Wheadon, 39 Ind. 520; State *v.* Bergen, etc., R. Co., 33 N. J. L. 108, s. c. 20 Atl. R. 762; Ontario, etc., R. Co. *v.* Canadian Pac. R. Co., 14 Ont. 432.

[1] See *ante*, § 641.

[2] Hazen *v.* Boston, etc., R. Co., 2 Gray (Mass.) 574; Eaton *v.* European, etc., R. Co., 59 Me. 520; Lafayette, etc., Co. *v.* New Albany, etc., R. Co., 13 Ind. 90; Worster *v.* Forty-Second St. R. Co., 50 N. Y. 203; Georgetown, etc., R. Co. *v.* Eagles, 9 Colo. 544, s. c. 30 Am. & Eng. R. Cas. 228; Schuylkill, etc., Co. *v.* McDonough, 33 Pa. St. 73; Little Miami, etc., R. Co. *v.* Naylor, 2 Ohio St. 235, s. c. 59 Am. Dec. 667; *In re* Metropolitan, etc., Co., 111 N. Y. 588, s. c. 19 N. E. R. 645; City of Concord *v.* Concord etc., Co., 65 N. H. 30, 18 Atl. R. 87; Biscoe *v.* Great Eastern R. Co., 16 L. R. Eq. 636; Jones *v.* Festiniog R. Co., 3 L. R. Q. B. 733.

[3] Gilbert *v.* Savannah, etc., R. Co., 69 Ga. 396; Ohio, etc., R. Co. *v.* Wachter, 123 Ill. 440, s. c. 5 Am. St. R. 532; Chicago, etc., R. Co. *v.* Henneberry, 42 Ill. App. 126; Chicago, etc., R. Co. *v.* Schaffer, 124 Ill. 112; Brewer *v.* Boston, etc., R. Co., 113 Mass. 52; Spencer *v.* Hartford, etc., R. Co., 10 R. I. 14; Kansas Pac. R. Co. *v.* Lundin, 3 Colo. 94; Colorado, etc., Co. *v.* O'Brien, 16 Colo. 219, s. c. 27 Pac. R. 701; Van Orsdol *v.* Burlington, etc., R. Co., 56 Iowa 470, s. c. 9 N. W. R. 379; Heath *v.* Texas, etc., R. Co., 37 La. Ann. 728; Libby *v.* Maine, etc., R. Co., 85 Me. 34, s. c. 26 Atl. R. 943.

[4] Commonwealth *v.* Old Colony, etc., R. Co., 14 Gray (Mass.) 93; Commonwealth *v.* Erie, etc., R. Co., 27 Pa. St. 339, s. c. 67 Am. Dec. 47; McCandless' Appeal, 70 Pa. St. 210. See, also, Mahon *v.* New York, etc., Railroad Co., 24 N. Y. 658; Stewart's Appeal, 56 Pa. St. 413.

proper exercise of a lawful power or authority "can not afford a basis for an action."[1] It follows, therefore, that, in the absence of any statutory or constitutional provision to the contrary, a railroad company is not liable for consequential damages, arising from the construction of its road, so long as it keeps within the bounds of its authority and is not negligent in the manner of doing the work or exercising such authority.[2]

[1] Slatten *v.* Des Moines Valley R. Co., 29 Iowa 154, s. c. 4 Am. R. 205; Dodge *v.* County Comrs., 3 Met. (Mass.) 380; Hatch *v.* Vermont Cent. R. Co., 25 Vt. 49; Radcliff *v.* Mayor, 4 N Y. 195, s. c. 53 Am. Dec. 357, and note, citing and reviewing numerous authorities. See, also, Transportation Co. *v.* Chicago, 99 U. S. 635; Mersey Docks Trustees *v.* Gibbs, L. R. 1 H. L. 93, 112.

[2] Pierce on Railroads, 197, 263, 264; 2 Wood on Railroads, § 275; Boothby *v.* Androscoggin R. Co., 51 Me. 318; Cleveland, etc., R. Co. *v.* Speer, 56 Pa. St. 325, s. c. 94 Am. Dec. 84; Hougan *v.* Milwaukee R. Co., 35 Iowa 558; Sunbury, etc., R. Co. *v.* Hummell, 27 Pa. St. 99; Burroughs *v.* Housatonic R. Co., 15 Conn. 124; Aldrich *v.* Cheshire R. Co., 21 N. H. 359; Hodge *v.* Lehigh Val. R. Co., 39 Fed. R. 449; McCormick *v.* Kansas City, etc., R. Co., 57 Mo. 433; Lynn, etc., R. Co. *v.* Boston, etc., R. Co., 114 Mass. 88; Brown *v.* Providence, etc., R. Co., 5 Gray (Mass.) 35; Terre Haute, etc., R. Co. *v.* McKinley, 33 Ind. 274; Stone *v.* Fairbury, etc., R. Co., 68 Ill. 394, and authorities cited in the following note. See, also, Wabash, etc., Canal *v.* Spears, 16 Ind. 441; State *v.* Louisville, etc., R. Co., 86 Ind. 114; Shepherd *v.* Baltimore, etc., R. Co., 130 U. S. 426, s. c. 9 Sup. Ct. R. 598; Fitch *v.* New York, etc., R. Co., 59 Conn. 414; Losee *v.* Buchanan, 51 N. Y. 476, s. c. 10 Am. R. 623; Beseman *v.* Pennsylvania R. Co., 50 N. J. L. 235; Struthers *v.* Dunkirk, etc., R. Co., 87 Pa. St. 282. But in some jurisdictions it is held that this immunity does not extend to private or *quasi* public corporations, such as a railroad company, although it does to strictly public corporations, and that the legislature can not give a railroad company any other rights in this respect as against a landowner than an individual would have. See Cogswell *v.* New York, etc., Railroad Co., 103 N. Y. 10, s. c. 8 N. E. R. 537; Booth *v.* Rome, etc., R. Co., 140 N. Y. 267, s. c. 9 Lewis' Am. R. & Corp. Rep. 92, 37 Am. St. R. 552, 35 N. E. R. 592, followed in French *v.* Vix, 143 N. Y. 90. (But see Bellinger *v.* New York, etc., Railroad Co., 23 N. Y. 42; Conklin *v.* New York, etc., R. Co., 102 N. Y. 107.) Evansville, etc., R. Co. *v.* Dick, 9 Ind. 433, followed in Egbert *v.* Lake Shore, etc., R. Co., 6 Ind. App. 350; Staton *v.* Norfolk, etc., R. Co., 111 N. Car. 278, s. c. 17 L. R. A. 838, and note; Baltimore, etc., R. Co. *v.* Reaney, 42 Md. 117; Alton, etc., R. Co. *v.* Deitz, 50 Ill. 210; Baltimore, etc., R. Co. *v.* Fifth Baptist Church, 108 U. S. 317; Delaware, etc., Canal Co. *v.* Lee, 22 N. J. L. 243. It may be that authority to inflict consequential damages should be more readily inferred in the case of a public corporation than in that of a private corporation, but we do not believe there is any radical distinction which prevents the legislature from giving a *quasi* public corporation the same protection from liability for

The theory is that all damages incident to the authorized construction of the road in a careful and lawful manner are taken into consideration in determining the amount of compensation when the property is condemned or the right of way obtained.[1] But where its authority is negligently, unlawfully or improperly exercised the company may be held liable in damages to one who is injured thereby. Thus, it is liable for negligently or unlawfully throwing debris, dirt and rocks upon adjoining land,[2] or for trespassing thereon and digging up the soil,[3] or appropriating and converting material without authority.[4] So, railroad companies have been held liable for negligently constructing embankments in such a manner as to cause water to overflow the land of others,[5] for negligently depriving adjacent

consequential injuries, not amounting to a taking, that it may give a public corporation. Randolph on Em. Dom., § 139.

[1] Pierce on Railroads, 197, 264; Dearborn *v.* Boston, etc., R. Co., 24 N. H. 179; Clark's Admx. *v.* Hannibal, etc., R. Co., 36 Mo. 202; Pittsburg, etc., R. Co. *v.* Gilleland, 56 Pa. St. 445; Van Schoick *v.* Delaware, etc., Co., 20 N. J. L. 249; New Orleans, etc., R. Co. *v.* Brown, 64 Miss. 479; Watts *v.* Norfolk, etc., R. Co., 39 W. Va. 196, s. c. 19 S. E. R. 521, 23 L. R. A. 674; Blackwell *v.* Lynchburg, etc., R. Co., 111 N. Car. 151, 16 S. E. R. 12; Johnson *v.* Atlantic, etc., R. Co., 35 N. H. 569, s. c. 69 Am. Dec. 560; Porterfield *v.* Bond, 38 Fed. R. 391; *ante*, § 1004. Compare Lewis' Em. Dom., §§ 565, 566, 567.

[2] Georgetown, etc., R. Co. *v.* Eagles, 9 Colo. 544, s. c. 30 Am. & Eng. R. Cas. 228; Hendershott *v.* City of Ottumwa, 46 Iowa 658, s. c. 26 Am. R. 182; Hay *v.* Cohoes Co., 2 N. Y. 159, s. c. 51 Am. Dec. 279, and note; Norfolk, etc., R. Co. *v.* Carter, 91 Va. 587, 22 S. E. R. 517; Nicholson *v.* New York, etc., R. Co., 22 Conn. 74, s. c. 56 Am. Dec. 390; Elliott on Roads and Streets, 157.

[3] Cairo, etc., R. Co. *v.* Woosley, 85 Ill. 370; Doud *v.* Mason City, etc., Co., 76 Iowa 438, s. c. 41 N. W. R. 65.

[4] Railroad Co. *v.* Hutchins, 37 Ohio St. 282, s. c. 4 Am. & Eng. R. Cas. 219; Parsons *v.* Howe, 41 Me. 218; Moore *v.* City of Albany, 98 N. Y. 396; Vermont Cent. R. Co. *v.* Baxter, 22 Vt. 365.

[5] Lawrence *v.* Great Northern, etc., Co., 16 Ad. & El. (Q. B.) 643, s. c. 20 L. J. Q. B. 293; Kansas City, etc., R. Co. *v.* Lackey, 72 Miss. 881, 16 So. R. 909; Hunt *v.* Iowa Cent. R. Co., 86 Iowa 15, s. c. 41 Am. St. R. 473; Henry *v.* Ohio, etc., R. Co., 40 W. Va. 234, s. c. 21 S. E. R. 863. See, also, Staton *v.* Norfolk, etc., R. Co., 111 N. Car. 278, s. c. 17 L. R. A. 838; Eaton *v.* Boston, etc., R. Co., 51 N. H. 504; Galveston, etc., Co. *v.* Bibb, 3 Tex. App. (Civil Cases) 330; Ohio, etc., R. Co. *v.* Thillman, 143 Ill. 127, s. c. 36 Am. St. R. 359. But the right to properly erect embankments may be implied from the power and duty to provide suitable and safe roadways. Kansas City, etc., R. Co. *v.* Smith, 72 Miss. 677, 27 L. R. A. 762, s. c. 17 So. R. 78; Hodge *v.* Lehigh Valley R. Co., 39 Fed. R. 449. And the liability in most states does not

land of its lateral support,[1] for obstructing navigation,[2] for negligently leaving work in a public street in a dangerous condition so that one who is properly using the street is injured thereby,[3] and for various other negligent acts in the construction of the road resulting in injury to others.[4] The question as to the liability of railroad companies for injuries or damages caused by blasting has given rise to some difference of opinion. There can be no doubt that the company is liable for injuries proximately caused by its negligence in blasting,[5] and some

extend to injuries caused by properly fighting off surface water. Missouri Pac. R. Co. *v.* Renfro, 52 Kan. 237, s. c. 39 Am. St. R. 344; Bunderson *v.* Burlington, etc., R. Co., 43 Neb. 545, s. c. 61 N. W. R. 721; Jordan *v.* St. Paul, etc., R. Co., 42 Minn. 172; Hannaher *v.* St. Paul, etc., R. Co., 5 Dak. 1; Atchison, etc., R. Co. *v.* Hammer, 22 Kan. 763, s. c. 31 Am. R. 216; Edwards *v.* Charlotte, etc., R. Co., 39 S. Car. 472, s. c. 39 Am, St. R. 746; Mills on Em. Dom., §§ 187, 189; Cairo, etc., R. Co. *v.* Stevens, 73 Ind. 278; Jean *v.* Pennsylvania Co., 9 Ind. App. 56, s. c. 36 N. E. R. 159. As to what is surface water, see Cairo, etc., R. Co. *v.* Brevoort, 62 Fed. R. 129, and authorities there cited.

[1] Larson *v.* Metropolitan, etc., Co., 110 Mo. 234, s. c. 33 Am. St. R. 439, and note; Richardson *v.* Vermont, etc., R. Co., 25 Vt. 465, s. c. 60 Am. Dec. 283; Parke *v.* Seattle, 5 Wash. 1, s. c. 20 L. R. A. 68; Rau *v.* Minnesota Valley R. Co., 13 Minn. 442; Charless *v.* Rankin, 22 Mo. 566, s. c. 66 Am. Dec. 642, and note; City of Quincy *v.* Jones, 76 Ill. 231, s. c. 20 Am. R. 243. We do not here consider whether there is a liability in the absence of negligence nor whether this constitutes a taking. There is conflict among some of the authorities upon that point, as well as to how far the right to lateral support extends. See elaborate note to Larson *v.* Metropolitan, etc., Co., 33 Am. St. R. 439, 446, *et seq.*; Elliott on Roads and Streets, 157, 350; Nichols *v.* City of Duluth, 40 Minn. 389, s. c. 12 Am. St. R. 743; Parke *v.* Seattle, 5 Wash. 1, s. c. 20 L. R. A. 68, and authorities cited in both the prevailing and dissenting opinion. Compare Hortsman *v.* Covington, etc., R. Co., 18 B. Mon. (Ky.) 218, with Eaton *v.* Boston, etc., R. Co., 51 N. H. 504, and see Lewis Em. Dom., § 569. See, also, *ante*, § 977.

[2] Tuckahoe Canal Co. *v.* Tuckahoe, etc., R. Co., 11 Leigh (Va.) 42. See, also, Philadelphia, etc., R. Co. *v.* Philadelphia, etc., Co., 23 How. (U. S.) 209.

[3] Gudger *v.* Western, etc., R. Co., 87 N. Car. 325, s. c. 19 Am. & Eng. R. Cas. 144; Hogan *v.* Kentucky Union R. Co., (Ky.), 21 S. W. R. 242.

[4] See Watts *v.* Norfolk, etc., R. Co., 39 W. Va. 196, s. c. 19 S. E. R. 521; Hunt *v.* Iowa Cent. R. Co., 86 Iowa 15, s. c. 52 N. W. R. 668; Roushlange *v.* Chicago, etc., R. Co., 115 Ind. 106, s. c. 17 N. E. R. 198; Payne *v.* Morgan's, etc., Co., 38 La. Ann. 164, s. c. 58 Am. R. 174.

[5] Sabin *v.* Vermont Cent. R. Co., 25 Vt. 363; Blackwell *v.* Lynchburg, etc., R. Co., 111 N. Car. 151, s. c. 16 S. E. R. 12; Tissue *v.* Baltimore, etc., R. Co., 112 Pa. St. 91, s. c. 3 Atl. R. 667;

courts seem to hold that it may be liable, even in the absence of negligence.[1] Thus, in one case it was held that a hotel-keeper could recover for loss of business, or rents and profits, caused by his guests and tenants leaving the hotel in fear of falling rock and debris resulting from the blasting, although there was nothing to show that it was negligently done.[2] But where there is no physical invasion and no negligence, as, for instance, in cases in which the injury is caused by mere vibration necessarily resulting from the blasting, it seems that the company is not liable.[3] So, upon the theory that all damages likely to arise from necessary and proper blasting should be considered and allowed in the condemnation proceedings, and may be presumed to have been so considered and allowed, it is generally held that the company is not liable for casting rocks and debris upon adjoining land in the proper and careful exercise of its authority to use all necessary and appropriate means to construct its road, although it may be liable for not removing the debris within a reasonable time.[4] It would seem,

Beauchamp *v.* Saginaw, etc., Co., 50 Mich. 163, s. c. 45 Am. R. 30; Hinkle *v.* Richmond, etc., R. Co., 109 N. Car. 472, s. c. 26 Am. St. R. 581; Klepsch *v.* Donald, 4 Wash. 436, s. c. 31 Am. St. R. 936.

[1] Carman *v.* Steubenville, etc., R. Co., 4 Ohio St. 399; Hay *v.* Cohoes Co., 2 N. Y. 159, s. c. 51 Am. Dec. 279; Scott *v.* Bay, 3 Md. 431; Colton *v.* Onderdonk, 69 Cal. 155; Munro *v.* Pacific, etc., R. Co., 84 Cal. 515, s. c. 24 Pac. R. 303.

[2] Georgetown, etc., R. Co. *v.* Doyle, 9 Colo. 549, s. c. 30 Am. & Eng. R. Cas. 231; Georgetown, etc., R. Co. *v.* Eagles, 9 Colo. 544, s. c. 30 Am. & Eng. R. Cas. 228. See, also, Hunter *v.* Farren, 127 Mass. 481, s. c. 34 Am. R. 423.

[3] Booth *v.* Rome, etc., R. Co., 140 N. Y. 267, s. c. 35 N. E. R. 592, 9 Lewis' Am. R. & Corp. R. 92, 37 Am. St. R. 552; Louisville, etc., R. Co. *v.* Bonhayo, 94 Ky. 67, 21 S. W. R. 526. See, also, Fenwick *v.* East London, etc., R. Co., L. R. 20 Eq. 544; French *v.* Vix, 143 N. Y. 90; Benner *v.* Atlantic, etc., Co., 134 N. Y. 156, s. c. 17 L. R. A. 220. In the first case above cited, it was held that the company was not liable in the absence of negligence, although the court which decided it has gone as far at least as any other court towards holding that a railroad company is no more protected from liability in such a case than an individual and that the rule which protects a public corporation does not apply to a railroad company.

[4] Whitehouse *v.* Androscoggin R. Co., 52 Me. 208; Sabin *v.* Vermont Cent. R. Co., 25 Vt. 363; Dodge *v.* County Commissioners, 3 Metc. (Mass.) 380; Brown *v.* Providence, etc., R. Co., 5 Gray (Mass.) 35; Pro-

however, that this rule exempting the company from further liability where the injury was taken into consideration or may be presumed to have been taken into consideration in allowing damages in the condemnation proceedings, can not apply where the injury caused by blasting is to persons and property not affected by the original condemnation proceedings.

§ 1058. **Construction contracts.**—It is said that it is against public policy to let contracts for the construction of a railroad to a director or officer of the company as "the law will not permit the agent to place himself in a situation in which he may be tempted by his own private interest to disregard that of his principal"[1] and on the same grounds it has been held that such a contract can not be assigned to a director or officer.[2] An agreement by which directors are to share with the contractor in the profits of a contract with the company can only be confirmed, so as to be binding, by the stockholders and not by the board of directors of which the guilty parties are a part,[3] and even if confirmed by the stockholders and the company, such a contract is open to attack by creditors or bondholders affected by the fraud and may be set aside by a court of equity.[4]

prietors of Locks *v.* Nashua, etc., R. Co., 10 Cush. (Mass.) 385; Watts *v.* Norfolk, etc., R. Co., 39 W. Va. 196, s. c. 19 S. E. R. 570; Blackwell *v.* Lynchburg, etc., R. Co., 111 N. Car. 151, s. c. 16 S. E. R. 12, s. c. 32 Am. St. R. 786.

[1] Flint, etc., R. Co. *v.* Dewey, 14 Mich. 477; Thomas *v.* Brownville, etc., R. Co., 109 U. S. 522, 16 Am. & Eng. R. Cas. 557; Blake *v.* Buffalo, etc., R. Co., 56 N. Y. 485; European, etc., R. Co. *v.* Poor, 59 Me. 277; Ryan *v.* Leavenworth, etc., R. Co., 21 Kan. 365; Gilman, etc., R. Co. *v.* Kelly, 77 Ill. 426; Wardell *v.* Union Pac. R. Co., 4. Dill. (U. S.) 330; United States *v.* Union Pac. R. Co., 98 U. S. 569, 610; Woodstock Iron Co. *v.* Richmond, etc., Co., 129 U. S. 643, 9 Sup. Ct. R. 402. Stockholders or bondholders, or a corporation itself may bring suit to set aside a construction contract with a dominant stockholder for his own benefit. Central Trust Co. *v.* Bridges, 57 Fed. R. 753.

[2] Paine *v.* Lake Erie, etc., R. Co., 31 Ind. 283; Flint, etc., R. Co. *v.* Dewey, 14 Mich. 477.

[3] Paine *v.* Lake Erie, etc., R. Co., 31 Ind. 283.

[4] Paine *v.* Lake Erie, etc., R. Co., 31 Ind. 283. Such contracts when executed are voidable only upon attack by stockholders or existing creditors, i. e., parties affected by the fraud, and can not be denied on the same ground by the contractor. Robison *v.* Mc-

Where a construction contract was otherwise free from fraud, however, the fact that the president of the company had an interest in it unknown to the directors, was held, in a recent case, not to render it absolutely void, and all parties interested having tacitly ratified the contract after discovering his interest they were not allowed to disaffirm it long afterwards.[1] But all such contracts are regarded with suspicion and, at least in the absence of good faith, are voidable, or according to some authorities, "void, upon the clearest principles of public policy."[2] Where a construction contract is signed by the company only, but is assigned by the contractor, the assignment is held to be evidence of acceptance by the contractor;[3] and so on the other hand, a company can not repudiate a contract by questioning the authority of the officer who executed it, when the contractor has performed and received pay for a large portion of the work with the knowledge and ratification of the company, and the contractor may recover damages for a wrongful obstruction of the progress of his work.[4] So where contractors submitted bids to receivers for the completion of construction in accordance with the order of the court and a written contract was drawn up and signed by the contractors, and one of the receivers testified that the receivers accepted the same while the other receiver knew the work was going on, but professed ignorance of the contract, it was held that the evidence justified a finding that the work was done under a valid

Cracken, 52 Fed. R. 726, citing Barr *v.* New York, etc., Railroad Co., 125 N. Y. 263, 26 N. E. R. 145; Thomas *v.* Brownville, etc., Railroad Co., 109 U. S. 522, 3 Sup. Ct. R. 315; Railroad Co. *v.* Durant, 95 U. S. 576. See Union Pac. R. Co. *v.* Credit Mobilier, 135 Mass. 367, 16 Am. & Eng. R. Cas. 570.

[1] Augusta, etc., R. Co. *v.* Kittel, 52 Fed. R. 63. A president of a railway corporation taking an assignment of such a contract will hold it in trust for the company. Risley *v.* Indianapolis, etc., R. Co., 1 Hun 202, 62 N. Y. 240.

[2] *Ante*, §§ 276, 348; Wardell *v.* Union Pac. R. Co., 4 Dill. (U. S.) 330, per Miller, J. In Union Pac. R. Co. *v.* Credit Mobilier, 135 Mass. 367, 16 Am. & Eng. R. Cas. 570, it was held that the granting of a construction contract to a company in which the railway officers were interested was not fraud where the railway stockholders had opportunity to become stockholders in the construction company.

[3] Western M. R. Co. *v.* Orendorff, 37 Md. 328.

[4] Buffalo, etc., Co. *v.* Whitehead, 8 Grant's Ch. (U. C.) 157.

contract with the receivers.[1] Contracts for the construction of railways are subject to the same rules of construction as other contracts,[2] but for the reason that the time within which a railroad must be completed is often prescribed in the charter of the company and that it is a matter of public concern that the road should be well and safely constructed, the law sometimes allows and enforces provisions in this class of contracts which would not usually be binding in ordinary contracts.[3] The right to terminate the contract is often reserved to the railway company, when, in its opinion, the work is not progressing properly, or the contractor is not duly complying with the provisions of the contract, or his acts are negligent and wrongful.[4]

[1] Girard, etc., Co. *v.* Cooper, 51 Fed. R. 332, 4 U. S. App. 631.

[2] For construction of particular contracts, see Mansfield *v.* New York, etc., R. Co., 102 N. Y. 205, 24 Am. & Eng. R. Cas. 628; Campbell *v.* Trustees of Cincinnati, etc., Co., (Ky.), 6 S.W.R.337, 34 Am. & Eng. R. Cas. 113; Wright *v.* Kentucky, etc., R. Co., 117 U. S. 72, 24 Am. & Eng. R. Cas. 312; Brownlee *v.* Lowe, 117 Ind. 420, 20 N. E. R. 301; Laidlou *v.* Hatch, 75 Ill. 11; Ayres *v.* Chicago, etc., R. Co., 52 Iowa 478, 3 N. W. R. 522; Smith *v.* Boston, etc., R. Co., 36 N. H. 458; Woodruff *v.* Rochester, etc., R. Co., 108 N. Y. 39; Wolff *v.* McGavock, 29 Wis. 290; Snell *v.* Cottingham, 72 Ill. 161; Hutchinson *v.* New Sharon, etc., R. Co., 63 Iowa 727, 16 Am. & Eng. R. Cas. 617; Louisville, etc., R. Co. *v.* Hollerbach, 105 Ind. 137, 24 Am. & Eng. R. Cas. 340; Dudley *v.* Toledo, etc., R. Co., 65 Mich. 655, 30 Am. & Eng. R. Cas. 236. Time of payment where not specified. Boody *v.* Rutland, etc., R. Co., 24 Vt. 660. Payment on forfeiture. Hennessey *v.* Farrell, 4 Cush. (Mass.) 267; Phelan *v.* Albany, etc., R. Co., 1 Lans. (N. Y.) 258. On contract to construct road-bed between two towns, construction to the corporate limits of each will not complete performance. Western Union R. Co. *v.* Smith, 75 Ill. 496. The practical construction given by the parties should control. Galveston, etc., R. Co. *v.* Johnson, 74 Tex. 256.

[3] 2 Wood on Railroads, § 277; 1 Redfield's Law of Railways, § 112.

[4] The validity of such reservations is denied by some authorities which hold that they do not preclude resort to the courts. Kistler *v.* Indianapolis, etc., R. Co., 88 Ind. 460, 12 Am. & Eng. R. Cas. 314; Louisville, etc., R. Co. *v.* Donnegan, 111 Ind. 179, 34 Am. & Eng. R. Cas. 116. See, also, Starkey *v.* DeGraff, 22 Minn. 431. But the weight of authority sustains the doctrine that such a stipulation precludes an action at law concerning the matters embraced in the stipulation, unless the estimate of the arbiter is assailed by allegations of fraud or gross error implying bad faith. See Grant *v.* Savannah, etc., R. Co., 51 Ga. 348; Martinsburg, etc., R. Co. *v.* March, 114 U. S. 549; Chicago, etc., R. Co. *v.* Price, 138 U. S. 185, 47 Am. & Eng. R. Cas. 298; Fox *v.* Hempfield R. Co., 2 Abb. (U. S.) 151; Lauman *v.* Young, 31 Pa. St. 306, and cases cited.

Such a reservation is not equivalent to an arbitrary power to terminate a contract without cause and must be exercised in good faith,[1] but the burden is upon the contractor to show a fraudulent exercise of the reserved power.[2] Although the right be enforced and the contract thus terminated the contractor will not thereby necessarily forfeit such money as he had already earned.[3] It is not unusual for the contract to contain a provision that the contractor shall pay or forfeit a certain sum as liquidated damages, for delay in the work or other deviations from the terms of the agreement, and even though it may be called a penalty such sum is usually regarded as in the nature of liquidated damages.[4] In defense to a suit against the company for damages arising from a termination of the contract the company may show the inability of the contractor to perform his obligations and it is not necessary that the company

[1] 1 Rorer on Railroads, 461; Philadelphia, etc., R. Co. *v.* Howard, 13 How. (U. S.) 307, s. c. 1 Am. Ry. Cas. 70; Martinsburg, etc., R. Co. *v.* March, 114 U. S. 549, 5 Sup. Ct. R. 1035; Wood *v.* Chicago, etc., R. Co., 39 Fed. R. 52. However, it has been held that a provision in the contract making the company itself sole arbiter is valid and binding. Gray *v.* Central R. Co., 11 Hun (N. Y.) 70.

[2] 1 Rorer on Railroads, 460. Where the contract provides that the estimate of the engineer shall be final and conclusive it will stand until impeached by evidence of fraud or such gross mistake as would imply bad faith. Martinsburg, etc., R. Co. *v.* March, 114 U. S. 549, 5 Sup. Ct. R. 1035. Citing Kihlberg *v.* U. S., 97 U. S. 398; Sweeney *v.* U. S., 109 U. S. 618; Wood *v.* Chicago, etc., R. Co., 39 Fed. R. 52.

[3] Philadelphia, etc., R. Co. *v.* Howard, 13 How. (U. S.) 307, s. c. 1 Am. Ry. Cas. 70; Memphis, etc., R. Co. *v.* Wilcox, 48 Penn. St. 161; 2 Wood on Railroads, § 278. In case of such termination of the contract any percentum reserve retained by the company out of the previous earnings does not inure to the company, but is at once payable to the contractor, less damages incurred, if any, by failure of the contractor to perform. Philadelphia, etc., R. Co. *v.* Howard, *supra*. Unless the reserve is forfeited by terms of the contract. Hennessey *v.* Farrell, 4 Cush. 267.

[4] Ranger *v.* Great Western Ry., 5 Ho. Lds. Cas. 72, s. c. 27 Eng. L. & Eq. Cas. 35, 61; Faunce *v.* Burke, 16 Pa. St. 469; Philadelphia, etc., R. Co. *v.* Howard, 13 How. (U. S.) 307; Nilson *v.* Jonesboro, 57 Ark. 168, s. c. 20 S. W. R. 1093; Texas, etc., R. Co. *v.* Rust, 19 Fed. R. 239; Wolf *v.* Des Moines, etc., R. Co., 64 Iowa 380; Easton *v.* Penn., etc., Canal Co., 13 Ohio 79; Geiger *v.* Western, etc., R. Co., 41 Md. 4; Elizabethtown, etc., R. Co. *v.* Geoghegan, 9 Bush. (Ky.) 56. But see Cochran *v.* People's R. Co. 113 Mo. 359, 21 S. W. R. 6; Clements *v.* Schuylkill, etc., R. R. Co., 132 Pa. St. 445, s. c. 19 Atl. R. 274.

wait until too late to complete the contract before terminating it and thus delay the enterprise when it is obvious that the contractor is unable to perform.[1] But the company has no right to terminate a contract on account of the insolvency of the surety without giving the contractor opportunity to furnish new surety.[2]

§ 1059. **Engineers' estimates and certificates.**—Contracts for the construction of railways ordinarily contain stipulations that the company's engineer shall make estimates as to the value, character and progress of the work, and that his decision shall be conclusive and binding upon both parties. Such stipulations are upheld as founded upon a consideration which enters into and becomes a part of the contract.[3] Unlike a submission to arbitration, which can usually be withdrawn before an award is made, these stipulations, having been made upon a consideration, are held irrevocable in the absence of fraud in the procurement of the contract.[4] This view has been criticised by some of the courts on the ground that any agreement intended to preclude resort to the courts would, if valid, render the contract as a basis for legal redress wholly idle, and is against public policy and void,[5] and such seems to be the doc-

[1] Waco Tap. R. Co. *v.* Shirley, 45 Tex. 355, s. c. 13 Am. Ry. R. 233.

[2] Waco Tap. R.Co. *v.* Shirley, 45 Tex. 355, s. c. 13 Am. Ry. R. 233.

[3] Summers *v.* Chicago, etc., R. Co.. 49 Fed. R. 714; Williams *v.* Chicago, etc., R. Co., 112 Mo. 463, 20 S. W. R. 631; McMahon *v.* New York, etc., R. Co., 20 N. Y. 463; Denver, etc., Construction Co. *v.* Stout, 8 Colo. 61; President of Delaware, etc., R. Co. *v.* Penn. Coal Co., 50 N. Y. 250; Wilson *v.* York, etc., R. Co., 11 Gill & J. (Md.) 58; Martinsburg, etc., R. Co. *v.* March, 114 U. S. 549; Mitchell *v.* Kavanagh, 38 Iowa 286; Candon *v.* Southside R. Co., 14 Gratt. (Va.) 302; Mansfield, etc., R. Co. *v.* Veeder, 17 Ohio 385; Easton *v.* Penn., etc., Canal Co., 13 Ohio 79; Vanderwerker *v.* Vermont, etc., R. Co., 27 Vt. 130; Howard *v.* Allegheny, etc., R. Co., 69 Pa. St. 489; Lauman *v.* Young, 31 Pa. St. 306; McCauley *v.* Keller, 130 Pa. St. 53, s. c. 40 Am. & Eng. R. Cas. 509; Snell *v.* Brown, 71 Ill. 133; Herrick *v.* Belknap's Estate and Vermont, etc., R. Co., 27 Vt. 673; O'Reilly *v.* Kerns, 52 Pa. St. 214.

[4] Denver, etc., Construction Co. *v.* Stout, 8 Colo. 61; Herrick *v.* Belknap's Estate and Vermont, etc., R. Co., 27 Vt. 673; O'Reilly *v.* Kerns, 52 Pa. St. 214; Howard *v.* Allegheny, etc., R. Co., 69 Pa. St. 489.

[5] 1 Redf. on Railways, 454; Kistler *v.* Indianapolis, etc., R. Co., 88 Ind. 460, s. c. 12 Am. & Eng. R. Cas. 314;

trine announced in other analogous cases,[1] but the large majority of American cases involving contracts for the construction of railroads uphold the validity of such an agreement.[2] Even those authorities, however, which maintain most strongly the validity of such stipulations agree that an estimate or certificate which is fraudulent or so grossly erroneous as to imply bad faith on the part of the engineer may be corrected by a court of equity,[3] and that in case estimates are not furnished at the proper time the contractor may otherwise prove the value of his work.[4] It is well settled that the en-

Louisville, etc., R. Co. *v.* Donnegan, 111 Ind. 179, 34 Am. & Eng. R. Cas. 116; Bauer *v.* Samson Lodge, 102 Ind. 262; See 1 Elliott's Gen. Pr., § 464, and authorities cited on general question. Also, Hart *v.* Lauman, 29 Barb. (N. Y.) 410.

[1] It has been decided in many cases that parties can not by contract oust the courts of their ordinary jurisdiction. The clause requiring arbitration is not a condition precedent, but is an independent covenant, for whose breach damages may be recovered in an independent action, but which can not be pleaded in bar or abatement of a suit on the insurance certificate. Smith *v.* Preferred, etc., Assn., 51 Fed. R. 520; Laflin *v.* Chicago, etc., R. Co., 34 Fed. R. 859; Tobey *v.* County of Bristol, 3 Story 800; Scott *v.* Avery, 5 H. L. Cas. 811; 1 Story Eq. Jur., § 670.

[2] Mundy *v.* Louisville, etc., R. Co., 67 Fed. R. 633; Fox *v.* Hempfield R. Co., 2 Abb. (U. S.) 151; Lauman *v.* Young, 31 Pa. St. 306; Martinsburg, etc., R. Co. *v.* March, 114 U. S. 549, 5 Sup. Ct. R. 1035; Chicago, etc., R. Co. *v.* Price, 138 U. S. 185, 47 Am. &Eng. R. Cas. 298; Galveston, etc., R. Co. *v.* Henry, 65 Tex. 685, 25 Am. & Eng. R. Cas. 265; Wood *v.* Chicago, etc., R. Co., 39 Fed. R. 52; Lewis *v.* Chicago, etc., Co., 49 Fed. R. 708; Williams *v.* Chicago, etc., R. Co., 112 Mo. 463, 20 S. W. R. 631, 59 Am. & Eng. R. Cas. 4; Kidwell *v.* Baltimore, etc., R. Co., 11 Gratt. (Va.) 676. Under a contract which provided that in case of dispute the decision of the engineer should be final and conclusive, a suit can not be maintained. Howard *v.* Allegheny, etc., R. Co., 69 Pa. St. 489; Reynolds *v.* Caldwell, 51 Pa. St. 298; O'Reilly *v.* Kerns, 52 Pa. St. 214.

[3] Martinsburg, etc., R. Co. *v.* March, 114 U. S. 549, 5 Sup. Ct. R. 1035; Kidwell *v.* Baltimore, etc., R. Co., 11 Gratt. 676; Kihlberg *v.* United States, 97 U. S. 398; Gray *v.* Central Railroad Co., 11 Hun 70; Wood *v.* Chicago, etc., R. Co., 39 Fed. R. 52; Grant *v.* Savannah, etc., R. Co., 51 Ga. 348; O'Reilly *v.* Kerns, 52 Pa. St. 214; Herrick *v.* Belknap's Est. & Vermont, etc., R. Co., 27 Vt. 673; Baltimore, etc., R. Co. *v.* Polly, 14 Gratt. (Va.) 447; Baltimore, etc., R. Co. *v.* Laffertys, 14 Gratt. 478. Engineers estimates are not binding when so plainly a violation of the terms of the contract as to amount to fraud. Mills *v.* Norfolk, etc., R. Co., 90 Va. 523, 19 S. E. R. 171; Dorwin *v.* Westbrook, 86 Hun 363.

[4] Fletcher *v.* New Orleans, etc., R. Co., 19 Fed. R. 731; Bean *v.* Miller, 69 Mo. 384; Crumlish *v.* Wilmington, etc., R. Co., 5 Del. Ch. 270; Crawford *v.* Wolf, 29 Iowa 567; Starkey *v.* De

gineer's decision can be conclusive only as to matters designated in the contract, and that his powers can not be extended by implication,[1] but there is some difference among the authorities which uphold these stipulations as to how far and over what subjects the engineer's authority extends. Many well reasoned decisions hold that clear proof of fraud or of such gross error as necessarily implies bad faith is necessary in order to successfully assail the engineer's certificate.[2] There are other decisions to the effect that the courts will relieve against mistakes in measurements and calculation that are apparent on the face of the estimate, or that can be clearly proved, although the contract contains a provision that the engineer's decision upon "every question which can or may arise between the parties in the execution of this contract shall be final."[3] It is held by

Graff, 22 Minn. 431; Herrick *v.* Belknap's Est. & Vt., etc., R. Co., 27 Vt. 673; McMahon *v.* New York, etc., R. Co.,20 N. Y. 463; Williams *v.* Chicago, etc., R. Co., 112 Mo. 463, 20 S. W. R. 631, 59 Am. & Eng. R. Cas. 4.

[1] Galveston, etc., R. Co. *v.* Henry, 65 Tex. 685, 25 Am. & Eng. R. Cas. 265; Lauman *v.* Young, 31 Pa. St. 306; Drhew *v.* Altoona City, 121 Pa. St. 401; Hostetter *v.* City of Pittsburgh, 107 Pa. St. 419; Starkey *v.* DeGraff, 22 Minn. 431, 18 Am. Ry. R. 444; Campbell *v.* Trustees Cincinnati, etc., R. Co., (Ky.), 34 Am. & Eng. R. Cas. 113, 6 S. W. R. 337; Annapolis, etc., R. Co. *v.* Ross, 68 Md. 310, 11 Atl. R. 820; McGovern *v.* Bockius, 10 Phila. (Pa.) 438; Denver, etc., R. Co. *v.* Riley, 7 Colo. 494, 4 Pac. R. 785. He can not alter the terms of the contract. Sharpe *v.* San Paulo, etc., R. Co., 27 L. T. R. 699, L. R. 8 Ch. App. Cas. 605, *n.* Where there is an essential alteration of the written contract the engineer's decision will not be conclusive as to the alterations, nor to the balance of the contract if not separated. Malone *v.* Philadelphia, etc., R. Co., 157 Pa. St. 430, 27 Atl. R. 756.

[2] If the engineer's decision in such case be honest and does not appear to be tainted with fraud, it will stand, even if arbitrary and unreasonable. Kidwell *v.* Baltimore, etc., R. Co., 11 Gratt. 776; Gray *v.* Central R. Co., 11 Hun 70; Zaleski *v.* Clark, 44 Conn. 218; Gibson *v.* Cranage, 39 Mich. 49; Martinsburg, etc., R. Co. *v.* March, 114 U. S. 549; Kihlberg *v.* United States, 97 U. S. 398; Sweeney *v.* United States, 109 U. S. 618; McCauley *v.* Keller, 130 Pa. St. 53, 40 Am. & Eng. R. Cas. 509; Sweet *v.* Morrison, 116 N. Y. 19, 22 N. E. R. 276; Yeats *v.* Ballentine, 56 Mo. 530; Bowman *v.* Stewart, 165 Pa. St. 394; Central, etc., R. Co. *v.* Spurck, 24 Ill. 587.

[3] Lewis *v.* Chicago, etc., R. Co., 49 Fed. R. 708. Engineer's estimates may be avoided in chancery on ground of fraud, gross negligence or mistake of fact. Wood *v.* Chicago, etc., R. Co., 39 Fed. R. 52. "The most irrefragable proof of mistake in fact" may be ground for recovery. Vanderwerker *v.* Vermont, etc., R. Co., 27 Vt. 130. A court of equity has power to correct the estimate for fraud or mistake. Mansfield, etc., R. Co. *v.* Veeder, 17

still other courts that it is in the province of the court to construe the agreement, and that the engineer's general authority to conclusively decide all questions arising between the parties does not extend to questions of construction of the contract.[1] Decisions of the engineer as to the quality of material, efficiency of work, or any question involving the judgment and skill of the engineer will not be disturbed unless bad faith is proven.[2] In order that the engineer's certificate shall be conclusive the contract must expressly stipulate that his estimate shall be a final adjudication of disputed matters, and it must be plain that the subject is clearly within the submission, as his absolute authority can not be extended by implication.[3] It is the general rule that an engineer is not disqualified by reason of being a stockholder in the company, for he is employed by and stands for the company by which he is paid, and ownership of stock does not change his relation to the parties,[4] but

Ohio 385. The estimate of the engineer is to be tested by its correctness. Memphis, etc., R. Co. *v.* Wilcox, 48 Pa. St. 161. The presumption is that the engineer's measurements are correct and the burden is upon the plaintiff to overthrow them. Torrance *v.* Amsden, 3 McLean 509; Bumpass *v.* Webb, 4 Port. (Ala.) 65; Pleasants, etc., Co. *v.* Ross, 1 Wash. (Va.) 156.

[1] King Iron Bridge, etc., Co. *v.* St. Louis, 43 Fed. 768; Lewis *v.* Chicago, etc., R. Co., 49 Fed. 708; Galveston, etc., R. Co. *v.* Henry & Dilley, 65 Tex. 685, 25 Am. & Eng. R. Cas. 265; Galveston, etc., R. Co. *v.* Johnson, 74 Tex. 256, 11 S. W. Rep. 1113; Martinsburg, etc., R. Co. *v.* March, 114 U. S. 549. If the engineer bases his estimates upon an erroneous view of the contract they will not conclude the parties. McAvoy *v.* Long, 13 Ill. 147; Alton, etc., R. Co. *v.* Northcott, 15 Ill. 49. It is presumed that the parties contract "to abide by a legal award and not an illegal award." Atlanta, etc., R. Co. *v.* Mangham & Prickett, 49 Ga. 266. But if the contractor accepts an estimate based upon a particular construction of the contract he is bound by it. Kidwell *v.* Baltimore, etc., R. Co., 11 Gratt. (Va.) 676.

[2] Ranger *v.* Great Western, etc., R. Co., 1 Eng. Ry. & Canal Cas. 1, 13 Simons, 368; Lewis *v.* Chicago, etc., R. Co., 49 Fed. R. 708.

[3] Lauman *v.* Young, 31 Pa. St. 306; Hostetter *v.* City of Pittsburg, 107 Pa. St. 419; Drhew *v.* Altoona City, 121 Pa. St. 401; Memphis, etc., R. Co. *v.* Wilcox, 48 Pa. St. 161. A provision in a construction contract that there should be a final estimate, by the engineer, of the quantity, character and value of the work according to the terms of the contract, and that upon receiving this certificate and signing a release, the contractor should be paid in full, does not bind the contractor to accept the engineer's estimate as final and conclusive. Central Trust Co. *v.* Louisville, etc., R. Co., 70 Fed. Rep. 282.

[4] Williams *v.* Chicago, etc., R. Co.,

it has been held that where an engineer was a stockholder in the company, and that fact was unknown to the contractors at the time of the agreement making him arbitrator, he was by that reason disqualified and his award was set aside by a court of equity.[1] A duty rests upon the company to employ competent and trustworthy engineers, and to see that estimates are made in a proper time and manner,[2] and in one case it was held that, where the contract provides that the decision of the engineer shall be final as to measurements and estimates of the amount of labor performed, the contractor is entitled to notice and opportunity to be present, and is not concluded by measurements made *ex parte*.[3] Standing, as he does, in the employ of one of the parties, it is held in some jurisdictions that the estimates and awards of the engineer should receive the closest scrutiny of the courts.[4] Where an estimate by the engineer is required by the terms of the agreement before either an installment or final payment may be demanded, such stipulation is held to be a condition precedent to payment, and the parties, if a dispute arises, must refer the matter in question to the tribunal provided by the contract before resort may be had to the courts,[5] but if the engineer fails or refuses to make esti-

112 Mo. 463, 20 S. W. Rep. 631, 59 Am. & Eng. R. Cas. 4; Ranger *v.* Great Western, etc., R. Co., 5 H. L. Cas. 72; Monongahela Navigation Co. *v.* Fenlon, 4 Watts and S. 205; Faunce *v.* Burke, 16 Pa. St. 469; Baltimore, etc., Railroad Co. *v.* Polly, 14 Gratt. 447; Smith *v.* Boston, etc., Railroad, 36 N. H. 458. The company itself may be the sole arbiter. Gray *v.* Central R. Co., 11 Hun (N. Y.) 70. It is held that the engineer of a railway company is not disqualified from certifying payments to a contractor although he has become lessee of the railway and the amount of rent depends upon the payments so certified. Hill *v.* South Staffordshore R. Co., 11 Jur. N. S. 192. 12 L. T. Rep. 63. But it seems to us that this case carries the doctrine beyond reasonable limits.

[1] Milnor *v.* Georgia, etc., R. Co., 4 Ga. 385.

[2] Smith *v.* Boston, etc., R. Co., 36 N. H. 458; Herrick *v.* Belknap's Est. and Vermont, etc., R. Co., 27 Vt. 673; McMahon *v.* New York, etc., R. Co., 20 N. Y. 463; Kistler *v.* Indianapolis, etc., R. Co., 88 Ind. 460. See Washington Bridge Co. *v.* Land, etc., Co., 12 Wash. 272, 40 Pac. R. 982.

[3] McMahon *v.* New York, etc., R. Co., 20 N. Y. 463. See, also, Wilson *v.* York, etc., R. Co., 11 Gill & J. (Md.) 58.

[4] Wood *v.* Chicago, etc., R. Co., 39 Fed. R. 52.

[5] McNamara *v.* Harrison, 81 Iowa 486, 46 N. W. R. 976; President, etc., Delaware, etc., Canal Co. *v.* Pennsylvania, etc., Co., 50 N.Y. 250; Jackson *v.* Cleveland, 19 Wis. 400; Hudson *v.*

mates or render decisions, it is held that an action at law will lie for compensation.[1] Estimates having been made or decisions rendered, relief can only be found in a court of equity.[2] It has been held that in case of fraudulent estimates, the remedy of the contractor is against the engineer guilty of the fraud, and not against the company,[3] but it seems to us that this decision is unsound, as the engineer, while in one sense an arbitrator, is employed and paid by the company, and stands in its place, and good conscience will not allow the company to profit by his fraud and thus escape liability to the contractor. If the contract provides that the company's engineer shall himself measure and estimate the work, it is essential that its terms be strictly complied with, and an estimate made by a third person, although approved by the engineer, is not binding,[4] but it

McCartney, 33 Wis. 331; United States *v.* Robeson, 9 Pet. 319; Reynolds *v.* Caldwell, 51 Pa. St. 298; Humaston *v.* Telegraph Co., 20 Wall.20; Fox *v.* The Railroad, 3 Wall. Jr. 243; Herrick *v.* Belknap's Est. and Vermont, etc., R. Co., 27 Vt. 673. It is held in Pennsylvania that the contractor is not entitled to an action in court against the company unless the action of the engineer has been influenced by the company. Reynolds *v.* Caldwell, 51 Pa. St. 298; Howard *v.* Allegheny,etc., R. Co., 69 Pa. St. 489.

[1] Starkey *v.* De Graff, 22 Minn. 431; Wood *v.* Chicago, etc., R. Co., 39 Fed. R. 52; Kistler *v.* Indianapolis, etc., R. Co., 88 Ind. 460; United States *v.* Robeson, 9 Peters (U. S.) 319, 326; Herrick *v.* Belknap's Est. & Vermont, etc., R. Co., 27 Vt. 673. If the company should fail to appoint an engineer the contractor has right to action at law. North Lebanon, etc., R. Co. *v.* McGrann, 33 Pa. St. 530. Unreasonable delay in making estimates, if from fault of company or engineer, entitles the contractor to bring an action at law. Grant *v.* Savannah, etc., R. Co., 51 Ga. 348; Atlanta,etc., R. Co. *v.* Mangham & Prickett, 49 Ga. 266. A request made to the company for such estimates is sufficient, and if they are not produced recovery may be had upon other evidence. McMahon *v.* New York, etc., R. Co., 20 N. Y. 463. But see McIntosh *v.* Great Western, etc., R. Co., 2 De G. & S. 758.

[2] Sharpe *v.* San Paulo Railway Co.L. R., 8 Ch. 597; Wood *v.* Chicago, etc., R. Co., 39 Fed. R. 52; Grant *v.* Savannah, etc., Railroad Co., 51 Ga. 348; Mansfield, etc.,Railroad Co. *v.* Veeder, 17 Ohio 385; Lauman *v.* Young, 31 Pa. St. 306; Martinsburg, etc., R. Co. *v.* March, 114 U. S. 549.

[3] Reynolds *v.* Caldwell, 51 Pa. St. 298; Howard *v.* Allegheny, etc., R. Co., 69 Pa. St. 489.

[4] Wilson *v.* York, etc., R. Co., 11 Gill & J. (Md.) 38; Snell *v.* Brown, 71 Ill. 133. See North Lebanon R. Co. *v.* McGrann, 33 Pa. St. 530; Sweet *v.* Morrison, 116 N. Y. 19, 22 N. E. R. 276; McMahon *v.* New York, etc., R. Co., 20 N. Y. 463. Where estimates are prevented by death of the engineer, equity will afford relief. Firth *v.* Midland R. Co. L. R., 20 Eq. 100.

has been held that if it is provided that the "engineer's certificates" shall be final, the actual measurements and estimates may be made by subordinates.[1] This is determined, of course, by the language of the particular contract. The same rules as to the validity and binding force of engineers' estimates and certificates are held to apply to contracts between contractors and sub-contractors, as between the company and contractor, and upon the same grounds.[2]

§ 1060. **Extra work.**—Where work is performed at the request of the company in addition to that required by the plans, specifications and stipulations in the contract, or, if those plans and specifications are so changed by the company as to require extra work, the contractor is entitled to compensation for the excess, unless the extra labor has been rendered necessary by his own negligence or lack of skill.[3] Thus, where a contractor, at the request of the company encased the embankments with stone to protect them from flood, he was allowed extra compensation, it being shown that the work was not necessary to protect his other construction;[4] but in another case the contractor was required to remove, without compensation, dirt which fell in after cuts had been made.[5] Where the contractor has bound himself to complete the railway for a prescribed amount of money and the agreement waives any claim for extra work or damages or provides that the specified sum shall be the limit of the company's liability, he can not recover beyond the stipulated sum;[6] but if a clause in the con-

[1] Chicago, etc., R. Co. *v.* Price, 138 U. S. 185, s. c. 47 Am. & Eng. R. Cas. 298.

[2] O'Reilly *v.* Kerns, 52 Pa. St. 214; Reynolds *v.* Caldwell, 51 Pa. St. 298; Guilbault *v.* McGreevy, 18 Can. Sup. Ct. 609.

[3] Fruin *v.* Crystal R. Co., 89 Mo. 397, 14 S. W. Rep. 557; Seymour *v.* Long Dock Co., 20 N. J. Eq. 396; Western Union R. Co. *v.* Smith, 75 Ill. 496; Orange, etc., R. Co. *v.* Placide, 35 Md. 315; Henderson Bridge Co. *v.* McGrath, 134 U. S. 260, s. c. 10 Sup. Ct. R. 730.

[4] Western Union R. Co. *v.* Smith, 75 Ill. 496.

[5] Woodruff *v.* Rochester, etc., R. Co., 108 N. Y. 39, 14 N. E. Rep. 832.

[6] Sharpe *v.* San Paulo, etc., R. Co., L. R. 8 Ch. 605, *n*, 27 L. T. Rep. 699; Berlinquet *v.* Queen, 13 Can. Sup. Ct. 26; Jones *v.* Queen, 7 Can. Sup. Ct. 570.

tract provides that the engineer may make changes which shall be paid for by the company, the contractor may recover for the extra work occasioned by such changes.[1] One who contracted for a certain sum to erect depot buildings according to plans and dimensions to be adopted and fixed by the engineer was refused an extra allowance because the buildings required were of larger dimension than the engineer indicated at the time the contract was signed.[2] Under a contract to build and complete a railroad at a stipulated price per mile, side tracks and Y's, being necessary to the operation of the road, are held to be included although not enumerated, and the contractor is not entitled to extra compensation for building them,[3] especially where the contractor, by not asking for an extra allowance therefor in his monthly estimate, has given a practical construction to the contract.[4] Under such a contract, extra compensation has also been refused for the building of cattle guards, water-tanks, stock gaps and slides, for the reason that they are considered necessary to the complete construction of the road,[5] but by binding himself "to build and complete the railroad" the contractor did not obligate himself to equip the road with rolling stock or to pay the expenses of engineering,

[1] Logan *v.* Stranahan, 12 U. C. Q. B. 15. See, also, Houston, etc., R. Co. *v.* Trentum, 63 Tex. 442; Henderson Bridge Co. *v.* McGrath, 134 U. S. 260, s. c. 10 Sup. Ct. R. 730. But the engineer has no discretion to extend the work and bind the company for payment when not so provided in the contract. O'Brien *v.* Mayor, etc., of New York, 139 N. Y. 543, 35 N. E. Rep. 323, aff'd. 142 N. Y. 671, 37 N. E. Rep. 465.

[2] Cannon *v.* Wildman, 28 Conn. 472. One contracting to make excavations at an agreed price per yard of earth is not entitled to extra pay for removal of hardpan unexpectedly found. Nesbitt *v.* Louisville, etc., R. Co., 2 Spears (S. Car.) 697. But where on account of the unexpected hardship the contractor abandoned the contract, but returned under an agreement by the company to pay him reasonable compensation, the company was held liable under the new contract. Hart *v.* Lauman, 29 Barb. (N. Y.) 410.

[3] Barker *v.* Troy, etc., R. Co., 27 Vt. 766; Central Trust Co. *v.* Condon, 67 Fed. Rep. 84.

[4] Barker *v.* Troy, etc., R. Co., 27 Vt. 766. But it has been held that the fact the company had paid similar claims to others does not give such practical construction to the contract as will bind the company, unless the contractor was thereby influenced to perform the work. Vanderwerker *v.* Vermont, etc., R. Co., 27 Vt. 125.

[5] Central Trust Co. *v.* Condon, 67 Fed. Rep. 84.

and the court held that he was entitled to compensation for building a temporary track around a mountain so that the road might be in operation while a more direct route was being constructed.[1] Some of the courts have held that where the contract expressly provides that no allowance will be made for extra work unless authorized in writing by the engineer, or some other designated agent, the contractor, in the absence of such writing, can not recover either at law or in equity, although the agent of the company verbally assured him that he would be paid,[2] but on the other hand, it has been held by other courts that where the company had knowledge of the work while it was progressing it could not enjoy the benefit without paying therefor although the contractor might not be able to recover on the express contract.[3]

§ 1061. **Sub-contractors.**—A sub-contractor is one who takes from the principal contractor a specific part of the work,[4] contracting under and with the principal contractor.[5] The courts

[1] Central Trust Co. *v.* Condon, 67 Fed. Rep. 84.

[2] Thayer *v.* Vermont, etc., R. Co., 24 Vt. 440; Herrick *v.* Belknap's Est. and Vermont, etc., R. Co., 27 Vt. 673; Vanderwerker *v.* Vermont, etc., R. Co., 27 Vt. 125, 130; White *v.* San Rafael, etc., R. Co., 50 Cal. 417; Simpson *v.* New York, etc., R. Co., 19 J. & S. (N. Y.) 419.

[3] Dyer *v.* Jones, 8 Vt. 205; Gilman *v.* Hall, 11 Vt. 510; Nixon *v.* Taff, etc., R. Co., 7 Hare 136. See, also, Houston, etc., R. Co. *v.* Trentem, 63 Tex. 442. As to the right to recover on the *quantum meruit*, see Hinkle *v.* San Francisco, etc., R. Co., 55 Cal. 627, s. c. 6 Am. & Eng. R. Cas. 595; Jammison *v.* Gray, 29 Iowa 537; Chicago, etc., R. Co. *v.* Vosburgh, 45 Ill. 311. The burden, of course, is upon the party claiming extra compensation to show the extra work. Nesbitt *v.* Louisville, etc., R. Co., 2 Spears (S. Car.) 697.

[4] "We suppose a sub-contractor to be one who takes from the principal contractor a specific part of the work, as for instance, one who agrees with the principal contractor to construct ten miles of a railroad out of a line of twenty or more miles which the principal contractor has undertaken to build." Farmers' Loan and Trust Co. *v.* Canada, etc., R. Co., 127 Ind. 250. "A sub-contractor is one who has entered into a contract, express or implied, for the performance of an act with a person who has already contracted for its performance." Phillips on Mechanics' Liens, § 44; Lester *v.* Houston, 101 N. Car. 605.

[5] Richmond, etc., Co. *v.* Richmond, etc., R. Co., 68 Fed. Rep. 105. The term contractor as used in statutes may include sub-contractors where the context of the statute demands such construction. Kent *v.* N. Y., etc., R. Co., 12 N. Y. 628; Peters *v.* St.

have clearly marked and enforced the distinction between sub-contractors and laborers, as well as between sub-contractors and material men,[1] and the sub-contractor is not entitled to a lien under a statute thus protecting "laborers" and "material men." In most states the sub-contractor, especially in railway construction, is by statute given a lien on the road or property of the company for his compensation.[2] Stipulations that the estimates and certificates of the company's engineer shall be final and conclusive are binding as between contractor and sub-contractor to the same extent, and may be enforced or assailed in the same manner as like stipulations between the original contractor and the company.[3] The sub-contractor may be excused from performance by failure of the company to procure right of way,[4] to fix the grade as promised,[5] or by the failure of the contractor to furnish cars as required by the contract,[6] and if, on the strength of promises, he holds himself ready to prosecute the work he can recover for his enforced idleness, as well as for his estimated loss of profits on the contract.[7] Where his contract provides that the work shall be done under the specifications and on the same terms as the original contract, the sub-contractor is bound by the same conditions and entitled to the same benefits thereof as the first

Louis, etc., R. Co., 24 Mo. 586; Mundt *v.* Sheboygan, etc., R. Co., 31 Wis. 451. But if it appear that the term contractor is used in a more limited sense a sub-contractor will be excluded. Dawson *v.* Harrington, 12 Ill. 300. See Phillips on Mechanics' Liens, § 44.

[1] Farmers' Loan and Trust Co. *v.* Canada, etc., R. Co., 127 Ind. 250; Barker *v.* Buell, 35 Ind. 297; Colter *v.* Frese, 45 Ind. 96; Duncan *v.* Bateman, 23 Ark. 327; Huck *v.* Gaylord, 50 Tex. 578; Pitts *v.* Bomar, 33 Ga. 96; Chicago, etc., R. Co. *v.* Sturgis, 44 Mich. 538, 6 Am. & Eng. R. Cas. 619.

[2] See, *post*, §§ 1066, 1070.

[3] Faunce *v.* Burke, 16 Pa. St. 469; Monongahela, etc., Co. *v.* Fehon, 4 Watts & S. (Pa.) 205; Guilbault *v.* McGreevy, 18 Can. Sup. Ct. 609; Thayer *v.* Vermont, etc., R. Co., 24 Vt. 440. See Hendrie *v.* Canadian Bank, 49 Mich. 401, 13 N. W. Rep. 792; Maloney *v.* Malcolm, 31 Mo. 45. See as to general subject, *ante*, § 1059.

[4] Bean *v.* Miller, 69 Mo. 384.

[5] Hammond *v.* Beeson, 112 Mo. 190, 20 S. W. Rep. 474; O'Connor *v.* Smith, 82 Tex. 232, 19 S. W. Rep. 168.

[6] McAndrews *v.* Tippett, 39 N. J. L. 105.

[7] Hammond *v.* Beeson, 112 Mo. 190, 20 S. W. Rep. 474; Smith *v.* O'Donnell, 8 Lea (Tenn.) 468; Phila., etc., R. Co. *v.* Howard, 13 How. (U. S.) 307; McAndrews *v.* Tippett, 39 N. J. L. 105.

contractor under the original contract,[1] which is construed with the second contract and as a part of it, as between the contractor and sub-contractor. He can not pass by his immediate employer and recover of the company,[2] but if, on default of the contractor, the company, by a duly authorized agent, make such representations or promises as induces the sub-contractor to go on with the work, a contract based upon a valid consideration arises between the sub-contractor and the company, and he will be protected.[3] The company has been held liable for materials furnished the sub-contractor at its order and on its promise to pay therefor, although not indebted to the contractor,[4] but in the absence of any agreement or promise to pay, or any statutory provision to that effect, the liability of the company can not be so extended.[5] The sub-contractor has no right to pledge the credit of the contractor for supplies furnished by third persons, and it has been held that the payment by the contractor of a portion of the bills presented does not amount to a ratification of such a pledge.[6] A sub-contractor, employed by an independent contractor is in no such privity of contract with the company as will render it liable for his negligent acts in building its road,[7] unless it assumes direction and control of the work; nor such as will render it liable, either to him or to

[1] Price *v.* Garland, 3 N. M. 285, s. c. 6 Pac. 472. See, also, Collins *v.* Barnes, 83 Pa. St. 15.

[2] Lake Erie, etc., R. Co. *v.* Eckler, 13 Ind. 67; Branin *v.* Connecticut, etc., R. Co., 31 Vt. 214.

[3] Chapman *v.* Pittsburgh, etc., R. Co., 18 W. Va. 184, 9 Am. & Eng. R. Cas. 484. Where a sub-contractor placed material on the company's ground and the company took possession of it, although the contractor had defaulted and the sub-contractor had failed to perform his contract within the time limited, the company was held liable. Sherwood *v.* Saginaw, etc., R. Co., 53 Mich. 317, 16 Am. & Eng. R. Cas. 605. So, where drafts of the company are accepted by its treasurer as payment to a sub-contractor for labor, the sum becomes the debt of the company. Ney *v.* Dubuque, etc., R. Co., 20 Iowa 347. See, also, Iron Mountain, etc., R. Co. *v.* Stansell, 43 Ark. 275; Indianapolis, etc., R. Co. *v.* Miller, 71 Ill. 463. See Mann *v.* Burt, 35 Kan. 10, 10 Pac. R. 95.

[4] Chicago, etc., R. Co. *v.* West, 37 Ind. 211.

[5] St. Louis, etc., R. Co. *v.* Ritz, 30 Kan. 30, 11 Am. & Eng. R. Cas. 35; Atchison, etc., R. Co. *v.* Davis, 34 Kan. 199, 25 Am. & Eng. R. Cas. 305.

[6] Wells *v.* Martin, 32 Mich. 478.

[7] Town of Pawlet *v.* Rutland, etc., R. Co., 28 Vt. 297; Cuff *v.* Newark, etc., R. Co., 35 N. J. L. 17.

those employed by him for work performed on the road of the company,[1] unless the contractor stands in the relation of agent for the railway company in subletting the contract.[2] A subcontractor who has completed his portion of the work to the satisfaction of the chosen engineer is entitled to recover of the contractor the amount agreed upon, and the contractor can not withhold the percentage reserved to insure good faith performance for the reason that he has not completed his original contract and the company withholds from him an agreed amount.[3]

§ 1062. **Breach of contract—Remedies.**—Courts of equity refuse to enforce specific performance of contracts for the construction of a railroad, for the reason that it would entail upon the courts the supervision of a great number of acts extending over a long period of time, and thus involve an immense amount of labor and detail which does not properly belong to them,[4]

[1] Not liable to laborers employed by sub-contractor. Indianapolis, etc., R. Co. *v.* O'Reily, 38 Ind. 140; Marks *v.* Indianapolis, etc., R. Co., 38 Ind. 440.

[2] As to what does not constitute such a relation. See Baltzer *v.* Raleigh, etc., R. Co., 115 U. S. 634, 6 Sup. Ct. R. 216, 24 Am. & Eng. R. Cas. 354. The fact that the contractor is the largest and controlling stockholder in the railroad company does not make him the agent of the company in subletting contracts, although the subcontractor is ignorant of the relation. Central Trust Co. *v.* Bridges, 57 Fed. R. 753.

[3] Blair *v.* Corby, 29 Mo. 480; McBrien *v.* Shanly, 24 U. C. C. P. 28. Where such is the agreement the contractor may withhold estimates and pay the laborers and creditors of the sub-contractor and such sums will be applied to the discharge of his debt to the sub-contractor. Solomon *v.* Nicholas, 113 Ill. 351, 1 N. E. R. 901.

[4] Ross *v.* Union Pacific R. Co., 1 Woolw. (U. S.) 26; South Wales R.Co. *v.* Wythes, 1 K. & J. 186; Fallon *v.* Missouri, etc., R. Co., 1 Dill (U. S.) 121; Danforth *v.* Philadelphia, etc., R. Co., 30 N. J. Eq. 12, 18 Am. Ry. Rep. 66; Heathcote *v.* North Staffordshire R. Co., 6 Eng. R. & Canal Cas. 358, 369; Ranger *v.* Great Western, etc., R. Co., 1 Eng. Ry. & Canal Cas. 1. In Ross *v.* Union Pac. R. Co., *supra*, the court said: "Years must elapse before this work can be done and paid for. At every step in its progress, the interposition of the court, either by orders in this case, or by decrees in successive cases, may be invoked, if we are at this time to lend the aid of chancery to either of the parties. It is not difficult to foresee the mischiefs of such a course. The rule is settled, even in the English chancery, where the jurisdiction is greatly extended in all such cases, that it will decree specific performance only when it can dispose of the matter by an order capable of being enforced at once;

and it follows that if the courts will not decree specific performance against the contractor, they will not enforce such contract in favor of the contractor as against the railroad company, since it is well settled that equity will only exercise the power against one party where it can enforce the contract against the other party as well.[1] But in rare instances the court has appointed a receiver to complete the construction of the railroad where the company was out of funds and failure to construct within a limited time would cause the lapse of a land grant, which was the principal security of the bondholders.[2] The contractor may abandon his contract and recover compensation for work already done and profits which he would have otherwise earned if at any time the company, without good cause, prevents him from completing the contract,[3] or repeatedly defaults in payment.[4] It has been held, however, that where but one

that it will not decree a party to perform a continuous duty, extending over a number of years, but will leave the opposite party to his remedy at law."

[1] Munro *v.* Wivenhoe, etc., R. Co., 4 DeG. J. & S. 723; Peto *v.* Brighton, etc., R. Co., 1 H. & M. 468; Heathcote *v.* North Staffordshire R. Co., 6 Eng. R. & Canal Cas. 358; Waring *v.* Manchester, etc., R. Co., 7 Hare 482; Ross *v.* Union Pac. R. Co., 1 Woolw. (U. S.) 26. See Texas Pac. R. Co. *v.* City of Marshall, 136 U. S. 393, 42 Am. & Eng. R. Cas. 637.

[2] Kennedy *v.* St. Paul, etc., R. Co., 2 Dillon (U. S.) 448; Allen *v.* Dallas, etc., R. Co., 3 Woods (U. S.) 316; *ante*, § 547.

[3] Cox *v.* Western Pac. R. Co., 47 Cal. 87; Lake Shore, etc., R. Co. *v.* Richards, 40 Ill. App. 560; Whitfield *v.* Zellnor, 24 Miss. 663. The acts of the company must be such as to indicate an intention to prevent completion of the contract, and must in effect prevent performance. Lake Shore, etc., R. Co. *v.* Richards, *supra*. The measure of damages as regards the uncompleted portion is the difference between the contract price for completing it and the actual cost to the contractor of completing it. Grand Rapids, etc., R. Co. *v.* Van Dusen, 29 Mich. 431; Masterton *v.* Mayor of Brooklyn, 7 Hill 61. Where one party absolutely repudiates the contract, the other is released from further performance and may sue for damages. Cort *v.* Ambergate, etc., Ry., 17 Q. B. 127, 6 Eng. L. & Eq. 230; Hochster *v.* De La Tour, 2 El. & Bl. 678, 20 Eng. L. & Eq. 157.

[4] Grand Rapids, etc., R. Co. *v.* Van Dusen, 29 Mich. 431; Bean *v.* Miller, 69 Mo. 384; Dobbins *v.* Higgins, 78 Ill. 440; Wharton *v.* Winch, 140 N. Y. 287, 35 N. E. Rep. 589. Where the contractor has given bond for faithful performance he is entitled to be paid in the manner provided in the contract. If the company withhold money to pay laborers or sub-contractors he may abandon the contract and recover damages. Dobbins *v.* Higgins, 78 Ill. 440. But where the company,

default occurred, upon which the contractor abandoned the work, he could not recover damages for the remainder of the work since the breach of the company did not deny the right to complete it.[1] If, by virtue of the stipulation in the contract giving it the right to terminate the contract whenever its engineer was not satisfied with the work or its progress, the company should annul the contract merely for the purpose of injuring or oppressing the contractor or getting the work done cheaper, the contractor is entitled to recover damages for loss of profits.[2] The contractor may recover for any damages resulting to him from delay caused by the negligence or lack of due diligence of the company in performing its part of the contract or in providing him the necessary access or means to prosecute his work; as where the company neglected to procure the dissolution of an injunction which the contractor was bound to obey,[3] to make the necessary preliminary surveys,[4] to procure right of way,[5] or where the contractor was delayed by reason of the failure of the company to do certain preliminary

in order to protect itself against liens of laborers and material men, paid their claims, the amount of such claims may be set off in a suit by the contractors against the company, although the abandonment was caused by a breach of the company. Moore *v.* Taylor, 42 Hun 45, 651.

[1] Moore *v.* Taylor, 42 Hun 45, 651; Wharton *v.* Winch, 140 N. Y. 287, 35 N. E. R. 589. But if after breaches of the company have occurred, causing delay, the contractor resumes the work and makes no claim for damages, his assignee in bankruptcy can make no claim for such damages. Geiger *v.* Western Maryland R. Co., 41 Md. 4.

[2] Philadelphia, etc., R. Co. *v.* Howard, 13 How. (U. S.) 307. See, also, Myers *v.* York, etc., R. Co., 2 Curtis (U. S.) 28; South, etc., R. Co. *v.* McLendon, 63 Ala. 266; Black River Lumber Co. *v.* Warner, 93 Mo. 374; Smith *v.* O'Donnell, 8 Lea (Tenn.) 468. In such case it has been held the contractor can recover on the *quantum meruit*. Merrill *v.* Ithaca,etc., R. Co., 16 Wendell 586, 2 Am. Ry. Cas. 421. But if the company has reserved the right to terminate the contract whenever the enterprise should prove unprofitable the contractor can not insist that the work proceed in the face of failure. Zimmer *v.* Brooklyn, etc., R. Co., 53 Hun 637.

[3] Philadelphia etc., R. Co. *v.* Howard, 13 How. (U. S.) 307.

[4] O'Connor *v.* Smith, 84 Tex. 232, 19 S. W. R. 168; Hammond *v.* Beeson, 112 Mo. 190, 20 S. W. R. 474.

[5] Bean *v.* Miller, 69 Mo. 384; Lauman *v.* Young, 31 Pa. St. 306; Elizabethtown, etc., R. Co. *v.* Pottinger, 10 Bush. (Ky.) 185.

work,[1] or to furnish cars for transportation of material.[2] Where the right is reserved by the company to suspend or delay the work, the company is only authorized to suspend for a reasonable time, after which the contractor may proceed and recover his compensation when the work is completed, and if, during the suspension, he is requested to keep his plant in readiness to proceed, the company is liable for expenses so incurred.[3] It has been held that where the company terminates the contract, it can not, on estimates of work already done, retain the per cent. reserved to insure good faith performance, beyond actual damages suffered, but the contractor is entitled to the amount beyond indemnity to the company.[4] And where the work was not being completed within the specified time, but the company waived the right to terminate the contract, it was held also to have waived the right to an absolute forfeiture on such account.[5] The amount of the liability of the contractor to the company for failure to complete the work within the time limited or in a proper manner is generally fixed in the contract as a stipulated penalty or forfeiture, which is regarded and enforced as in the nature of liquidated damages.[6]

§ 1063. Liability of the company for injuries resulting from negligence of contractor or his servants.—The liability of the company for injuries resulting from the negligence of the contractor depends primarily upon whether or not he is an independent contractor. An independent contractor may be defined as one who, in the course of an independent occupation, prosecutes and directs the work himself, using his own method to

[1] Louisville, etc., R. Co. *v.* Hollerbach, 105 Ind. 137, 5 N. E. R. 28, 24 Am. & Eng. R. Cas. 340.

[2] Louisville, etc., R. Co. *v.* Hollerbach, *supra*. See, also, Memphis, etc., R. Co. *v.* Wilcox, 48 Pa. St. 161; McAndrews *v.* Tippett, 39 N. J. L. 105.

[3] Curnan *v.* Delaware, etc., R. Co., 138 N. Y. 480, 34 N. E. R. 201.

[4] Philadelphia, etc., R. Co. *v.* Howard, 13 How. (U. S.) 307; Ricker *v.* Fairbanks, 40 Me. 43. In one case it was held that the forfeiture provided in the contract could only be enforced within the time fixed for the completion of the work. Walker *v.* London, etc., R. Co., L. R. 1. C. P. D. 518, 36 L. T. Rep. 53.

[5] Henderson Bridge Co. *v.* O'Connor, 88 Ky. 303, 11 S. W. Rep. 18 and 957. But see McDonell *v.* Canada, etc., R. Co., 33 U. C. Q. B. 313.

[6] See *ante*, § 1058.

accomplish it, and representing the will of the company only as to the result of his work.[1] Generally, where an independent contractor is employed to perform a work lawful in itself and not intrinsically dangerous, the company, if it is not negligent in selecting the contractor, is not liable for the wrongful acts or negligence of such contractor,[2] and in order that the company shall be liable in such a case it must appear that it either exercised or reserved the right to exercise control over the work, or had the power to choose, direct and discharge the employes of the contractor.[3] In general it may be said that

[1] Jaggard on Torts, 229; Shearm. & Redf. on Neg., (2d ed.) § 73; 2 Thomp. on Neg., 899, § 22; Cooley on Torts, 548; Elliott's Roads and Streets, 466; Wabash, etc., R. Co. *v.* Farver, 111 Ind. 195, 31 Am. & Eng. R. Cas. 134; Edmundson *v.* Pittsburgh, etc., Co., 111 Pa. St. 316; Knowlton *v.* Hoit, (N. H.) 30 Atl. R. 346; Harrison *v.* Collins, 86 Pa. St. 153; Savannah, etc., R. Co. *v.* Phillips, 90 Ga. 829, 17 S. E. R. 82; Alabama, etc., R. Co. *v.* Martin, 100 Ala. 511, 14 So. R. 401.

[2] Chicago, etc., R. Co. *v.* Ferguson, 3 Colo. App. 414, 33 Pac. R. 684; Wabash, etc., R. Co. *v.* Farver, 111 Ind. 195, 31 Am. & Eng. R. Cas. 134; Waltemeyer *v.* Wisconsin, etc., R. Co., 71 Iowa 626, 30 Am. & Eng. R. Cas., 384; St. Louis, etc., R. Co. *v.* Willis, 38 Kan. 330, 33 Am. & Eng. R. Cas. 397; Speed *v.* Atlantic, etc., R. Co., 71 Mo. 303; Casement *v.* Brown, 148 U. S. 615; McCafferty *v.* Spuyten, etc., R. Co., 61 N. Y. 178; Kansas, etc., R. Co. *v.* Fitzsimmons, 18 Kan. 34; Cuff *v.* Newark, etc., R. Co., 35 N. J. L. 17; Town of Powlet *v.* Rutland, etc., R. Co., 28 Vt. 297; West *v.* St. Louis, etc., R. Co., 63 Ill. 545; Hughes *v.* Cincinnati, etc., R. Co., 39 Ohio St. 461; Conlon *v.* Eastern R. Co., 135 Mass. 195, 15 Am. & Eng. R. Cas. 99; Cunningham *v.* International R. Co., 51 Tex. 503; Burton *v.* Galveston, etc., R. Co., 61 Tex. 526, 21 Am. & Eng. R. Cas. 218; King *v.* New York, etc., R. Co., 66 N. Y. 181, 23 Am. R. 37; Bailey *v.* Troy, etc., R. Co., 57 Vt. 252, 52 Am. R. 129; Eaton *v.* European, etc., R. Co., 59 Me. 520, 8 Am. R. 430; Tibbetts *v.* Knox, etc., R. Co., 62 Me. 437; Sweeney *v.* Boston, etc., R. Co., 128 Mass. 5; Edmundson *v.* Pittsburgh, etc., R. Co., 111 Pa. St. 316, 23 Am. & Eng. R. Cas. 423; Elliott's Roads and Streets, 466, and cases cited. The rule is more fully and precisely stated by Judge Cooley, who says: "Where the contract is for something that may lawfully be done, and is proper in its terms, and there has been no negligence in selecting a suitable person to contract with in respect to it and no general control reserved, either as respects the manner of doing the work or the agents to be employed in doing it, and the person for whom the work is to be done is interested only in the ultimate result of the work, and not in the several steps as it progresses, the latter is neither liable to third persons for the negligence of the contractor as his master, nor is he master of the persons employed by the contractor, so as to be responsible to third persons for their negligence." Cooley on Torts, 548.

[3] Boswell *v.* Laird, 8 Cal. 469; Hughes *v.* Cincinnati, etc., R. Co., 39 Ohio St. 461, 15 Am. & Eng. R. Cas. 100; New

the liability of the company depends upon whether or not it has retained control and direction of the work.[1] But neither the reservation of the power to terminate the contract when in the discretion of the engineer the work is not progressing satisfactorily,[2] the right to exercise general supervision and inspect the work as it progresses,[3] nor the right to enforce forfeitures will change the relation so as to render the company liable.[4] The company may reserve the right to determine what work shall be done,[5] but, as a general rule, the contractor must have control of the means by which it is to be accomplished, or he will not be liable for the consequences.[6] The fact that the contractor is paid by the day,[7] or that the company pays the employes of the contractor directly,[8] does not necessarily destroy the independent character of the employment. If the company

Orleans, etc., R. Co. *v.* Norwood, 62 Miss. 565; Hackett *v.* W. U. Tel. Co., 80 Wis. 187; Speed *v.* Atlantic, etc., Railroad Co., 71 Mo. 303; Burmeister *v.* New York, etc., Railroad Co., (15 J. & S.) 47 N. Y. S. C. 264; Wabash, etc., R. Co. *v.* Farver, 111 Ind. 195; Cunningham *v.* International Railroad Co., 51 Tex. 503; Hunt *v.* Pennsylvania R. Co., 51 Pa. St. 475. See 41 Cent. L. J. 6.

[1] Fuller *v.* Cit. N. B., 15 Fed. R. 875; Samuelson *v.* Cleveland, etc., Co., 49 Mich. 164; 14 Am. & Eng. Ency. of Law 830; Warburton *v.* Great Western R. Co. L. R., 2 Exch. 30; Fulton, etc., St. R. Co. *v.* McConnell, 87 Ga. 756, 13 S. E. R. 828; New Orleans, etc., R. Co. *v.* Hanning, 15 Wall. 649; 1 Jaggard on Torts, 229.

[2] Reedie *v.* London & N. W. R. Co., 4 Exch. 244; Blake *v.* Ferris, 5 N. Y. 48; Cuff *v.* Newark, etc., R. Co., 35 N. J. L. 17; Wray *v.* Evans, 80 Pa. St. 102; Schular *v.* Hudson River R. Co., 38 Barb. (N. Y.) 653.

[3] Eaton *v.* European, etc., R. Co., 59 Me. 520; Hunt *v.* Pennsylvania R. Co., 51 Pa. St. 475; Steel *v.* Southeastern R. Co., 32 Eng. L. & Eq. 366; Wray *v.* Evans, 80 Pa. St. 102; Casement *v.* Brown, 148 U. S. 615, 13 Sup. Ct. R. 672; Carman *v.* Steubenville, etc., R. Co., 4 Ohio St. 399; Allen *v.* Willard, 57 Pa. St. 374; Kelly *v.* Mayor, 11 N. Y. 432.

[4] Tibbetts *v.* Knox, etc., R. Co., 62 Me. 437; Allen *v.* Willard, 57 Pa. St. 374.

[5] Schular *v.* Hudson, etc., R. Co., 38 Barb. 653; Callahan *v.* Burlington, etc., R. Co., 23 Iowa 562. See note to Stone *v.* Cheshire, etc., R. Co., (19 N. H. 427), 51 Am. Dec. 192, 203.

[6] Burmeister *v.* New York, etc., R. R. Co., (15 J. & S.) 47 N. Y. S. C. 264; Hughes *v.* Cincinnati, etc., R. Co., 39 Ohio St. 461; King *v.* New York, etc., R. Co., 66 N. Y. 181; New Orleans, etc., R. Co. *v.* Hanning, 15 Wall. 649.

[7] Corbin *v.* American Mills, 27 Conn. 274; Forsyth *v.* Hooper, 11 Allen 419; Harrison *v.* Collins, 86 Pa. St. 153, 27 Am. R. 699; Hexamer *v.* Webb, 101 N. Y. 377, 23 Cent. L. J. 249.

[8] Rourke *v.* White Moss Colliery Co., L. R. 1 C. P. Div. 556.

have a public duty to perform, or if statutory duties rest upon it, the employment of an independent contractor, with entire control of prescribed work, can not avert its liability; it must perform those duties or be directly liable for any neglect thereof.[1] If the contract be in itself unlawful, as where the prosecution or result of the work is necessarily a nuisance, the company can not escape liability by letting the work to a contractor.[2] And if the work be dangerous in its nature the company will be held liable for such injuries as might have been contemplated.[3] However, if the nuisance is not a necessary incident to the work, but arises from the manner in which it is conducted,[4] or if the contractor use unnecessarily dangerous means not contemplated by the parties, the fault is imputed to him alone.[5] Where blasting is contemplated by the contract, the company may be liable for such injuries as will result directly from the acts which the contractor is authorized to do, if he does them in a proper manner; but for those injuries which arise from

[1] Carrico *v.* West Virginia, etc., R. Co., 39 W. Va. 86, 19 S. E. R. 571; Donovan *v.* Oakland, etc., Co., 102 Cal. 245, 36 Pac. 516; Nelson *v.* Vermont, etc., R. Co., 26 Vt. 717; Houston, etc., R. Co. *v.* Meader, 50 Tex. 77; Bay City, etc., R. Co. *v.* Austin, 21 Mich. 390; Lowell *v.* Boston, etc., R. Co., 23 Pick. 24; Gray *v.* Pullen, 34 L. J. Q. B. 265; West Riding, etc., R. Co. *v.* Wakefield Local Board, 33 L. J. M. C. 174; Rockford, etc., R. Co. *v.* Heflin, 65 Ill. 366; Chicago, etc., R. Co. *v.* McCarthy, 20 Ill. 385; Montgomery, etc., Co. *v.* Montgomery, etc., R. Co., 86 Ala. 372; City, etc., R. Co. *v.* Moores, 80 Me. 348, 30 Atl. R. 643; Hole *v.* Settingbourne R. Co., 6 H. & N. 488, s. c. 30 L. J. N. S. Exch. 81; Storrs *v.* City of Utica, 17 N. Y. 104; Woodman *v.* Metropolitan R. Co., 149 Mass. 335, 4 L. R. A. 213. But see Blake *v.* Ferris, 5 N. Y. 48, 55 Am. Dec. 304.

[2] Stone *v.* Cheshire, etc., R. Co., 19 N. H. 427; Carmen *v.* Steubenville, etc., R. Co., 4 Ohio St. 399; King *v.* New York, etc., R. Co., 66 N. Y. 181, 23 Am. R. 37; Sabin *v.* Vermont Central R. Co., 25 Vt. 363.

[3] Booth *v.* Rome, etc., R. Co., 17 N. Y. Supp. 336; Stone *v.* Cheshire, etc., R. Co., 19 N. H. 427, 51 Am. Dec. 192; Carman *v.* Steubenville, etc., R. Co., 4 Ohio St. 399; City of Joliet *v.* Harwood, 86 Ill. 110, 29 Am. R. 17; City of Logansport *v.* Dick, 70 Ind. 65, 36 Am. R. 166.

[4] Tibbetts *v.* Knox, etc., R. Co., 62 Me. 437; McCafferty *v.* Spuyten, etc., R. Co., 61 N. Y. 178; Bailey *v.* Troy, etc., R. Co., 57 Vt. 252; Atlanta, etc., R. Co. *v.* Kimberly, 87 Ga. 161, 13 S. E. R. 277.

[5] West *v.* St. Louis, etc., R. Co., 63 Ill. 545; Hackett *v.* W. U. Tel. Co., 80 Wis. 187. See Elliott's Roads and Streets, 468; 14 Am. & Eng. Encyc. of Law 832, *n.*

the careless or wrongful acts of the contractor or his servants in employing blasting as a means of performing the work or in conducting the blasting authorized by the contract, the company will be in nowise liable.[1] Where the company contracts to haul the material for the contractor and operates its trains for such purpose entirely by its own employes, the contractor having no control of the train, the company is liable for injuries resulting from the negligent running of the train,[2] but where the contract gives the contractor the right to control the train, the liability rests upon him.[3] However, it is held that if the railroad be operated by the contractor for purposes of traffic with the knowledge or authority of the company, he is considered the agent of the company for that purpose, and the company is liable for his negligence.[4] For trespass in entering upon land under the franchise of a railroad company, the company may be held liable, although the actual entry was made by contractors. So, where the contractor cuts trenches and throws up embankments, hauls stone across adjacent premises, cuts down trees, or leaves waste dirt upon arable land, in the exercise of the charter power, the company is liable, unless the contractor has exceeded his authority,[5] and a wrongful appro-

[1] McCafferty *v.* Spuyten, etc., R. Co., 61 N. Y. 178, 19 Am. R. 267; Tibbetts *v.* Knox, etc., R. Co., 62 Me. 437; Edmundson *v.* Pittsburgh, etc., R. Co., 111 Pa. St. 316; Booth *v.* Rome, etc., R. Co., 17 N. Y. Supp. 336; Carman *v.* Steubenville, etc., R. Co., 4 Ohio St. 399; City of Tiffin *v.* McCormack, 34 Ohio St. 638. See, also, Cuff *v.* Newark R. Co., 35 N. J. L. 17. But see, *ante*, § 1057. An examination of the cases shows that the conflict sometimes referred to by writers is only an apparent one and that the rules laid down in the text have been followed in both classes of cases. See note to Blumb *v.* City of Kansas, 84 Mo. 112, 54 Am. R. 87.

[2] Burton *v.* Galveston, etc., R. Co., 61 Tex. 526, 21 Am. & Eng. R. Cas. 218; Chicago, etc., R. Co. *v.* Clark, 26 Neb. 645, 38 Am. & Eng. R. Cas. 192; Railroad *v.* Norwood, 62 Miss. 565. But see Illinois Central R. Co. *v.* Finnigan, 21 Ill. 646; Chicago, etc., R. Co. *v.* Whipple, 22 Ill. 105.

[3] Miller *v.* Minnesota, etc., R. Co., 76 Iowa 655, 38 Am. & Eng. R. Cas. 234; Cunningham *v.* International R. Co., 51 Tex. 503; Central R. & B. Co. *v.* Grant, 46 Ga. 417; Union, etc., R. Co. *v.* Hause, 1 Wyo. 27; Meyer *v.* Midland, etc., R. Co., 2 Neb. 319; Kansas, etc., R. R. Co. *v.* Fitzsimmons, 18 Kan. 34; Rome, etc., R. Co. *v.* Chasteen, 88 Ala. 591; Powell *v.* Construction Co., 88 Tenn. 692.

[4] Lakin *v.* Willamette, etc., R. Co., 13 Ore. 436; Cogswell *v.* West, etc., Elec. Ry. Co., 5 Wash. 46, 7 Lewis' Am. R. & Corp. R. 48.

[5] West *v.* St. Louis, etc., R. Co., 63 Ill. 545; Rockford, etc., R. Co. *v.*

priation by an independent contractor will render a company liable if it ratifies his acts.[1] But for trespasses by contractors or sub-contractors, which were not the natural result of the work, or were not authorized or directed by the company, no liability attaches to the company.[2] The negligent selection of an incompetent contractor may render the company liable for his negligent or wrongful acts,[3] and where injury is caused by defective construction, which was inherent in the original plan of the employer, the fault is imputed to him.[4] Where the contract provides that the company shall furnish appliances or material the liability of the company for injuries resulting from defects in such appliances or material furnished depends largely upon the circumstances of each case.[5]

Wells, 66 Ill. 321; St. Louis, etc., R. Co. *v.* Drennan, 26 Ill. App. 263; Vermont, etc., R. Co. *v.* Baxter, 22 Vt. 365; Alabama, etc., R. Co. *v.* Williams, 92 Ala. 277, 9 So. R. 203. There are many authorities that hold that the company is liable for improper entries, and all abuses of the right of eminent domain committed by the contractor. Lesher *v.* Wabash Nav. Co., 14 Ill. 85; Chicago, etc., R. Co. *v.* Whipple, 22 Ill. 105; Chicago, etc., R. Co. *v.* Woosley, 85 Ill. 370; Vermont, etc., R. Co. *v.* Baxter, 22 Vt. 365; Macon, etc., R. Co. *v.* Mayes, 49 Ga. 355; Cunningham *v.* International R. Co. 51, Tex. 503. Land-owners who stand by and permit contractors to commit waste on adjacent soil without objection can not recover damages in a court of equity. Murdfeldt *v.* New York, etc., R. Co., 102 N. Y. 703, 25 Am. & Eng. R. Cas. 144.

[1] Bloomfield R. Co. *v.* Grace, 112 Ind. 128; Lesher *v.* Wabash Nav. Co. 14 Ill. 85, 56 Am. Dec. 494.

[2] Eaton *v.* European, etc., R. Co., 59 Me. 520, 8 Am. R. 430; St. Louis, etc., R. Co. *v.* Knott, 54 Ark. 424; Hughes *v.* Cincinnati, etc., R. Co., 39 Ohio St. 461; Steel *v.* South Eastern R. Co., 16 C. B. 550; Waltemeyer *v.* Wisconsin, etc., R. Co., 71 Iowa 626, 30 Am. & Eng. R. Cas. 384; Clark *v.* Vermont, etc., R. Co., 28 Vt. 103; Clark *v.* Hannibal, etc., R. Co., 36 Mo., 202; Callahan *v.* Burlington, etc., R. Co., 23 Iowa 562.

[3] Jaggard on Torts, 232; 2 Thompson Neg. 908; Berg *v.* Parsons, 84 Hun 60, 31 N. Y. Supp. 1091; Norwalk Gas Light Co. *v.* Borough of Norwalk, 63 Conn. 495, 28 Atl. 32; Cuff *v.* Newark, etc., Railroad Co., 35 N. J. L. 17; Robbins *v.* Chicago City, 4 Wall. (U. S.) 657.

[4] Atlanta, etc., R. Co. *v.* Kimberly, 87 Ga. 161, 13 S. E. R. 277, and cases cited.

[5] See King *v.* New York, etc., R. Co., 66 N. Y. 181; Tobin *v.* Portland, etc., R. Co., 59 Me. 183. Where a poisonous substance was applied to timber to prevent decay and a servant of the contractor was injured thereby the company was held not liable. West *v.* St. Louis, etc., R. Co., 63 Ill. 545. Where a derrick was supplied by the company, which being defective, fell and injured a servant, it was held that no implied duty to keep in repair existed as the relation to the

§ 1064. **Liability of contractor—Joint liability.**—As a general rule the independent contractor is alone liable to third persons for the consequence of his own negligence and that of his servants,[1] and where the contract is for the delivery of the completed work his liability continues until the work is accepted,[2] when , it is held, that of the employer begins.[3] If the contractor employ means unnecessarily dangerous, not contemplated in the agreement, or commit an unauthorized trespass, or neglect to use proper precaution in conducting dangerous work which could be safely conducted by the means prescribed in the contract, the liability rests upon him alone.[4] But where the work is wrongful or unlawful in itself, or if done in the ordinary manner would result in a nuisance or injury to others, the company and contractor may be jointly liable.[5] And so if the company's contractor by its direction

contractor was not that of master and servant, and the company was held not liable. King *v.* New York, etc., R. Co., 66 N. Y. 181. But see *contra*, Conlon *v.* Eastern, R. Co., 135 Mass. 195, 15 Am. & Eng. R. Cas. 99.

[1] City,etc.,Ry.Co. *v.* Moores, 80 Md. 348, 30 Atl. R. 643; Wabash, etc., R. Co. *v.* Farver, 111 Ind. 195, 12 N. E. R. 296; Hitte *v.* Republican, etc., Railroad Co., 19 Neb. 620, 29 Am. & Eng. R. Cas. 586; Miler *v.* Minnesota, etc., R. Co., 76 Iowa 655; West *v.* St. Louis, etc., R. Co., 63 Ill. 545. "The contractor must answer for his own wrongs committed in the course of the work by his servants." 2 Thompson on Negligence, 899; Crenshaw *v.* Ullman, 113 Mo. 633, 20 S.W. R. 1077. See, also, authorities cited in last section. We do not, of course, mean that the contractor's servant may not also be held liable for his own negligence. What we mean is that the company is not liable.

[2] St. Louis, etc., R. Co. *v.* Knott, 54 Ark. 424, 16 S. W. R. 9; Atlanta, etc., R. Co. *v.* Kimberly, 87 Ga. 161, 13 S. E. R. 277.

[3] Sturges *v.* Society, 130 Mass. 414; Gorham *v.* Gross, 125 Mass. 232; Cork *v.* Blossom, 162 Mass. 330, 38 N. E. R. 495; Harding *v.* City of Boston, 163 Mass. 14, 39 N. E. R. 411.

[4] Burke *v.* Anderson, 69 Fed. R. 814; West *v.* St. Louis, etc., R. Co., 63 Ill. 545; Hackett *v.* W. U. Tel. Co., 80 Wis. 187, 49 N. W. R. 822; Chicago, etc., R. Co. *v.* Ferguson, 3 Colo. App. 414, 33 Pac. R. 684; McDonell *v.* Rifle Boom Co., 71 Mich. 61; Atlanta, etc., R. Co. *v.* Kimberly, 87 Ga. 161, 13 S. E. R. 277; Fulton County St. R. Co. *v.* McConnell, 87 Ga. 756, 13 S. E. R. 828; McCann *v.* Kings County R. Co., 19 N. Y. Supp. 668; City, etc., R. Co. *v.* Moores, 80 Md. 348, 30 Atl. R. 643; Wabash, etc., R. Co. *v.* Farver, 111 Ind. 195, 12 N. E. R. 296; Cuff *v.* Newark, etc., R. Co., 35 N. J. L. 17, 10 Am. R. 205.

[5] Atlanta, etc., R. Co. *v.* Kimberly, 87 Ga. 161, 13 S. E. R. 277; Ohio, etc., R. Co. *v.* Morey, 47 Ohio St. 207, 7 L. R. A. 701; Chicago City *v.* Robbins, 2 Black (U. S.) 418; Robbins *v.* Chicago City, 4 Wall. 657; Hughes *v.* Cincinnati, etc., R. Co., 39 Ohio St. 461,

enters upon lands before the right to do so has been acquired they are both trespassers and are jointly liable.[1] It has been held, however, that where the company can foresee the danger attendant upon the construction it is incumbent upon the company to take precautions against it, and that if the work be done in a careful manner no liability attaches to the contractor.[2] The employer will share the liability where he selects an incompetent contractor to perform dangerous work, notwithstanding the contractor may have agreed to assume all risk.[3] The contractor stands in the relation of master to those immediately employed by him and his liability to them is determined by the settled rules determining the liability of master to servant.

§ 1065. **Rights of laborers.**—In many of the states statutes have been enacted giving the laborers employed in the construction of a railway a claim upon the company for any arrears of wages.[4] In the absence of a statute whose terms are broad enough to include them, the laborers employed by a contractor or sub-contractor are not in such privity of contract with the company as to render it liable for their wages.[5] In several states the statutes are broad enough to include the

15 Am. & Eng. R. Cas. 100; Booth *v.* Rome, etc., R. Co., 63 Hun 624; 2 Thompson on Negligence, 903.

[1] St. Louis, etc., R. Co. *v.* Knott, 54 Ark. 424, 16 S. W. R. 9; Ullman *v.* Hannibal, etc., Railroad Co., 67 Mo. 118; McKinley *v.* Chicago, etc., Railroad Co., 40 Mo. App. 449; Turman *v.* Bell, 54 Ark. 273, 15 S. W. R. 886.

[2] Atlanta, etc., R. Co. *v.* Kimberly, 87 Ga. 161, 13 S. E. R. 277, citing Bower *v.* Peate, L. R. 1 Q. B. Div. 321; Tarry *v.* Ashton, L. R. 1 Q. B. Div. 314; Pickard *v.* Smith, 10 C. B. (N. S.) 470.

[3] Berg *v.* Parsons, 31 N. Y., Supp. 1091; Cuff *v.* Newark, etc., R. Co., 35 N. J. L. 17, 10 Am. R. 205; Eaton *v.* European, etc., R. Co., 59 Me. 520, 8 Am. R. 430, and cases cited *infra.*

[4] 2 Stimson's Am. Stat., §§ 8551, 8553. The liability is the same whether the work is performed under a contract or at a stipulated price or on a *quantum meruit.* Chapman *v.* Utica, etc., R. Co., 4 Lans. (N. Y.) 96.

[5] Indianapolis, etc., R. Co. *v.* O'Reily, 38 Ind. 140; Marks *v.* Indianapolis, etc., R. Co., 38 Ind. 440; Gallaghar *v.* Ashby, 26 Barb. (N. Y.) 143; Bontwell *v.* Townsend, 37 Barb. (N. Y.) 205; Rogers *v.* Dexter, etc., R. Co., 85 Me. 372, 27 Atl. R. 257. An unwritten promise by a railroad company to assume a contractor's obligations to his employes has been held insufficient to sustain an action. Bottomley *v.* Port Huron, etc., R. Co., 44 Mich. 542, 7 N. W. R. 214.

laborers employed by contractors and sub-contractors as well as the immediate servants of the company, while in others only laborers employed directly by the company are so protected.[1] Such statutes have been upheld as constitutional, as they can neither be regarded as special legislation nor as an impairment of the obligation of contracts, and they apply as well to companies chartered before the passage of the law as to those chartered afterward.[2] In a number of states labor claims of the company are made a liability of the stockholder, in some instances to the amount of the stock, and in others they are made an individual liability to the full amount of the claims.[3] In other states the company making contracts for

[1] Indiana, etc., R. Co. *v.* Larrew, 130 Ind. 368, 30 N. E. R. 517; Farmers' Loan and Trust Co. *v.* Canada, etc., R. Co., 127 Ind. 250, 47 Am. & Eng. R. Cas. 271. A superintendent and time-keeper are not within the statute. Missouri, etc., R. Co. *v.* Baker, 14 Kan. 563. Laborers employed by a sub-contractor have their remedy under the statute. Mann *v.* Corrigan, 28 Kan. 194; Mundt *v.* Sheboygan, etc., R. Co., 31 Wis. 451; Kent *v.* New York, etc., R. Co., 12 N. Y. 628; Branin *v.* Connecticut, etc., R. Co., 31 Vt. 214; Peters *v.* St. Louis, etc., R. Co., 24 Mo. 586. See Hart's Appeal, 96 Pa. St. 355. The sub-contractor himself is not included, although his employes are. Rogers *v.* Dexter, etc., R. Co., 85 Me. 372, 27 Atl. R. 257. The liability extends to labor of teams as well as of direct manual labor. Branin *v.* Connecticut, etc., R. Co., 31 Vt. 214. But see *contra*, Atcherson *v.* Troy, etc., R. Co., 6 Abb. Pr. N. S. 329, and cases cited; Groves *v.* Kansas City, etc., R. Co., 57 Mo. 304. As to construction of such statutes and compliance with them, see Mundt *v.* Sheboygan, etc., R. Co., 31 Wis. 451; Redmond *v.* Galena, etc., R. Co., 39 Wis. 426, 13 Am. Ry. R. 400; Cartwright *v.* New York, etc., R. Co., 59 Vt. 675, 30 Am. & Eng. R. Cas. 234; Chapman *v.* Utica, etc., R. Co., 4 Lans. (N. Y.) 96; Grannahan *v.* Hannibal, etc., R. Co., 30 Mo. 546; Cosgrove *v.* Tebo, etc., R. Co., 54 Mo. 495; Dudley *v.* Toledo, etc., R. Co., 65 Mich. 655, 32 N. W. R. 884; Quackenbush *v.* Chicago, etc., R. Co., 91 Mich. 308, 51 N. W. R. 883.

[2] Luther *v.* Saylor, 8 Mo. App. 424; Peters *v.* St. Louis, etc., R. Co., 23 Mo. 107; Grannahan *v.* Hannibal, etc., R. Co., 30 Mo. 546; Conner *v.* Hannibal, etc., R. Co., 30 Mo. 549; Branin *v.* Connecticut, etc., R. Co., 31 Vt. 214; Shipley *v.* Terre Haute, 74 Ind. 297, 4 Am. & Eng. R. Cas. 345.

[3] 2 Stimson's Am. Stat., § 8553. In Michigan, liable only to the amount of the stock. Peck *v.* Miller, 39 Mich. 594. A suit against a railroad company for a labor debt can be maintained only on the theory that the company is owner of the road and not upon the theory that it is agent of the owner. Chicago, etc., R. Co. *v.* Sturgis, 44 Mich. 538, 7 N. W. R. 213. A city having subscribed to stock as authorized by statute is bound by the same liability as attaches to the ordinary stockholder for labor done in con-

building must require a bond from the contractor securing payment of all material men and labor and if it fail to take such a bond it is liable to the full extent of such unpaid debts.[1] But the most common remedy of the unpaid laborer is the lien given him by statute upon the property of the company.[2]

§ 1066. **Mechanics' liens—General laws do not include railroads.**—The ordinary mechanics' lien laws do not, as a rule, embrace railroads. They may, of course, expressly provide for liens upon railroads, or, although the term, "railroad" is not used, the language and intent of the statute may be such as to clearly include railroads; but the courts will not presume that the legislature intended to subject the public to the annoyances and inconveniences which would necessarily attend the enforcement of a mechanics' lien against a railroad under a general mechanics' lien law, and will not so construe it unless such an interpretation is clearly required.[3] Thus, although a railroad is, in a general sense, a structure, it has been held in several cases that a statute giving a lien for materials and labor upon any "house, mill, manufactory, building or other structure," does not include a railroad.[4] But this may depend very largely upon the context, under the maxim *noscitur a sociis*, and the phrase "any other structure" has been held to include a railroad when preceded by a specific enumeration of works or property of a somewhat similar character.[5] So, the poles

struction of the road. Shipley *v.* Terre Haute, 74 Ind. 297, 4 Am. & Eng. R. Cas. 345.

[1] 2 Stimson's Am. Stat., § 8551. The Kansas statute requires the company to take a bond of the contractor, and failing to do so the company is liable to laborers and their assignees. Missouri, etc., R. Co. *v.* Brown, 14 Kan. 557; Maun *v.* Corrigan, 28 Kan. 194.

[2] See *post*, § 1067, *et seq.*

[3] Buncombe Co. Comrs. *v.* Tommey, 115 U. S. 122, s.c. 5 Sup. Ct. R. 626, 1186; Pennsylvania, etc., Co. *v.* J. E. Potts, etc., Co., 63 Fed. R. 11; Newcastle R. Co. *v.* Simpson, 26 Fed. R. 133; Tyler, R. Co. *v.* Driscol, 52 Tex. 13; La Crosse, etc., Co. *v.* Vanderpool, 11 Wis. 119, 124; Esterley's Appeal, 54 Pa. St. 192.

[4] Rutherford *v.* Cincinnati, etc., R. Co., 35 Ohio St. 559; Graham *v.* Mt. Sterling C. Co., 14 Bush. (Ky.) 425, s. c. 29 Am. R. 412; Pennsylvania, etc., Co. *v.* J. E. Potts, etc., Co., 63 Fed. R. 11.

[5] Giant Powder Co. *v.* Oregon Pac. R. Co., 42 Fed. R. 470, s. c. 8 L. R. A. 700. See, also, Central Trust Co. *v.* Sheffield, etc., Co., 42 Fed. R. 106.

and wires of an electric light system have been held to constitute a structure within the meaning of the mechanics' lien law.[1]

§ 1067. **Statutes authorizing liens.**—If it is clear that the statute includes railroads, we suppose that it should be liberally construed as in other cases.[2] It was held in a recent case, however, that a statute giving laborers a lien upon a "railroad" or "any other structure" did not authorize a lien upon a street railway where the fee of the street was in the city.[3] Other decisions showing that the right to acquire a lien upon a railroad must be clearly given and that a general statute will not be extended by construction so as to include railroads, are reviewed in the preceding section. It has been held that a statute expressly giving a lien upon a railroad for materials furnished and used in its construction is, in effect, a legislative declaration that prior statutes did not cover such cases.[4] Statutes giving a preference or lien to laborers and material men upon the insolvency of the company are to be distinguished from ordinary mechanics' lien statutes, and one who has lost his right to enforce his lien under the mechanics' lien statute by failing to file his notice in time can not enforce it as a preferred claim under the statute giving preferences to certain classes of claims upon the insolvency of the company,

[1] Forbes *v.* Willamette, etc., Co., 19 Ore. 61, s. c. 23 Pac. R. 670. See, also, Helm *v.* Chapman, 66 Cal. 291, s. c. 5 Pac. R. 352; Putnam *v.* Ross, 46 Mo. 337; Taggard *v.* Buckmore, 42 Me. 77; *Ex parte*, Schmidt, 62 Ala. 252; Buchanan *v.* Smith, 43 Miss. 90.

[2] Flagstaff, etc., Co. *v.* Cullins, 104 U. S. 176; Texas, etc., R. Co. *v.* Orman, 3 N. Mex. 308, 9 Pac. R. 253; Kiel *v.* Carll, 51 Conn. 440; Bradish *v.* James, 83 Mo. 313; Montandon *v.* Deas, 14 Ala. 33; White Lake, etc., Co. *v.* Russell, 22 Neb. 126; Edwards *v.* Derrickson, 28 N. J. L. 39; Schulenburg *v.* Memphis, etc., R. Co., 67 Mo. 442; Railway Co. *v.* Cronin, 38 Ohio St. 122, 127. Such statutes will not, however, be construed as retroactive and authorizing a lien for work done or materials furnished before their passage. Arbuckle *v.* Illinois Midland R. Co., 81 Ill. 429; Parker *v.* Massachusetts R. Co., 115 Mass. 580; Central, etc., R. Co. *v.* Henning, 52 Tex. 466.

[3] Front Street Cable R. Co. *v.* Johnson, 2 Wash. 112, 25 Pac. R. 1084, s. c. 11 L. R. A. 693. This decision seems to be of questionable soundness. See St. Louis, etc., Co. *v.* Donahoe, 3 Mo. App. 559.

[4] Tod *v.* Kentucky Un. R. Co., 52 Fed. R. 241, s. c. 18 L. R. A. 305.

unless he shows that it is within the terms of such statute.[1] For instance, as held in the case just cited, where the mechanics' lien statute authorizes a lien in favor of "contractors" and another statute provides that the claims of "employes" shall be preferred and constitute a lien, upon the insolvency of the company, a contractor who has not filed notice of his lien as required by the former statute, is not entitled to a preference or a lien under the latter statute.

§ 1068. **For what lien may be obtained.**—The nature of the claim for which a lien may be acquired depends, of course, upon the governing statute in each particular case. It is generally required that the labor should be performed or the material used in the construction of the road. Under such a statute it has been held that giant powder furnished to be used, and used, by the contractor in constructing the road is "material" for the value of which a lien may be acquired;[2] but a lien can not be obtained for machinery furnished to a contractor to be used in doing the work upon a bridge, under a statute authorizing a lien for all materials "used in and about" the construction of the bridge.[3] So, of course, groceries and food furnished for the workmen, while, in a sense, used in the construction of the road, are not materials which so enter into its construction that a lien can be based upon them.[4] Nor can one who furnishes an electric light plant for hotel premises at

[1] Tod *v.* Kentucky Un. R. Co., 52 Fed. R. 241, s. c. 18 L. R. A. 305.

[2] Giant Powder Co. *v.* Oregon Pac. R., 42 Fed. R. 470, s. c. 8 L. R. A. 700; Rapauno, etc., Co. *v.* Greenfield, etc., R. Co., 59 Mo. App. 6. "Timber" has been held to include railroad ties. Kollock *v.* Parcher, 52 Wis. 393.

[3] Bashor *v.* Baltimore, etc., R. Co., 65 Md. 99. See, also, Gordon, etc., Co. *v.* San Francisco, etc., R. Co., 86 Cal. 620, s. c. 22 Pac. R. 406, 23 Pac. 1025, 25 Pac. 125; First Nat. Bank *v.* Perris, etc., Dict., 107 Cal. 55, s. c. 40 Pac. R. 45. But compare Perry *v.* Duluth, etc., R. Co., 56 Minn. 306, s. c. 57 N. W. R. 792.

[4] Ferguson *v.* Despo, 8 Ind. App. 523, 528; Dudley *v.* Toledo, etc., R. Co., 65 Mich. 655, s. c. 30 Am. & Eng. R. Cas. 236. Nor is lumber sold to a contractor on a railroad for shanties for his employes or stables for his teams. Stewart, etc., Co. *v.* Missouri Pac. R. Co., 33 Neb. 29, s. c. 49 N. W. R. 769. See, also, Central Trust Co. *v.* Texas, etc., R. Co., 23 Fed. R. 703; Central Trust Co. *v.* Texas, etc., R. Co., 27 Fed. R. 178.

the instance of a railroad company obtain a lien therefor under a statute authorizing a lien for labor performed or materials furnished for the construction of the road, depot buildings or water tanks.[1] And there can be no lien for material contracted for and prepared but never delivered.[2] But one who is employed to grub and clear the right of way and construct the road-bed may take and enforce a lien for the grubbing and clearing as well as for constructing the road-bed where all the work is necessary in constructing the road.[3] So, it has been held that one who furnishes materials for the construction of a road in one state under a contract made therein is entitled to a lien against the road although the materials are delivered in another state.[4] It is frequently provided that the material must be furnished for, as well as used in, the construction of the road or property upon which the lien is claimed, and it has been held that an allegation in a finding that it was purchased for such purpose in not equivalent to an averment or a finding that it was furnished for that purpose.[5]

§ 1069. **Upon what lien may be acquired.**—It has been held that a mechanics' lien may be taken upon a stable built by a street railway company,[6] or a depot of a commercial railroad

[1] Industrial, etc., Co. *v.* Electrical, etc., Co., 58 Fed. R. 732.

[2] Richmond, etc., Co. *v.* Richmond, etc., R. Co., 68 Fed. R. 105. This case also holds that there can be no lien where the material is lost through the negligence of the party who claims the lien, although the title had passed, that furnishing a right of way is not furnishing "material," and that legal services are not "labor." See, also, Weir *v.* Barnes, 38 Neb. 875, s. c. 57 N. W. R. 750; Lee *v.* King, 99 Ala. 246, s. c. 13 So. R. 506, and compare Howes *v.* Reliance Wire Works Co., 46 Minn. 44, s. c. 48 N. W. R. 448; Huttig Bros., etc., Co. *v.* Denny, etc., Co., 6 Wash. 122, 32 Pacific R. 1073; Trammell *v.* Mount, 68 Tex. 210.

[3] Dean *v.* Reynolds, 12 Ind. App. 97, s. c. 39 N. E. R. 763.

[4] Carnegie Bros. *v.* Lancaster, etc., R. Co., 1 Ohio N. P. 300. See St. Louis, etc., R. Co. *v.* Memphis, etc., R. Co., 72 Mo. 664; Thompson *v.* St. Paul, etc., R. Co., 45 Minn. 13; Mallory *v.* La Crosse, etc., Co., 80 Wis. 170.

[5] City of Crawfordsville *v.* Barr, 45 Ind. 258; Lawton *v.* Case, 73 Ind. 60; Jones *v.* Hall, 9 Ind. App. 458, s. c. 35 N. E. R. 923. Compare Jeffersonville, etc., Co. *v.* Riter, 138 Ind. 170; Neeley *v.* Searight, 113 Ind. 316; Smith *v.* Newbaur, (Ind.) 42 N. E. R. 40.

[6] McIlvain *v.* Hestonville, etc., R. Co., 5 Phila. (Pa.) 13.

company.[1] But, as elsewhere shown, where materials are furnished or labor is performed in the construction of the road the statutes are usually construed as giving a lien upon the entire road, and the general rule is that it can not be sold in parcels to satisfy the lien.[2] It has been held, however, that, unless the statute so provides, the lien does not extend to the cars and other movable property of the company,[3] and that even where it does, such property need not all be sold as an entirety in order to satisfy the lien.[4] So, in a recent case it was held, chiefly upon the ground of public policy, that, as the statute did not authorize a lien upon the franchise, it could not be acquired and enforced against a water-works "plant" which the purchaser would have no franchise or authority to operate.[5]

§ 1070. **Who may acquire lien.**—Only those who are members of one of the classes designated by the statute can acquire a mechanics' lien upon a railroad for material furnished or labor performed in its construction. Nearly all the statutes give such a lien to laborers and material men, and some of them extend it to contractors and sub-contractors. We have elsewhere attempted to show who are laborers within the meaning of these and similar statutes.[6] A corporation is a person

[1] Hill *v.* La Crosse, etc., R. Co., 11 Wis. 214. See, also, Purtell *v.* Chicago, etc., R. Co., 74 Wis. 132; Botsford *v.* New Haven, etc., R. Co., 41 Conn. 454; Smith Bridge Co. *v.* Bowman, 41 Ohio St. 37. But compare King *v.* Alford, 9 Ont. Rep. 643, s. c. 24 Am. & Eng. R. Cas. 331; Breeze *v.* Midland R. Co., 26 Gr. Ch. (Can.) 225; Shrainka *v.* Rohan, 18 Mo. App. 340.

[2] *Post*, § 1074. See, also, Steger *v.* Arctic, etc., Co., 89 Tenn. 453, s. c. 11 L. R. A. 580; Brooks *v.* Railway Co., 101 U. S. 443; Midland R. Co. *v.* Wilcox, 122 Ind. 84, s. c. 23 N. E. R. 506; Farmers' Loan & T. Co. *v.* Candler, 87 Ga. 241, s. c. 13 S. E. R. 560.

[3] Neilson *v.* Iowa, etc., R. Co., 51 Iowa 184, s. c. 33 Am. R. 124. See, also, New England, etc., R. Co. *v.* Baltimore, etc., R. Co., 11 Md. 81, s. c. 69 Am. Dec. 181.

[4] Knapp *v.* St. Louis, etc., R. Co., 74 Mo. 374, s. c. 7 Am. & Eng. R. Cas. 394; Cranston *v.* Union T. Co., 75 Mo. 29.

[5] Chapman, etc., Co. *v.* Oconto Water Co., 89 Wis. 264, s. c. 60 N. W. R. 1004. But compare Oconto Water Co. *v.* National, etc., Co., 59 Fed. R. 19.

[6] *Ante*, §§ 186, 605. See, also, note

within the meaning of a statute authorizing a lien in favor of "any person" who furnishes materials to be used in the construction of the road.[1] Many of the statutes authorize a lien in favor of contractors and sub-contractors as well as in favor of laborers, but when a lien is authorized in favor of only one of these classes, it can not be acquired by those who are members of a different class. Thus, a lien in favor of contractors alone does not extend to sub-contractors,[2] and a lien in favor of sub-contractors does not extend to persons who furnish material under a contract with them.[3] So, neither a contractor nor a sub-contractor can obtain a lien as a laborer under a statute authorizing liens in favor of "laborers."[4] Under some of the statutes the lien of the sub-contractor is

to Tod *v.* Kentucky Un. R. Co., in 18 L. R. A. 305, (where most of the authorities are collected and reviewed); McDonald *v.* Charleston, etc., R. Co., 93 Tenn. 281, s. c. 24 S. W. R. 252; McElwaine *v.* Hosey, 135 Ind. 481, s. c. 35 N. E. R. 272. A time-keeper, in the employ of a railroad contractor, is not a laborer within the meaning of the Kansas statute. Missouri, etc., R. Co. *v.* Baker, 14 Kan. 563. Nor is the secretary of a railroad company a servant or employe within the meaning of such a statute. Wells *v.* Southern, etc., R. Co., 1 Fed. R. 270.

[1] Dallas, etc., Co. *v.* Wasco, etc., Co., 3 Ore. 527. See, also, Fagan *v.* Boyle, etc., Co., 65 Tex. 324; Doane *v.* Clinton, 2 Utah 417; South Carolina R. Co. *v.* McDonald, 5 Ga. 531. So, a foreign corporation may have a lien where it is authorized in favor of "any person." Chapman *v.* Brewer, 43 Neb. 890, s. c. 62 N. W. R. 320. There may, perhaps, be a stronger reason for giving such a lien to laborers, but there is no reason why the legislature may not just as well give it to corporations who furnish material as to material men generally or ordinary contractors.

[2] Cartter *v.* Rome, etc., R. Co., 89 Ga. 158, s. c. 15 S. E. R. 36; Arbuckle *v.* Illinois Cent. R. Co., 81 Ill. 429; Tucker *v.* St. Louis, etc., R. Co., 59 Ark. 81, s. c. 26 S. W. R. 375. But see Vaughn *v.* Smith, 58 Iowa 553, s. c. 7 Am. & Eng. R. Cas. 82. In McDonald *v.* Charleston, etc., R. Co., 93 Tenn. 281, s. c. 24 S. W. R. 252, one who contracted with a construction company was held, as against creditors, to be a contractor with the railroad company under the peculiar circumstances of the case.

[3] Cairo, etc., R. Co. *v.* Watson, 85 Ill. 531; Schaar *v.* Knickerbocker, etc., Co., 149 Ill. 441, s. c. 37 N. E. R. 54; Smith Bridge Co. *v.* Louisville, etc., R. Co., 72 Ill. 506; Baltzer *v.* Raleigh, etc., R. Co., 115 U. S. 634; Mills *v.* Paul, (Tex.) 30 S. W. R. 558; Farmers' Loan & T. Co. *v.* Canada, etc., R. Co., 127 Ind. 250, s. c. 47 Am. & Eng. R. Cas. 271.

[4] Chicago, etc., R. Co. *v.* Sturgis, 44 Mich. 538; Tod *v.* Kentucky Un. R. Co., 52 Fed. R. 241, s. c. 18 L. R. A. 305; Vane *v.* Newcombe, 132 U. S. 220; Savannah, etc., R. Co. *v.* Callahan, 49 Ga. 506; St. Johns, etc., R. Co. *v.* Bartola, 28 Fla. 82; Parks *v.*

entirely independent of that of the contractor and neither an agreement by the latter to keep down liens nor payment to him can affect the right of the sub-contractor to his lien.[1] But sub-contractors are usually required to give notice to the owner of the property, and, in most of the states payment to the contractor in good faith before such notice is given will relieve him from liability to the sub-contractors.[2] In some jurisdictions, one who furnishes material or performs labor for a sub-contractor may acquire a lien, while in others the materials must be furnished or the labor performed directly for the owner or the contractor, and in some of them it must be shown that the credit was given to the property. All these matters, however, depend upon the peculiar provisions of the particular statute under consideration. The only general rule that can be laid down, perhaps, is that one who asserts a lien must bring himself and his claim within the purview of the statute. A mere creditor of a material man or laborer is not entitled to a lien which his debtor might have acquired, even though the debt may have been incurred for money with which to purchase and furnish the material.[3] Nor will the fact that money obtained on a draft given by a railroad company to the contractor engaged in constructing its road was used by him to pay for labor and material entitle the holder of the draft to a mechanic's or material man's lien on the road.[4]

§ 1071. **Mode of acquiring lien.**—As the lien is wholly statutory, it must not only be such as the statute provides for,

Loche, (Tex. Civil App.), 25 S. W. R. 702; Krakauer *v.* Locke, 6 Tex. Civil App. 446, 25 S. W. R. 700.

[1] Central Trust Co. *v.* Richmond, etc., R. Ca., 68 Fed. R. 90; Spokane, etc., Co. *v.* McChesney, 1 Wash. 609, s. c. 21 Pac. R. 198; Henry, etc., Co. *v.* Evans, 97 Mo. 47; Ammendale, etc., Inst. *v.* Anderson, 71 Md. 128, s. c. 17 Atl. R. 1030. See, also, Norfolk, etc., R. Co. *v.* Howison, 81 Va. 125.

[2] Spaulding *v.* Thompson, etc., Society, 27 Conn. 573; Roland *v.* Centreville, etc., R. Co., 61 Iowa 380, s. c. 11 Am. & Eng. R. Cas. 47; Whelan *v.* Young, 21 D. C. 51; Crane *v.* Genin, 60 N. Y. 127; Geiger *v.* Hussey, 63 Ala. 338; Griswold *v.* Wright, 69 Wis. 1; Whittier *v.* Hollister, 64 Cal. 283; Rivers *v.* Mulholland, 62 Miss. 766; Central Trust Co. *v.* Bridges, 57 Fed. R. 753.

[3] Ray, etc., Bank *v.* Cramer, 54 Mo. App. 587.

[4] Central Trust Co. *v.* Bridges, 57 Fed. R. 753.

both as to the claim upon which it is based and the person in whose favor it is claimed, but the statutory mode must also be pursued in order to obtain it. A common requirement is that notice shall be given to the owner of the property or his agent.[1] It has been held that a notice served upon the secretary of the company is sufficient, where the statute makes no provision as to the mode of service of such a notice upon a corporation, and no higher officer can be found.[2] So, it has been held that such a notice may be served upon the station agent of a foreign corporation.[3] And under a statute providing that the notice should be served "upon the secretary or other officer or agent" of the company, it was held sufficient to serve it upon a director of the company.[4] But the mere fact that a director happened to be present on one occasion and saw that work was being done has been held insufficient notice to the company to validate the lien.[5] Another common provision is that notice of the lien or claim shall be filed in a certain office within a specified time. If not so filed within the time designated the lien can not be enforced.[6] But if a proper notice is filed within

[1] As to the necessity for giving such a notice as the statute requires and complying with the essential provisions of the statute in all respects, see note to Farmers' L. & T. Co. *v.* Canada, etc., R. Co., 11 L. R. A. 740; and note to Giant Powder Co. *v.* Oregon Pac. R. Co., 8 L. R. A. 700, where the recent decisions upon the subject are collected and classified by states; Greeley, etc., R. Co. *v.* Harris, 12 Colo. 226; Arkansas Cent. R. Co. *v.* McKay, 30 Ark. 682; Cherry *v.* North, etc., R. Co., 65 Ga. 633; Arbuckle *v.* Illinois, etc., R. Co., 81 Ill. 429; Cairo, etc., R. Co. *v.* Cauble, 4 Ill. App. 133; Cairo, etc., R. Co. *v.* Cauble, 85 Ill. 555; Lounsbury *v.* Iowa, etc., R. Co., 49 Iowa 255; Roland *v.* Centreville, etc., R. Co., 61 Iowa 380; Scioto Valley R. Co. *v.* Cronin, 38 Ohio St. 122; Tod *v.* Kentucky Un. R. Co., 52 Fed. R. 241, s. c. 18 L. R. A. 305.

[2] Heltzell *v.* Chicago, etc., R. Co., 77 Mo. 315, s. c. 16 Am. & Eng. R. Cas., 619. Compare Rapauno, etc., Co. *v.* Greenfield, etc., R. Co., 59 Mo. App. 6; Union Pac. R. Co. *v.* Davidson (Colo.), 39 Pac. R. 1095.

[3] Morgan *v.* Chicago, etc., R. Co., 76 Mo. 161.

[4] Railway Co. *v.* Cronin, 38 Ohio St. 122, 127. See, also, Barnes *v.* Thompson, 2 Swan (Tenn.) 313; Buck *v.* Brian, 2 How. (Miss.) 874; Railway Co. *v.* McCoy, 42 Ohio St. 251.

[5] Lothian *v.* Wood, 55 Cal. 159. Mere knowledge on the part of the owner that materials are being furnished or that work is being done is not equivalent to the statutory notice generally required. Neeley *v.* Searight, 113 Ind. 316.

[6] Delaware, etc., Co. *v.* Davenport R. Co., 46 Iowa 406; Central Trust Co. *v.* Richmond, etc., R. Co., 68 Fed. R.

such time, the fact that a defective notice had previously been filed is immaterial.[1] Where a road runs through a number of different counties and the statute simply contains a general provision that the notice shall be filed in a certain office "in the county," it is a question of some doubt as to whether the notice must be filed in every county through which the road extends. In a recent case, after a careful consideration of the subject, it was held sufficient to file the notice in the proper office in the county in which the work was done and the materials were furnished, and that the lien should be enforced against the entire road.[2] A different view, however, seems to have been taken by another court.[3]

§ 1072. **Priority of liens.**—The general rule is that liens on railroad property have priority according to the order of time or date at which they attached, as in ordinary cases.[4] It is the spirit and intent of most of the mechanics' lien laws, however, that all such liens, whether for work performed or for materials furnished, should stand upon an equality and share *pro rata* in the proceeds of that which all the lien-holders contributed in creating.[5] There are also cases in which a me-

90; Alexandria, etc., Co. *v.* McHugh, 12 Ind. App. 282, s. c. 40 N. E. R. 80.

[1] Williams *v.* Chicago, etc., R. Co., 112 Mo. 463, 7 Lewis' Am. R. & Corp. R. 86. But successive valid liens for the same thing can not be filed by the same party under one entire contract. Battle *v.* McArthur, 49 Fed. R. 715; Cox *v.* West. Pac. R. Co., 44 Cal. 18, 47 Cal. 87.

[2] Farmers' L. & T. Co. *v.* Canada, etc., R. Co., 127 Ind. 250.

[3] Boston, etc., Co. *v.* Chesapeake, etc., R. Co. 76 Va. 180, s. c. 12 Am. & Eng. R. Cas. 263. In Giant Powder Co. *v.* Oregon Pac. R. Co., 42 Fed. R. 470, s. c. 8 L. R. A. 700, the court held that it was sufficient to file this notice in the county in which that portion of the road for which it was furnished and used was situated, and that the lienor had a right to limit the lien by such notice to that section of the road, even if the whole road had to be sold, which the court inclined to doubt. See, also, Richmond, etc., Co. *v.* Richmond, etc., R. Co., 68 Fed. R. 105.

[4] Galveston R. Co. *v.* Cowdrey, 11 Wall. (U. S.) 459 (and not as in maritime cases); Fox *v.* Seal, 22 Wall. (U. S.) 424; Howard *v.* Railway Co., 101 U. S. 837; Coe *v.* New Jersey, etc., R. Co., 31 N. J. Eq. 105; Phillips on Mechanics' Liens, § 225. See, also, Central Trust Co. *v.* Louisville, etc., R. Co., 70 Fed. R. 282. *Ante*, § 500.

[5] Phillips on Mechanics' Liens, § 251, *et seq*; Choteau *v.* Thompson, 2 Ohio St. 114; Moxley *v.* Shepard, 3 Cal. 64; Crowell *v.* Gilmore, 18 Cal. 370; Wing *v.* Carr, 86 Ill. 347; Rosenthal *v.* Maryland, etc., Co., 61 Md. 590; Wil-

chanics' lien may take precedence of a prior mortgage. Thus, it has been held that where the railroad has not been constructed or completed when a mortgage is given upon it the mortgagees must take notice of that fact and of the fact that labor and materials would be needed to construct or complete it, and that a mechanics' lien for materials furnished or work and labor performed in constructing or completing it will take precedence of the mortgage.[1] So, it has been held that a mortgage executed before the company has acquired any title to the property is subordinate to a lien thereon for labor performed after the execution of the mortgage and before the acquisition of the title.[2] As we have elsewhere shown, persons who perform labor or furnish materials may also be preferred, in certain cases, over mortgage bond-holders where the mortgage is foreclosed or the property placed in the hands of a receiver.[3] This rule is applied in proper cases, however, even where a preferred claim does not constitute a statutory lien, but such claims are frequently given priority as liens, or otherwise, by express provision of the statute.[4] Specific statutory liens acquired before the property passes into the hands of the receiver or the court are superior to the general equitable liens of credit-

lamette, etc., Co. *v.* Riley, 1 Ore. 183; Pennsylvania, etc., R. Co. *v.* Leuffer, 84 Pa. St. 168, s. c. 24 Am. R. 189.

[1] Farmers' L. & T. Co. *v.* Canada, etc., R. Co., 127 Ind. 250, s. c. 11 L. R. A. 740; Kilpatrick *v.* Kansas City R. Co., 38 Neb. 620, s. c. 41 Am. St. R. 741; Brooks *v.* Railway Co., 101 U. S. 443; Meyer *v.* Hornby, 101 U. S. 728; Railroad Co. *v.* Meyer, 100 U. S. 457; Neilson *v.* Iowa, etc., R. Co., 44 Iowa 71; Taylor *v.* Burlington, etc., Co., 4 Dill. (U. S. C. C.) 570. See, also, Carew *v.* Stubbs, 155 Mass. 549, s. c. 30 N. E. R. 219; Chicago, etc., R. Co. *v.* Union, etc., Co., 109 U. S. 702; Addison *v.* Lewis, 75 Va. 701, s. c. 9 Am. & Eng. R. Cas. 702, and note. But compare Central Trust Co. *v.* Cameron, etc., Co., 47 Fed. R. 136; Toledo, etc., R. Co. *v.* Hamilton, 134 U. S. 296. It is held that a prior mortgage on the entire road takes precedence of liens for repairs or improvements forming an integral part of the road as it already existed. Bear *v.* Burlington, etc., R. Co., 48 Iowa 619; Coe *v.* New Jersey, etc., R. Co., 31 N. J. Eq. 105. See, also, Tommey *v.* Spartanburg, etc., R. Co., 7 Fed. R. 429; Boston, etc., R. Co. *v.* Chesapeake, etc., R. Co., 76 Va. 180, s. c. 12 Am. &. Eng. R. Cas. 263; Phillips on Mechanics' Liens, § 237.

[2] Botsford *v.* New Haven, etc., R. Co., 41 Conn. 454. See, also, Phœnix, etc., Co. *v.* Batchen, 6 Ill. App. 621.

[3] *Ante*, §§ 528, 590, 592, 593.

[4] See Blair *v.* St. Louis, etc., R. Co., 25 Fed. R. 232.

ors of an insolvent corporation upon the fund brought into the court for distribution.[1]

§ 1073. **Assignability of lien.**—There is some conflict among the authorities as to whether a lien for work done or materials furnished in the construction of a railroad can be assigned. The matter may, of course, be regulated by statute, but there is seldom any express statutory provision upon the subject. At common law choses in action were not assignable; but in equity they were, and we think the better rule is that such liens are assignable,[2] at least under most of the modern statutes, which have adopted the old equity rule, and many of which permit the assignee to sue in his own name. In some jurisdictions, however, he must sue in the name of his assignor,[3] and several of the courts have held that a mechanics' lien is in the nature of a personal privilege and can not be assigned.[4] It has also been held that the assignment of an order drawn by a sub-contractor in favor of a laborer is not a good assignment of the debt or claim itself.[5]

§ 1074. **Enforcement of lien.**—Where the statute gives a

[1] Farmers' L. & T. Co. *v.* Canada, etc., R. Co., 127 Ind. 250.

[2] Midland R. Co. *v.* Wilcox, 122 Ind. 84; Texas, etc., R. Co. *v.* McCaughey, 62 Tex. 271; Austin, etc., R. Co. *v.* Daniels, 62 Tex. 70; Skyrme *v.* Occidental, etc., Co., 8 Nev. 219; Tuttle *v.* Howe, 14 Minn. 145; Stryker *v.* Cassidy, 76 N. Y. 50; Rogers *v.* Omaha, etc., Co., 4 Neb. 54; Mason *v.* Germaine, 1 Mont. 263. See, also, Linneman *v.* Bieber, 33 N. Y. Supp. 129; Cairo, etc., R. Co. *v.* Fackney, 78 Ill. 116; Iaege *v.* Bossieux, 15 Gratt. (Va.) 83; Davis *v.* Crookston, etc., Co., 57 Minn. 402, s. c. 89 N. W. R. 482; Kerr *v.* Moore, 54 Miss. 286; Brown *v.* Harper, 4 Ore. 89; Phillips on Mechanics' Liens, §§ 54, 55.

[3] Murphy *v.* Adams, 71 Me. 113; Caldwell *v.* Lawrence, 10 Wis. 331. See, also, Rollin *v.* Cross, 45 N. Y. 766; Phœnix, etc., Co. *v.* Batchen, 6 Ill. App. 621.

[4] Ruggles *v.* Walker, 34 Vt. 468; Fitzgerald *v.* Trustees, etc., 1 Mich. N. P. 243; Dano *v.* Mississippi, etc., R. Co., 27 Ark. 564. See, also, Tewksbury *v.* Bronson, 48 Wis. 581; St. John *v.* Hall, 41 Conn. 522.

[5] Dudley *v.* Toledo, etc., R. Co., 65 Mich. 655, s. c. 30 Am. & Eng. R. Cas. 236. See, also, Frailey *v.* Winchester, etc., R. Co , 96 Ky. 570, 29 S. W. R. 446. But see Midland R. Co. *v.* Wilcox, 122 Ind. 84, 91; Skyrme *v.* Occidental, etc., Co., 8 Nev. 219. In California the assignment must be in writing. Ritter *v.* Stevenson, 7 Cal. 388. See and compare McCrea *v.* Johnson, 104 Cal. 224, s. c. 37 Pac. R. 902; Murray *v.* Micolino, 83 Hun 564, s. c. 31 N. Y. Supp. 1109.

right, as in the case of a mechanics' lien, it may provide the remedy that shall be pursued, and one who obtains a lien in the authorized mode "has a right to have it enforced as the law directs, and not otherwise."[1] In some of the states *scire facias* has been adopted as the appropriate remedy for the enforcement of a mechanics' lien,[2] but in most jurisdictions a foreclosure suit, similar to a suit in equity to foreclose a mortgage, is the proper remedy.[3] As we have elsewhere shown, it would be detrimental to the interest of the public as well as to that of the railroad company and the lienholders, to permit a railroad to be broken up and sold in practically useless fragments,[4] and, for this reason it is generally held that the lien must be enforced against the entire road and all of it may be sold, in a proper case, to satisfy a lien thereon.[5] In some instances, however, the lien has been satisfied by sequestrating the earnings of the corporation or appointing a receiver, without a sale of the road.[6]

§1075. **Waiver of lien.**—A mechanics' lien may, of course, be waived by the voluntary act or agreement of the lienholder. It may also be waived, in some cases, by inconsistent acts, al-

[1] Farmers' L. & T. Co. *v.* Canada, etc., R. Co., 127 Ind. 250, 259; Delaware, etc., Co. *v.* Davenport, etc., R. Co., 46 Iowa 406; Lounsbury *v.* Iowa, etc., R. Co., 49 Iowa 255; Cranston *v.* Union Trust Co., 75 Mo. 29.

[2] Phillips on Mechanics' Liens, § 410.

[3] See Albrecht *v.* Foster Lumber Co., 126 Ind. 318, 26 N. E. R. 157, and authorities there cited; Hamilton *v.* Dunn, 22 Ill. 259; McGraw *v.* Bayard, 96 Ill. 146; Davis *v.* Alvord, 94 U. S. 545; Willer *v.* Bergenthal, 50 Wis. 474; Maxwell Code Pl., 238. See, also, Central Trust Co. *v.* Condon, 67 Fed. R. 84.

[4] *Ante*, §§ 520, 522.

[5] Louisville, etc., R. Co. *v.* Boney, 117 Ind. 501; Farmers' L. & T. Co. *v.* Canada, etc., R. Co., 127 Ind. 250 (so holding although notice of the lien was filed in only one of the counties through which the road ran); Midland R. Co. *v.* Wilcox, 122 Ind. 84; Muller *v.* Dows, 94 U. S. 444; Dano *v.* Miss., etc., R. Co., 27 Ark. 564; Cox *v.* Western Pac. R. Co., 44 Cal. 18; Knapp *v.* St. Louis, etc., R. Co., 74 Mo. 374; Cranston *v.* Union Trust Co., 75 Mo. 29. See, also, Graham *v.* Mt. Sterling, etc., R. Co., 11 Bush (Ky.) 425, s. c. 29 Am. R. 412 See Ireland *v.* Atchison, etc., R. Co., 79 Mo. 572, s. c. 20 Am. & Eng. R. Cas. 493, where this general rule was admitted, but it was held that the lien could only be enforced against that portion of the road within the state.

[6] See Phillips on Mechanics' Liens, § 460; Foster *v.* Fowler, 60 Pa. St. 27.

though he may have had, in fact, no intention to waive it, but the intent of the parties is usually controlling. The rule is thus stated in a recent case: "It may be admitted that lien laws do not, in general, create a lien in favor of one who accepts in full a different security at the time the contract or agreement is made, or who has entered into any other agreement which manifestly indicates a clear purpose and intention to waive the benefit of the statutory lien. A contract for a security which is inconsistent with the intention that a mechanics' lien should exist will be held, generally, as a waiver of the statutory lien; but it is well settled that though the owner obligate himself to give a security inconsistent with the intention that a mechanics' lien should exist, or where the contract is to pay in land, or other specific article of property, yet if the owner fail to fulfill the agreement for such mode of payment, or for different security, it will not be taken as an agreement to waive the mechanics' lien in case payment is not made in the manner provided for, or the security is not given according to the obligation of the owner."[1] According to this rule, taking a mortgage or other security may operate as a waiver of the lien,[2] but it does not necessarily do so unless such was the in-

[1] Central Trust Co. *v.* Richmond, etc., R. Co., 68 Fed. R. 90. Citing Grant *v.* Strong, 18 Wall. (U. S.) 623; Reiley *v.* Ward, 4 G. Greene 21; McMurray *v.* Brown, 91 U. S. 257. In the latter case it is said: "If the labor has been performed, or the materials furnished, no matter in what the owner agreed to pay, if he has not paid in any way, the laborer or mechanic has a right to resort to the security provided by law, unless the rights of third parties intervene before he gives the required notice. Liens of the kind, except where the statute otherwise provides, arise by the operation of law, independent of the express terms of the contract, in case the stipulated labor is performed, or the promised materials are furnished; the principle being that the parties are supposed to contract on the basis that if the stipulated labor is performed, or the promised materials are furnished, the laborer or material man is entitled to the lien which the law affords, provided he gives the required notice within the specified time." Chicago & A. R. Co. *v.* Union Rolling Mill Co., 109 U. S. 702, 721, 722, 3 Sup. Ct. R. 594; Van Stone *v.* Stillwell, etc., Manufacturing Co., 142 U. S. 128, 12 Sup. Ct. R. 181.

[2] Willison *v.* Douglas, 66 Md. 99; Picket *v.* Bullock, 52 N. H. 354; Trustees of German, etc., Congregation *v.* Heise, 44 Md. 453; Hale *v.* Burlington, etc., R. Co., 2 McCrary (U. S. C. C.) 558; Davis *v.* Bowsher, 5 Durnf. & East 488; Barrows *v.* Baughman, 9 Mich. 213; Gorman *v.* Sagner, 22 Mo. 137.

tention of the parties,[1] and it seems that, as between the parties at least, the presumption will be indulged, in the absence of anything to the contrary, that the lien was not intended to be waived unless the conditions of the contract as to the security or manner of payment are performed.[2] The mere fact that a note is taken for the amount due does not operate as a waiver of the lien in the absence of any such intention.[3] Nor does the recovery of a personal judgment, which remains unpaid, merge or waive the lien.[4] It has also been held that giving credit beyond the time allowed for filing notice of the lien does not waive the lien where the notice is duly filed.[5] The doctrine of estoppel may, however, prevent a lienholder from enforcing his lien against innocent third persons whom he has misled. This is generally true where he purposely conceals the fact that he is entitled to take a lien and induces others to act, to their injury, upon the belief that he has no such right, or represents that he has been paid, or the like, so that the as-

[1] Union, etc., Bank *v.* Baker, 42 Neb. 880, s. c. 61 N. W. R. 91; Chapman *v.* Brewer, 43 Neb. 890, s. c. 62 N. W. R. 320; Gilcrest *v.* Gottschalk, 39 Iowa 311; Kilpatrick *v.* Kansas City, etc., R. Co., 38 Neb. 620, s. c. 57 N. W. R. 664, 41 Am. St. R. 741, and note; Taliaferro *v.* Stevenson (N. J.), 33 Atl. R. 383; Maryland, etc., Co. *v.* Spilman, 76 Md. 337, s. c. 17 L. R. A. 599.

[2] See authorities cited in note 1, p. 1607, *supra*, Barnard, etc., Co. *v.* Galloway, 5 S. Dak. 205, 58 N. W. R. 565; Kingsland, etc., Co. *v.* Massey, 69 Miss. 296, s. c. 13 So. R. 269. See, also, review of authorities in note to Kilpatrick *v.* Kansas City, etc., R. Co., 41 Am. St. R. 741.

[3] Delaware, etc., Co. *v.* Oxford, etc., Co., 33 N. J. Eq. 192; Poland *v.* Lamoille Valley R. Co., 52 Vt. 144; Barnacle *v.* Henderson, 42 Neb. 169, s. c. 60 N. W. R. 382; Smith, etc., Co. *v.* Butts, 72 Miss. 269, s. c. 16 So. R. 242; Hill *v.* Allison, etc., Co. (S. Dak.), 60 N. W. R. 752; Aiken *v.* Steamboat, 40 Mo. 257; Linneman *v.* Bieber, 33 N. Y. Supp. 129; Goble *v.* Gale, 7 Blackf. (Ind.) 218.

[4] Marean *v.* Stanley, 5 Colo. App. 335, 38 Pac. R. 395; United States, etc., Co. *v.* Spencer, 40 W. Va. 698, s. c. 21 S. E. R. 769; Germania, etc., Asso. *v.* Wagner, 61 Cal. 349; Holbrook *v.* Ives, 44 Ohio St. 516; Kirkwood *v.* Hoxie, 95 Mich. 62, s. c. 35 Am. St. R. 549.

[5] Chicago, etc., R. Co. *v.* Union, etc., Co., 109 U. S. 702; Chisholm *v.* Williams, 128 Ill. 115; Kaufman, etc., Co. *v.* Christophel, 59 Mo. App. 80. But see Paul *v.* Frost, 40 Me. 293; Green *v.* Fox, 7 Allen (Mass.) 85; Ehlers' Adm. *v.* Elder, 51 Miss. 495; Pryor *v.* White, 16 B. Mon. (Ky.) 605; Dey *v.* Anderson, 39 N. J. L. 199; Jones *v.* Hurst, 67 Mo. 568.

sertion of the lien upon his part would operate as a fraud upon innocent third persons.[1] But it has been held that a sub-contractor is not estopped from enforcing his lien by the mere fact that a settlement is made in his presence between the owner and the contractor.[2]

[1] Hinchley *v.* Greany, 118 Mass. 595; Chapman *v.* Hamilton, 19 Ala. 121; McGraw *v.* Bayard, 96 Ill. 146; Scott *v.* Orbison, 21 Ark. 202; Howard *v.* Tucker, 1 B. & Ad. 712; West *v.* Klotz, 37 Ohio St. 420.

[2] Haveghart *v.* Lindberg, 67 Ill. 463. If, however, it had appeared that the owner had no knowledge of the sub-contractor's claim, that it had never been filed or recorded, and that the sub-contractor knew that the settlement was made in full, without deducting the amount due him, we think he would have been estopped.

CHAPTER XLII.

RAILROADS IN STREETS.

§ 1076. Authority to use streets.
1077. Implied authority of municipality to grant right to use streets.
1078. How and by whom grant should be made or consent given.
1079. Nature and effect of grant by municipality.
1080. Construction of grant—Illustrative cases.
1081. Right of municipality to impose conditions.
1082. Municipal regulation and control.
1083. Rights of rival companies in streets.
1084. Right of one company to use another's track.
1085. Rights of abutters—Generally.
§ 1086. Rights of land-owners other than abutters.
1087. Commercial railroad is an additional burden.
1088. Street railways—When an additional burden.
1089. Railroads in narrow streets.
1090. Obstruction of highways—Nuisance.
1091. Bridges, viaducts and approaches.
1092. Duty of company to restore and repair street.
1093. Respective rights of the company and of the public.
1094. Duty to travelers upon the street.
1095. Liability for negligence—Contributory negligence.
1096. Remedies for unlawful use of street.

§ 1076. **Authority to use streets.**—The legislature of the state represents the public at large and has paramount authority over its public ways, including the streets in cities as well as country roads.[1] Municipal corporations have no inherent power to create other corporations or grant franchises, and

[1] Dillon's Munic. Corp., § 656; Elliott on Roads and Streets, 14, 327; Portland, etc., R. Co. *v.* Portland, 14 Ore. 188; O'Connor *v.* Pittsburgh, 18 Pa. St. 187; Duval County Comrs. *v.* Jacksonville (Fla.), 29 L. A. R. 416; Chicago, etc., R. Co. *v.* Dunbar, 100 Ill. 110; Barney *v.* Keokuk, 94 U. S. 324; City of Council Bluffs *v.* Kansas City, etc., R. Co., 45 Iowa 338; Perry *v.* New Orleans, etc., Co., 55 Ala. 413; Lennon *v.* Mayor, 55 N. Y. 365; West Chicago Park Comrs. *v.* McMullen, 134 Ill. 170; Mayor of Jersey City *v.* Jersey City, etc., R. Co., 20 N. J. Eq. 360. As we shall hereafter show, however,

they can not give a railroad company the right to lay its tracks and operate its road in their streets unless they are authorized, either expressly or impliedly, to do so by the legislature.[1] Authority to use highways in this way must come, either directly or indirectly, from the legislature; but it is customary for the legislature to confer upon the municipalities the power to very largely regulate and control the roads and streets within their jurisdiction, and street railways are usually required by the legislature to obtain the consent of the municipality before using its streets.[2] In the case of commercial railroads, however, while cities and towns through which they run usually have power to make proper regulations for their operation therein, the interest of the general public is practically so much greater than in the case of street railways—which are used mostly by residents of the municipality—and the prohibition by the municipality of the right to use

the abutters have certain rights which can not be taken away without compensation.

[1] Peoples' Railroad *v.* Memphis Railroad, 10 Wall. (U. S.) 38, 51; Saginaw, etc., Co. *v.* City of Saginaw, 28 Fed. R. 529; State *v.* Hilbert, 72 Wis. 184, 39 N. W. R. 326; City of Clinton *v.* Cedar Rapids, etc., R. Co., 24 Iowa 455; Eichels *v.* Evansville, etc., Co., 78 Ind. 261; Denver Circle R. Co. *v.* Nestor, 10 Colo. 403; Davis *v.* Mayor, etc., New York, 14 N. Y. 506; Perry *v.* New Orleans, etc., R. Co., 55 Ala. 413; Metropolitan, etc., R. Co. *v.* Chicago, etc., R. Co., 87 Ill. 317; Potts *v.* Quaker City, etc., R. Co., 161 Pa. St. 396, s. c. 29 Atl. R. 108; Atlantic, etc., R. Co. *v.* St. Louis, 66 Mo. 228; Reg. *v.* Train, 2 B. & S. 640, s. c. 110 Eng. Com. L. 640; Elliott on Roads and Streets, 562, 563.

[2] See Hickey *v.* Chicago, etc., R. Co., 6 Bradw. (Ill.) 172; Atchison St. R. Co. *v.* Missouri, etc., Co., 31 Kan. 660; Atchison St. R. Co. *v.* Nave, 38 Kan. 744, s. c. 5 Am. St. R. 800; People *v.* Thompson, 98 N. Y. 6; City of Indianola *v.* Gulf, Western, etc., R. Co., 56 Tex. 594; State *v.* Jacksonville, etc., St. R. Co., 29 Fla. 590, s. c. 10 So. R. 590, 593; Yates *v.* Town of West Grafton, 34 W. Va. 783, 12 S. E. R. 1075. Elliott on Roads and Streets, 531, 563. Power may be given by the legislature to the municipality to grant such a right to use its streets, or its unauthorized exercise of the power may be ratified by statute. Pierce on Railroads, 247; Clarke *v.* Blackmar, 47 N. Y. 150; Brown *v.* Duplessis, 14 La. Ann. 842; Chicago, etc., R. Co. *v.* People, 91 Ill. 251; McCartney *v.* Evanston, etc., R. Co., 112 Ill. 611; Cairo, etc., R. Co. *v.* People, 92 Ill. 170; Denver, etc., Co. *v.* Landoner, 20 Colo. 150, s. c. 1 Am. & Eng. R. Cas. (N. S.) 124, and note; Koch *v.* North Ave., etc., R. Co., 75 Md. 222, s. c. 23 Atl. R. 463, 50 Am. & Eng. R. Cas. 401.

its streets might be so detrimental to the best interests of the public, that it is not unusual for the legislature to grant this right directly to railroad companies rather than to leave it solely to the municipalities to grant or withhold.[1] Where general authority over its highways is conferred upon a municipal corporation, and there is no statute authorizing their use by a railroad, they can not be so used without the consent of the municipality.[2] Authority to so use municipal streets may sometimes, however, be inferred from the provisions of the charter or act of incorporation;[3] but where the power is clearly delegated to the municipal corporation, mere general words in the charter or act for the incorporation of railroad companies will not be construed to confer a right to occupy the streets of the municipality without its consent, and a general grant of authority to construct a railroad from one point to another does not, in such a case, as a rule at least, include the right to use such streets for railroad purposes without the license or consent of the local authorities.[4] As we have elsewhere stated, the right to cross streets and roads may be inferred from a general grant of authority from which no such inference could be drawn as to the right to take them longitudinally.[5] The right to place rails upon a road or street and use it in the operation of a railroad can only be granted expressly or by necessary implication,[6]

[1] See Ingraham *v.* Chicago, etc., R. Co., 34 Iowa 249.

[2] Commonwealth *v.* Central, etc., R. Co., 52 Pa. St. 506; Savannah, etc., R. Co. *v.* Savannah, 45 Ga. 602; Hine *v.* Keokuk, etc., Co., 42 Iowa 636; St. Louis, etc., R. Co. *v.* St. Louis, 92 Mo. 160; Chicago, etc., R. Co. *v.* Chicago, 121 Ill. 176, s. c. 11 N. E. R. 907; Pennsylvania Company's Appeal, 116 Pa. St. 55, s. c. 8 Atl. R. 914.

[3] Denver, etc., Co. *v.* Domke, 11 Colo. 247, s. c. 17 Pac. R. 777; St. Paul, etc., Co. *v.* Minneapolis, 35 Minn. 141, s. c. 27 N. W. 500, 24 Am. & Eng. R. Cas. 309; Wheat *v.* City Council of Alexandria, 88 Va. 742.

[4] Chicago, etc., Co. *v.* Chicago, 121 Ill. 176, s. c. 11 N. E. R. 907; Pennsylvania Company's Appeal, 116 Pa. St. 55, s. c. 8 Atl. R. 914; Inhabitants of Springfield *v.* Connecticut, etc., Railroad Co., 4 Cush. (Mass.) 63; Rutles *v.* Covington, (Ky.) 10 S. W. R. 644; City of Clinton *v.* Cedar Rapids, etc., Railroad Co., 24 Iowa 455.

[5] *Ante*, §§ 41, 922; Burt *v.* Lima, etc., Co., 21 N. Y. Supp. 482; Chicago, etc., Co. *v.* Dunbar, 100 Ill. 110.

[6] Commonwealth *v.* Erie, etc., R. Co., 27 Pa. St. 339; Daly *v.* Georgia, etc., Co., 80 Ga., 793, s. c. 12 Am. St. R. 286, 36 Am. & Eng. R. Cas. 20; Chicago, etc., R. Co. *v.* Chicago, 121 Ill. 176; Columbus, etc., R. Co. *v.* Witherow, 82 Ala. 190; Virginia, etc.,

and the use must be reasonable and such as was clearly contemplated.[1] Thus, the right to construct a track along a street and run trains over it does not authorize an exclusive use of the street for a freight yard, or the like.[2] But it has been held that authority to construct and operate a railroad in a street includes the power to make a switch or turnout to a station on the street.[3] So, it has been held that trains may be made up in the street, provided the street is so used only to a reasonable extent and with due regard to its use for ordinary highway purposes,[4] and that cars may be stopped temporarily in the highway, in which the tracks are lawfully laid, for the purpose of loading and unloading freight as well as passengers.[5]

§ 1077. **Implied authority of municipalities to grant right to use street—Perpetuity.**—The power of municipalities to authorize railroads to use their streets may be derived either

R. Co. *v.* Lynch, 13 Nev. 92; State *v.* Vermont Cent. R. Co., 27 Vt. 103; Trustees *v.* Milwaukee, etc., Co., 77 Wis. 158, s. c. 45 N. W. R. 1086.

[1] Long Branch Comrs. *v.* West End R. Co., 29 N. J. Eq. 566; Glick *v.* Baltimore, etc., R. Co., 21 D. C. 363; Commonwealth *v.* Frankfort, 92 Ky. 149, 17 S. W. R. 287.

[2] Gahagan *v.* Boston, etc., R. Co., 1 Allen (Mass.) 187, s. c. 79 Am. Dec. 724; Owensborough, etc., R. Co. *v.* Sutton, (Ky.), 13 S. W. R. 1086; Mayor, etc., of Allegheny *v.* Ohio, etc., R. Co., 26 Pa. St. 355; Lackland *v.* North Missouri, etc., R. Co., 31 Mo. 180; Chapman *v.* Oshkosh, etc., R. Co., 33 Wis. 629. See, also, Stevenson *v.* Missouri Pac. R. Co. (Mo.), 31 S. W. R. 793; State *v.* Mayor of Jersey City, 52 N. J. L. 65, s. c. 28 Am. & Eng. Corp. Cas. 182; Hopkins *v.* Baltimore, etc., R. Co., 6 Mackey 311; Thompson *v.* Pennsylvania R. Co., 45 N. J. Eq. 870, 14 Atl. R. 897, 19 Atl. R. 622.

[3] New Orleans, etc., R. Co. *v.* Second Municipality, 1 La. Ann. 128; Knight *v.* Carrollton R. Co., 9 La. Ann. 284; Black *v.* Philadelphia, etc., Co., 58 Pa. St. 249. But see City of Concord *v.* Concord Horse R., 65 N. H. 30, s. c. 18 Atl. R. 87. In Chicago, etc., R. Co. *v.* Eisert, 127 Ind. 156, s. c. 26 N. E. R. 759, it was held that an ordinance giving the company the right of way along a certain street gave it a right to construct an additional track when its business demanded it. See, also, Philadelphia *v.* River, etc., R. Co., 133 Pa. St. 134. So, it has been held that, unless limited to a particular part of the street, the company may, in good faith, place its track on such part of the street as its interest demand. Campbell *v.* Metropolitan St. R. Co., 82 Ga. 320.

[4] Gahagan *v.* Boston, etc., R. Co., 1 Allen (Mass.) 187; State *v.* Vermont Cent. R. Co., 27 Vt. 103; Compare Glick *v.* Baltimore, etc., R. Co., 21 D. C. 363.

[5] Matthews *v.* Kelsey, 58 Me. 56. See State *v.* Morris, etc., R. Co., 23 N. J. L. 360, 25 N. J. L. 437.

from an express grant or by necessary implication. It is a question of some doubt as to whether the general authority over streets which is usually given to them empowers them to grant to street railway companies the right to use their streets, but the better rule seems to be that it does.[1] It is believed, however, that the ordinary powers of municipal corporations to regulate and improve their streets and prevent their obstruction are not in themselves sufficient to enable municipalities to grant the right to use their streets to ordinary commercial railroads,[2] although it has been held that a city may grant such a right where it is given sole and exclusive control of its streets.[3] It is clear that it can not grant such a right where the railroad is for the mere private use of an individual.[4] Although a municipality may have power, under its general authority over its streets, to grant a street railway company the right to use them, it does not necessarily follow that it has power to grant to any company a monopoly or a perpetual right to use them.

[1] Atchison St. R. Co. *v.* Missouri Pac. R. Co., 31 Kan. 660; Detroit Citizens' St. R. Co. *v.* City of Detroit, 64 Fed. R. 628, s. c. 1 Am. & Eng. R. Cas. (N. S.) 71; State *v.* Corrigan, etc., St. R. Co., 85 Mo. 263, s. c. 29 Am. & Eng. R. Cas. 591. See, also, Brown *v.* Duplessis, 14 La. Ann. 842; City of Michigan City *v.* Boeckling, 122 Ind. 39; Indianapolis, etc., Co. *v.* Citizens', etc., Co., 127 Ind. 369, 389; Davis *v.* Mayor, 14 N. Y. 506; 2 Dillon's Munic. Corp., §§ 719, 724. But compare Eichels *v.* Evansville, etc., R. Co., 78 Ind. 261; Newell *v.* Minneapolis, etc., R. Co., 35 Minn. 112. Much, of course, depends upon the language of the particular charter under consideration. See Schafer *v.* Long Island, etc., R. Co., 124 N. Y. 630; Forman *v.* New Orleans, etc., R. Co., 40 La. Ann. 446; Covington St. R. Co. *v.* Covington, 9 Bush (Ky.) 127; Booth on Street Railways, § 15.

[2] Ruttles *v.* Covington, (Ky.), 10 S. W. R. 644; Daly *v.* Georgia, etc., Railroad Co., 80 Ga. 793, s. c. 7 S. E. R. 146; Savannah, etc., R. Co. *v.* Shiels, 33 Ga. 601; State *v.* Corrigan, etc., St. R. Co., 85 Mo. 263, s. c. 29 Am. & Eng. R. Cas. 591; Newell *v.* Minneapolis, etc., R. Co., 35 Minn. 112; Stanley *v.* Davenport, 54 Iowa 463, s. c. 37 Am. R. 216; 2 Dillon's Munic. Corp., §§ 705, 724. See, also, Strasser *v.* New York, etc., R. Co., 128 N. Y. 157 and 623.

[3] Kistner *v.* City of Indianapolis, 100 Ind. 210. But compare Eichels *v.* Evansville St. R. Co., 78 Ind. 261.

[4] Glaessner *v.* Anheuser-Bush, etc., Assn., 100 Mo. 508, s. c. 33 Am. & Eng. Corp. Cas. 483; Heath *v.* Des Moines, etc., R. Co., 61 Iowa 11, s. c. 10 Am. & Eng. R. Cas. 313; State *v.* Trenton, 36 N. J. L. 79; Marine, etc., Ins. Co. *v.* St. Louis, etc., R. Co., 41 Fed. R. 643; Gustafson *v.* Hamm, 56 Minn. 334. See, also, Fanning *v.* Osborne, 102 N. Y. 441; Hartman, etc., Co.'s Appeal, (Pa.) 18 Atl. R. 553.

In our opinion the better rule is that its ordinary general powers over its streets will not authorize it to grant a monopoly or a perpetual right.[1] We have elsewhere[2] considered the subject of monopolies and perpetual grants, however, and it is sufficient, in this connection, to add that where a municipality is given the power to make a perpetual grant of such a character it seems, according to the weight of authority, that the term of such grant may extend beyond the corporate life of the grantee, at least where the grant is assignable.[3] So, on the other hand, it has recently been held that a street railway company which is given perpetual corporate existence by the statute under which it is incorporated, although subject to the reserved power of the legislature to amend or repeal, acquires a perpetual right to use the streets of a city, notwithstanding a provision of the statute requiring it to first obtain the consent of the city and notwithstanding it obtained such consent only upon the express condition, embodied in the ordinance which it accepted, that its rights in the streets should be lim-

[1] Louisville City R. Co. *v.* Louisville, 8 Bush (Ky.) 415; Memphis City R. Co. *v.* Memphis, 4 Cold. (Tenn.) 406; Nash *v.* Lowry, 37 Minn. 261, s. c. 33 N. W. R. 787; Lake Roland, etc., R. Co. *v.* Mayor, 77 Md. 352, s. c. 26 Atl. R. 510; Eichels *v.* Evansville St. R. Co., 78 Ind. 261; State *v.* Trenton, 36 N. J. L. 79; Birmingham, etc., St. R. Co. *v.* Birmingham St. R. Co., 79 Ala. 465; Davis *v.* Mayor, 14 N. Y. 506; Milhau *v.* Sharp, 27 N. Y. 611; Denver, etc., R. Co. *v.* Denver City R.Co., 2 Colo. 673; City of Boston *v.* Richardson, 13 Allen (Mass.) 146, 161. See, also, City of Detroit *v.* Detroit City R. Co., 64 Fed. R. 628, s. c. 1 Am. & Eng. R. Cas. (N. S.) 71; Altgelt *v.* City of San Antonio, 81 Tex. 436, s. c. 17 S. W. R. 75; Mayor of Houston *v.* Houston, etc., R. Co., 83 Tex. 548, 19 S. W. R. 127; New Orleans, etc., R. Co. *v.* City of New Orleans, 44 La. Ann. 748, 11 So. R. 77; Parkhurst *v.* Capital City Ry. Co., 23 Ore. 471, s. c. 32 Pac. R. 304, 7 Lewis' Am. Corp. & R. Rep. 562, 26 Am. L. Rev. 675. But compare Brown *v.* Duplessis, 14 La. Ann. 842; State *v.* Corrigan, etc., St. R. Co., 85 Mo. 263, s. c. 29 Am. & Eng. R. Cas. 591.

[2] *Ante*, § 39.

[3] Detroit Citizens' St. R. Co. *v.* City of Detroit, 64 Fed. R. 628, s. c. 1 Am. & Eng. R. Cas. (N. S.) 71; People *v.* O'Brien, 111 N. Y. 1. See, also, Union Pac. Ry. Co. *v.* Chicago, etc., R. Co., 51 Fed. R. 309, 2 C. C. A. 174; Nicoll *v.* N. Y. Railroad Co., 12 N. Y. 121; Milhau *v.* Sharp, 27 N. Y. 611; Davis *v.* Mayor, 14 N. Y. 506; People *v.* President of California College, 38 Cal. 166. But compare Turnpike Co. *v.* Illinois, 96 U. S. 63; City of Detroit *v.* Detroit City R. Co., 56 Fed. R. 867.

ited to a specified term of years.[1] It seems to us, however, that all that the railway company derived directly from the state by its incorporation under the statute was the right to be a corporation with capacity to receive the right to use the streets of the city upon such terms as the city might consent to grant; that this was an entirely different thing from the so-called franchise or right to use certain streets in a certain city, which, according to the very statute under which it was incorporated it could never have used at all under any circumstances without the consent of the city; and that as the city could have entirely prohibited such use of its streets, it certainly had the power to impose a condition limiting the time of the use. As we have elsewhere shown, a railroad or other corporation may exist without a right of way or any property whatever. It does not follow, as the courts seem to have thought in the cases referred to, that the grant of a franchise to exist perpetually as a corporation necessarily carries with it a perpetual right to use the streets of a city in the face of a statutory provision that it shall not use such streets at all without the city's consent and an ordinance, accepted by it, which expressly limits such use to a specified time. We content ourselves with citing some of the authorities which lead us to this conclusion, without further comment.[2]

§ 1078. **How and by whom grant should be made or consent given.**—The authority vested in a municipality to grant to a railroad company the right to use its streets must be exercised

[1] Citizens' St. R. Co. *v.* City R. Co., 64 Fed. R. 647. Per Woods, J. (Dissenting opinion upon this point by Baker, J., Id. 656); Africa *v.* Board, etc., of City of Knoxville, 70 Fed. R. 729.

[2] City of Allegheny *v.* Millville, etc., St. R. Co., 159 Pa. 411, s. c. 28 Atl. R. 202; Andrews *v.* National etc., Works, 61 Fed. R. 782; Fort Worth, etc., Co., *v.* Rosedale, etc., R. Co., 68 Tex. 169; Tudor *v.* Chicago, etc., R. Co., 154 Ill. 129; Grand Rapids, etc., Co. *v.* Prange, 35 Mich. 400; Southern, etc., Co. *v.* Orton, 32 Fed. R. 457; Suburban, etc., Co. *v.* Board, 153 Mass. 200, s. c. 26 N. E. R. 447; Union, etc., Co. *v.* Southern Co., 105 Mo. 562, 16 S. W. R. 920; Northern, etc., Co. *v.* Mayor, 21 Md. 93; St. Louis, etc., Co., *v.* Southern Co., 105 Mo. 577, 16 S. W. R. 960; Board *v.* South Bend, etc., Co., 118 Ind. 68; Pacific Railroad Co. *v.* Leavenworth City, 1 Dillon (U. S. C. C.) 393, 398; Larimer, etc., Ry. Co. *v.* Larimer, etc., Ry. Co., 137 Pa. St. 533. See, also, *ante*, §§ 68, 69.

by the proper officers or body. Thus, where it is vested in the common council it can not be delegated to a board or officer having mere ministerial powers.[1] So, where it was vested in the "mayor and assembly" it was held that it could only be exercised by an ordinance duly enacted for that purpose.[2] But it has also been held that the recognition by a city of the validity of such an ordinance for a long period of time raises a "sufficient presumption" of every fact necessary to its validity, "including approval by the mayor and publication."[3] In many states it is provided by constitution or statute that no street railway shall be constructed on any street without the consent of the "local authorities having control of the street or highway proposed to be occupied;" in others it is provided that consent must be given by ordinance, while in others the consent of the owner of a certain percentage of the abutting land must also be obtained.[4]

§ 1079. **Nature and effect of grant by municipality.**—The right granted by a municipality to use its streets is frequently called a franchise, but it is a franchise in the secondary rather than the primary sense of that term. Indeed, it seems to us that it is more in the nature of a license which may be revoked at any time before its acceptance, and which vests no right in the licensee, until it is "accepted and used."[5] A valid grant of

[1] Citizens' St. R. Co. *v.* Jones, 34 Fed. R. 579; State *v.* Bell, 34 Ohio St. 194. See, also, 1 Dillon's Munic. Corp., § 274.

[2] Lockwood *v.* Wabash R. Co., 122 Mo. 86, s. c. 1 Am. & Eng. R. Cas. (N. S.) 16. See McHale *v.* Easton, etc., Co., 169 Pa. 416, 32 Atl. R. 461.

[3] Santa Rosa, etc., R. Co. *v.* Central St. R. Co., (Cal.) 38 Pac. R. 986, 1 Am. & Eng. R. Cas. (N. S.) 105. See, also, Spokane St. R. Co. *v.* City of Spokane Falls, 6 Wash. 521, s. c. 33 Pac. R. 1072. But a rehearing has been granted in the case first cited in this note.

[4] See Booth on St. Rys., §§ 18, 28. In Nebraska the consent of the majority of the electors of the city is required. State *v.* Bechtel, 22 Neb. 158. See, as to the manner of giving consent by "local authorities" of township, Pennsylvania R. Co. *v.* Montgomery, etc., R. Co., 167 Pa. St. 62, s. c. 1 Am. & Eng. R. Cas. (N. S.) 190. As to consent of abutting owners, see White *v.* Manhattan, etc., R. Co., 139 N. Y. 19, 8 Lewis' Am. R. & Corp. R. 739, and note.

[5] Atchison St. R. Co. *v.* Nave, 38 Kan. 744; Galveston City R. Co. *v.* Gulf City, etc., R. Co., 63 Tex. 529, s. c. 26 Am. & Eng. R. Cas. 114; Gulf City, etc., Co. *v.* Galveston, etc.,

such a right by ordinance, however, upon an adequate consideration, when accepted and acted upon by the grantee becomes an irrevocable and binding contract.[1] Unless the right to repeal or amend is reserved, the city can not revoke the ordinance nor, by a subsequent ordinance, without the consent of the company, impose upon it further and additional burdens.[2] But the right to do so may be reserved,[3] and, as we shall hereafter show the city can not thus surrender or alienate its governmental and police powers.[4] In a recent case it was held, under a statute providing that any street railway company might use the streets of any city with the consent of the corporate authorities given by ordinance, that "the power to consent is in and of itself the power to grant an easement. The 'consent' is an easement, and the act of consenting to the use of the streets for street railway purposes is the act of granting an easement in the streets."[5]

§ 1080. **Construction of grant—Illustrative cases.**—Grants by a municipality of the privilege or right to use its streets

Co., 65 Tex. 502; City of Detroit *v.* Detroit City R. Co., 37 Mich. 558; Chicago, etc., R. Co. *v.* People, 73 Ill. 541; City of Belleville *v.* Citizens', etc., Co., 152 Ill. 171, 38 N. E. R. 584, 26 L. R. A. 681; Booth St. Ry., § 10; 2 Beach Pub. Corp., § 1218. *Ante*, § 65. But see State *v.* Madison St. R. Co., 72 Wis. 612, s. c. 40 N. W. R. 487.

[1] City of Belleville *v.* Citizens' Horse R. Co., 152 Ill. 171, s. c. 38 N. E. R. 584; People *v.* Chicago, etc., R. Co., 18 Ill. App. 125; Asheville St. R. Co. *v.* City of Asheville, 109 N. Car. 688, s. c. 14 S. E. R. 316; Town of Arcata *v.* Arcata, etc., R. Co., 92 Cal. 639, s. c. 28 Pac. R. 676; People *v.* O'Brien, 111 N. Y. 1, s. c. 7 Am. St. R. 684, 2 L. R. A. 255; State *v.* Noyes, 47 Me. 189; Commonwealth *v.* Proprietors, 2 Gray (Mass.) 339; Baltimore, etc., Co. *v.* Mayor of Baltimore, 64 Fed. R. 153; Africa *v.* Board, 70 Fed. R. 729; City of St. Louis *v.* Western U. Tel. Co., 63 Fed. R. 68, and authorities there cited. Compare Lake Roland, etc., R. Co. *v.* Mayor, etc., 77 Md. 352, 7 Lewis' Am. R. & Corp. R. 619, and see authorities cited by Mr. Lewis in note criticising that case.

[2] People *v.* Chicago, etc., R. Co., 118 Ill. 113; Electric R. Co. *v.* Common Council of Grand Rapids, 84 Mich. 257, s. c. 47 N. W. R. 567; Western Pav. & Supply Co. *v.* Citizens' St. R. Co., 128 Ind. 525, s. c. 26 N. E. R. 188, 28 N. E. R. 88; Coast Line R. Co. *v.* Savannah, 30 Fed. R. 646; Easton, etc., R. Co. *v.* Easton, 133 Pa. St. 505.

[3] Medford, etc., R. Co. *v.* Somnerville, 111 Mass. 232. See Lake Roland El. R. Co. *v.* Mayor, 7 Lewis' Am. R. & Corp. R. 619, and note.

[4] See *post*, § 1082.

[5] Detroit Citizens St. R. Co. *v.* City of Detroit, 64 Fed. R. 628, 643, s. c. 1 Am. & Eng. R. Cas. (N. S.) 71.

are strictly construed against the grantee.[1] But notwithstanding this rule, the construction should be reasonable with reference to the subject matter and the purpose of the grant. A brief statement of the facts involved and the questions decided in some of the recent cases will serve to show the extent and limits of the rule. On the one hand it has been held that an ordinance authorizing a company to construct its tracks "on, over and along" certain alleys does not authorize their construction on other land at the side of such alleys;[2] that a grant by a city to a railroad company of the right to construct its road "across, or along such streets as it might find expedient to use," and to occupy so much thereof as "may be necessary for the construction of its track, siding and branches," does not give the company the right to the exclusive use of such streets.[3] On the other hand, it has been held that a grant of authority to construct a railroad or railroads upon any public road or highway in the city or extending therefrom does not limit such construction to one continuous and direct street or highway;[4] that authority to extend its lines on streets south of a specified street, west of another, north of another and east of another does not limit the company to the streets within the boundaries specified, but authorizes it to use streets beyond such boundaries;[5] that an ordinance granting the right to construct a track on a certain street does not limit the construction of the track to the roadway as distinguished from the sidewalk,[6]

[1] Wabash R. Co. *v.* City of Defiance, (Ohio St.) 40 N. E. R. 89; Indianapolis, etc., St. R. Co. *v.* Citizens', etc., St. R. Co., 127 Ind. 369, s. c. 24 N. E. R. 1054; Citizens' St. R. Co. *v.* Jones, 34 Fed. R. 579; Chicago, etc., R. Co. *v.* Chicago, 121 Ill. 176; North Eastern R. Co. *v.* Payne, 8 Rich. L. 177; Heath *v.* Des Moines, etc., R. Co., 61 Iowa 11; Stein *v.* Bienville Water Co., 141 U. S. 67; Elliott on Roads and Streets, 561. *Ante*, § 38.

[2] Heath *v.* Des Moines St. R. Co., 61 Iowa 11. See, also, Galveston Wharf Co. *v.* Gulf, etc., R. Co., 81 Tex. 494, 17 S. W. R. 57.

[3] Pennsylvania, etc., R. Co. *v.* Philadelphia, etc., R. Co., 157 Pa. St. 42, s. c. 27 Atl. R. 683. See, also, Dubach *v.* Hannibal, etc., R. Co., 89 Mo. 483, s. c. 1 S. W. R. 86; Lockwood *v.* Wabash R. Co., 122 Mo. 86. *Ante*, § 39.

[4] West Jersey, etc., Co. *v.* Camden, etc., R. Co., 52 N. J. Eq. 452, s. c. 1 Am. & Eng. R. Cas. (N. S.) 132.

[5] Commonwealth *v.* Union, etc., R. Co., 163 Pa. St. 22, s. c. 29 Atl. R. 711.

[6] Knapp, etc., Co. *v.* St. Louis, R. Co., 126 Mo. 26, 28 S. W. R. 627.

and that an electric street railway company, authorized to erect trolley wires, has a right to top the branches of trees along the way when reasonably necessary to its construction and operation.[1] Other illustrative cases will be found in the note below.[2] In the construction of grants to street railway companies the question frequently arises as to the motive power authorized. Applying the rule of strict construction, it is generally held that where the use of one motive power is prescribed, the company has no right to use another and different kind of motive power.[3] So, where the charter or ordinance is silent upon the subject there is much reason for affirming that only such motive power as was in use by street railway companies at the time of the grant could have been contemplated.[4] Where, however, the right is granted to employ "mechanical or other power,"[5] "steam, horse or other power,"[6] or "any power other than locomotives,"[7] or the like,[8] electric, cable, or any similar power

[1] Dodd *v.* Consolidated Traction Co., (N. J.) 31 Atl. R. 980. See, also, Southern, etc., Tel. Co. *v.* Francis (Ala.), 19 So. R. 1.

[2] Chicago, etc., R. Co. *v.* City of Joliet, 79 Ill. 25; Bishop *v.* Union R. Co., 14 R. I. 314; City of Chicago *v.* Chicago, etc., R. Co., 105 Ill. 73; West End, etc., R. Co. *v.* Atlanta St. R. Co., 49 Ga. 151; State *v.* Newport St. R. Co., 16 R. I. 533, 18 Atl. R. 161.

[3] People *v.* Newton, 112 N. Y. 396, s. c. 19 N. E. R. 831; Denver, etc., R. Co. *v.* Denver, etc., R. Co., 2 Colo. 673; Citizens' St. R. Co. *v.* Jones, 34 Fed. R. 579; Indianapolis, etc., St. R. Co. *v.* Citizens' St. R. Co., 127 Ind. 369, s. c. 43 Am. & Eng. R. Cas. 234. See, also, Birmingham, etc., Co. *v.* Birmingham, etc., Co., 79 Ala. 465, s. c. 58 Am. R. 615; Omaha Horse R. Co., *v.* Cable, etc., Co., 30 Fed. R. 324; City of Houston *v.* Houston, etc., R. Co., 83 Tex. 548, s. c. 19 S. W. R. 786. As to use of steam and power of city to prohibit it, see Henderson *v.* Central, etc., Co., 21 Fed. R. 358; Harmon *v.* Chicago, 110 Ill. 400; Richmond, etc., R. Co. *v.* Richmond, 96 U. S. 521; Stanley *v.* Davenport, 54 Iowa 463, 37 Am. R. 216.

[4] See North Chicago, etc., R. Co. *v.* Lake View, 105 Ill. 207; State *v.* City of Trenton, 54 N. J. L. 92, s. c. 23 Atl. R. 281; Farrell *v.* Winchester Ave., etc., Co., 61 Conn. 127, s. c. 23 Atl. R. 757; Watkin *v.* West Phila. R. Co., 1 Pa. Dist. R. 463.

[5] Hudson, etc., Co. *v.* Watervliet, etc., Co., 9 N. Y. Sup. 177, 135 N. Y. 393, s. c. 32 N. E. R. 148.

[6] Taggart *v.* Newport, etc., R. Co., 16 R. I. 668, s. c. 19 Atl. R. 326.

[7] Lockhart *v.* Craig St. R. Co., 139 Pa. St. 419, s. c. 21 Atl. R. 26; Gillette *v.* Chester, etc., R. Co., 2 Pa. Dist. R. 450. See, also, Williams *v.* Citizens' R. Co., 130 Ind. 71, s. c. 29 N. E. R. 408.

[8] Green *v.* City, etc., R. Co., 78 Md. 294, s. c. 28 Atl. R. 626; Fox *v.* Catharine, etc., R. Co., 12 Pa. Co. Ct. R. 180; Buckner *v.* Hart, 52 Fed. R. 835.

in general or ordinary use by street railway companies would doubtless be authorized by the grant. The rule has even been extended by some of the courts so as to include within such a grant the right to use a motor not generally known or used at the time the grant was made.[1]

§ 1081. **Right of municipality to impose conditions.**—When a municipal corporation has the power to grant or refuse a railroad company the right to use its streets as it sees fit, or when its consent is required before any company can so use them, it has, as we think, authority to prescribe the terms and conditions upon which the company shall have the right to construct and operate a railway in its streets.[2] Thus, it may require the company to repair, to pay a license fee for the use of the streets, or the like.[3] So, it may prescribe a reasonable rate of fare for the carriage of passengers by a street railway company,[4] the location and character of its tracks, poles and wires and the like,[5] and, in general, it may impose any reason-

[1] Detroit City R. Co. *v.* Mills, 85 Mich. 634, s. c. 48 N. W. R. 1007. See, also, Commonwealth *v.* West Chester, 9 Pa. Co. Ct. R. 542; North Baltimore, etc., R. Co. *v.* North Ave. R. Co., 75 Md. 233, s. c. 23 Atl. R. 466; Paterson R. Co. *v.* Grundy, 51 N. J. Eq. 213, s. c. 26 Atl. R. 788.

[2] Union, etc., Co. *v.* Southern Co., 105 Mo. 562, 16 S. W. R. 920; Pacific R. Co. *v.* Leavenworth City, 1 Dillon (U. S. C. C.) 393, 398; Northern, etc., Co. *v.* Mayor, etc., 21 Md. 93; City of Allegheny *v.* Millville, etc., Co., 159 Pa. St. 411, 28 Atl. R. 202; Mager *v.* Grima, 8 How. (U. S.) 490, 494; St. Louis R. Co. *v.* Southern Co., 105 Mo. 562, 16 S. W. R. 960, s. c. 46 Am. & Eng. R. Cas. 1, citing Elliott on Roads and Streets, 565. See, also, Kinsman St. R. Co. *v.* Broadway, etc., R. Co., 36 Ohio St. 239, s. c. 5 Am. & Eng. R. Cas. 327; City of Indianapolis *v.* Consumers' Gas Trust Co., 140 Ind. 107, 116, s. c. 39 N. E. R. 433, 436, citing Elliott on Roads and Streets, 565; City of Houston *v.* Houston City St. R. Co., 83 Tex. 548, s. c. 19 S. W. R. 127, 6 Lewis' Am. R. & Corp. R. 106; Plymouth Tp. *v.* Chestnut Hill, etc., Co., 168 Pa. St. 181, s. c. 32 Atl. R. 19.

[3] New Orleans *v.* New Orleans, etc., Co., 40 La. Ann. 587, s. c. 4 So. R. 512; City of Newport *v.* South Covington, etc., R. Co., 89 Ky. 29, 11 S. W. R. 954; City of Detroit *v.* Detroit City R. Co., 37 Mich. 558; Pittsburgh, etc., R. Co. *v.* Birmingham, 51 Pa. St. 41. But see Hodges *v.* Western Un. Tel. Co., 72 Miss. 910, 29 L. R. A. 770.

[4] People *v.* Barnard, 110 N. Y. 548, s. c. 36 Am. & Eng. R. Cas. 70; Forman *v.* New Orleans, etc., R. Co., 40 La. Ann. 446, s. c. 36 Am. & Eng. R. Cas. 38.

[5] Electric R. Co. *v.* Common Council of Grand Rapids, 84 Mich. 257; Detroit *v.* Detroit City R. Co., 37 Mich. 558.

able conditions as to the terms upon which its consent shall be given so long as they are not repugnant to the grant of the franchise to the company by the legislature or to any constitutional or statutory provision upon the subject.[1] If the company accepts an ordinance granting the consent of the municipality upon certain conditions therein stated, it must, we think, take it "in its integrity" with its burdens as well as its privileges.[2] If the consent is clearly made to depend upon the conditions the company can not justly claim that it has such consent and at the same time repudiate the conditions,[3] and it has been held that if the consent of the municipality is not obtained the whole grant will fail.[4]

§ 1082. **Municipal regulation and control.**—A municipal corporation can not, by contract, surrender or alienate its governmental and police powers, which the public welfare demands that it should exercise.[5] All rights granted by the municipal-

[1] People *v.* Barnard, 110 N. Y. 548; *In re* Kings County El. R. Co., 105 N. Y. 97; Harrisburg, etc., R. Co. *v.* Harrisburg, 149 Pa. St. 465, s. c. 24 Atl. R. 56. See, also, City of Providence *v.* Union R. Co., 12 R. I. 473; Philadelphia *v.* Ridge Ave. R. Co., 143 Pa. St. 444.

[2] City of Allegheny *v.* Millville, etc., Co., Pa. 159 St. 411, s. c. 28 Atl. R. 202. See, also, Philadelphia *v.* Lombard, etc., Co., 3 Grant's Cas. (Pa.) 403; Bristow *v.* Whitmore, 9 H. L. Cas. 391; Fort Worth, etc., R. Co. *v.* Rosedale, 68 Tex. 163; Tudor *v.* Chicago, etc., R. Co., 154 Ill. 129, s. c. 1 Am. & Eng. R. Cas. (N. S.) 340; City of Detroit *v.* Detroit City R. Co., 37 Mich. 558.

[3] City of Allegheny *v.* Millville, etc., Co., 159 Pa. St. 411, s. c. 28 Atl. R. 202, 203; Peoples' Railroad *v.* Memphis Railroad, 10 Wall. (U. S.) 38; Long Island R. Co. *v.* Brooklyn, 8 N. Y. S. 805; Tiedeman on Munic. Corp., § 302.

[4] Peoples' *v.* Memphis Railroad 10 Wall. (U. S.) 38; Peoples', etc., R. Co. *v.* Memphis, 16 S. W. R. 973; Oakland R. Co. *v.* Oakland, etc., R. Co., 45 Cal. 365, s. c. 13 Am. R. 181; *In re* Rochester, etc., R. Co., 123 N. Y. 351, s. c. 46 Am. & Eng. R. Cas. 157; Larimer, etc., R. Co. *v.* Larimer, etc., Co., 137 Pa. St. 533; Musser *v.* Fairmount, etc., R. Co., 7 Am. L. Reg. (O. S.) 284. See, also, Pennsylvania R. Co. *v.* Montgomery, etc., R. Co., 167 Pa. St. 62, s. c. 46 Am. St. R. 659; Elliott on Roads and Streets, 584.

[5] Thorpe *v.* Rutland, etc., R. Co., 27 Vt. 140; Indianapolis, etc., Co. *v.* Kercheval, 16 Ind. 84; Louisville City R. Co. *v.* Louisville, 8 Bush (Ky.) 415; Horn *v.* Atlantic, etc., Co., 35 N. H. 169; Bulkley *v.* New York, etc., Co., 27 Conn. 479; Town of Westbrook's Appeal, 57 Conn. 95, s. c. 37 Am. & Eng. R. Cas. 446; Pennsylvania Co. *v.* Riblet, 66 Pa. St. 164, s. c. 5 Am. R. 360; Elliott on Roads and Streets, 564; 1 Dillon's Munic. Corp., § 97; Tiedeman's Munic. Corp., § 302.

ity or contracts made by it with reference to the use of its streets are subject to its exercise of such powers, and a railroad company which secures the right to use the streets of a city takes such right subject to all reasonable regulations and ordinances enacted by the city in the exercise of its police power.[1] Thus, it has been held that a municipality may enact and enforce an ordinance requiring a street railway company to keep down the dust by sprinkling its tracks;[2] that it may, by ordinance, require the company to have some employe or agent on each car in addition to the driver,[3] or to remove snow thrown up by the snow-plows of the company;[4] that it may temporarily remove the tracks of a street railway company, when necessary, in order to construct a sewer or culvert;[5] and that such a company may be enjoined from digging into the streets and re-

[1] State *v.* Mayor, etc., of Hoboken, 41 N. J. L. 71; City of Detroit *v.* Fort Wayne, etc., R. Co., 90 Mich. 646, s. c. 51 N. W. R. 688; Pittsburgh, etc., R. Co. *v.* City of Chicago, 159 Ill. 369, 42 N. E. R. 781; Frankford, etc., Co. *v.* City of Philadelphia, 58 Pa. St. 119; State *v.* Trenton, 53 N. J. L. 132; City of Clinton *v.* Clinton, etc., R. Co., 37 Iowa 61; City of San Jose *v.* San Jose, etc., R. Co., 53 Cal. 475; New Orleans, etc., Co. *v.* Louisiana, etc., Co., 115 U. S. 650.

[2] City, etc., R. Co. *v.* Savannah, 77 Ga. 731, s. c. 4 Am. St. R. 106.

[3] State *v.* Inhabitants of City of Trenton, 53 N. J. L. 132, s. c. 11 L. R. A. 410. See, also, Baltimore, etc., Co. *v.* Mali, 66 Md. 53. But see Brooklyn, etc., R. Co. *v.* Brooklyn, 37 Hun (N. Y.) 413; Corporation of Toronto *v.* Toronto, etc., R. Co., 15 Ont. App. R. 30, s. c. 36 Am. & Eng. Cas. 44. In State *v.* Heidinhain, 42 La. Ann. 483, it was held that the city might pass an ordinance prohibiting smoking in street cars, and in City of St. Louis *v.* St. Louis, etc., R. Co., 89 Mo. 44, it was held that the city might limit the number of passengers to be carried in each car.

[4] Broadway, etc., R. Co. *v.* Mayor, 1 N. Y. Suppl. 646. See, also, Wallace *v.* Detroit City R. Co., 58 Mich. 231; Bowen *v.* Detroit City R. Co., 54 Mich. 496, s. c. 52 Am. R. 822. So, it has been held that the city may change the grade of street and compel the company to make its tracks conform thereto. Ashland St. R. Co. *v.* Ashland, 78 Wis. 271; North Chicago, etc., R. Co. *v.* Lake View, 105 Ill. 183. See, also, City of Albany *v.* Watervliet, etc., Co., 108 N. Y. 14; Indianapolis, etc., R. Co. *v.* State, 37 Ind. 489; Water Comrs. of Jersey City *v.* City of Hudson, 13 N. J. Eq. 420.

[5] Kirby *v.* Citizens' R. Co. 48 Md. 168; North Pennsylvania R. Co. *v.* Stone, 3 Phila. 421. See, also, Middlesex R. Co. *v.* Wakefield, 103 Mass. 261; National, etc., Co. *v.* City of Kansas, 28 Fed. R. 921. But see Eddy *v.* Ottawa, etc., Co., 31 Upper C. Q. B. 569; Des Moines City R. Co. *v.* City of Des Moines, 90 Iowa 770, 58 N. W. R. 906. In City of Detroit *v.* Fort Wayne, etc., R. Co., 90 Mich. 646, 50

building without the consent of the city authorities where the city has authority to prescribe the manner in which corporations shall exercise any privileges granted them in the use of its streets.[1] So, as we have elsewhere shown, a municipal corporation may enact reasonable ordinances limiting the rate of speed at which trains shall be run,[2] and prohibiting the obstruction of its streets by either commercial or street railway companies.[3] It is a well established general rule, however, that where an ordinance is based upon a general power and its provisions are more specific than the expression of the power granted, the courts will inquire into its reasonableness and hold it invalid if clearly unreasonable,[4] but the presumption is

Am. & Eng. R. Cas. 447, a writ of mandamus was awarded to compel the company to remove the projecting ends of its ties in order to enable the city to properly improve the street; and in West Phila., etc., R. Co. *v.* City of Philadelphia, 10 Phila. 70, it was held that the city could compel the change of the track from one part of the street to another.

[1] Inhabitants of Trenton *v.* Trenton, etc., R. Co. (N. J.), 27 Atl. R. 483. But see State *v.* Latrobe, 81 Md. 222, 31 Atl. R. 788.

[2] Crowley *v.* Burlington, etc., Railroad Co., 65 Iowa 658; Merz *v.* Missouri Pac. R. Co., 88 Mo. 672, s. c. 1 S. W. R. 382; Whitson *v.* City of Franklin, 34 Ind. 392; Chicago, etc., R. Co. *v.* Haggerty, 67 Ill. 113; Richmond, etc., R. Co. *v.* Richmond, 96 U. S. 521; Weyl *v.* Chicago, etc., R. Co., 40 Minn. 350; Cleveland, etc., Railway Co. *v.* Harrington, 131 Ind. 426, s. c. 49 Am. & Eng. R. Cas. 358.

[3] City of Duluth *v.* Mallett, 43 Minn. 204, s. c. 45 N. W. R. 154; State *v.* Mayor, etc., of Jersey City, 27 N. J. L. 493; Mayor, etc., of Birmingham *v.* Alabama, etc., R. Co., 98 Ala. 134, 46 Am. & Eng. Corp. Cas. 631. So, it may require a flagman at a grade crossing. State *v.* East Orange, 41 N. J. L. 127; Toledo, etc., Co. *v.* Jacksonville, 67 Ill. 37. See, also, Hayes *v.* Michigan, etc., R. Co., 111 U. S. 228; St. Louis, etc., R. Co. *v.* Belleville, 122 Ill. 376.

[4] State *v.* Inhabitants of City of Trenton, 53 N. J. L. 132, s. c. 11 L. R. A. 410; *In re* Ah You, 88 Cal. 99, s. c. 11 L. R. A. 408; City of Chicago *v.* Trotter, 136 Ill. 430, s. c. 26 N. E. R. 359; 17 Am. & Eng. Ency. of Law 248, and authorities there cited; DesMoines City R. Co. *v.* City of Des Moines, 90 Iowa 770, 58 N. W. R. 906, s. c. 1 Am. & Eng. R. Cas. (N. S.) 215, and note; Cooley's Const. Lim. (4th ed.) 243; 1 Elliott's Gen. Pr., § 436. In Evison *v.* Chicago, etc., R. Co., 45 Minn. 370, s. c. 11 L. R. A. 434, an ordinance limiting the rate of speed to four miles an hour was held to be unreasonable and void under the circumstances of the case. It may be unreasonable for making an unjust discrimination between different companies where the circumstances are the same. City of Lake View *v.* Tate, 130 Ill. 247, s. c. 22 N. E. R. 791; Soon Hing *v.* Crowley, 113 U. S. 703. See, also, 1 Dillon on Munic. Corp., §§ 319, 322, 328.

that such an ordinance is reasonable.[1] Where part of the ordinance is reasonable and valid and part unreasonable, if that part which is reasonable can be separated from that which is unreasonable, so as to be capable of enforcement as complete in itself, it may be upheld and enforced although the unreasonable part is held invalid.[2]

§ 1083. **Rights of rival companies in streets.**—The effect of a grant to use a designated part of a street is to license or give a right to the company first in point of time to occupy and use the designated space.[3] This may, in a sense, create a monopoly of the portion of the street occupied, but it does not create a monopoly of the business, for competing companies may be granted the right to use other parts of the same street.[4] If the company having the first grant actually occupies the streets it is authorized to use, its right to the part so occupied and used is, of necessity, paramount and exclusive; but it can not obtain such an exclusive right by a mere colorable possession for the purpose of keeping out rival companies without taking any steps to provide accommodation for the public or to carry out the purpose for which the grant was made, and where each of two or more companies has the right to lay tracks in a street, the company which first, in good faith, takes possession and enters upon the construction of its system, although it may not have manual possession of all the streets embraced in the system, acquires a right to occupy each and all of such streets

[1] Mayor, etc., of Birmingham *v.* Alabama, etc., R. Co., 98 Ala. 134, 46 Am. & Eng. Corp. Cas. 631; City of Indianapolis *v.* Bieler, 138 Ind. 30.

[2] Paxson *v.* Sweet, 13 N. J. L. 196; Van Hook *v.* Selma, 70 Ala. 361, s. c. 45 Am. R. 85; Mayor, etc., of New York *v.* Dry Docks etc., R. Co., 133 N. Y. 104.

[3] Elliott on Roads and Streets, 567. See, also, West Jersey, etc., Co. *v.* Camden, etc., Co., 52 N. J. Eq. 452, s. c. 1 Am. & Eng. R. Cas. (N. S.) 132.

[4] North Baltimore, etc., R. Co. *v.* Mayor, 75 Md. 247, s. c. 23 Atl. R. 470, 471, citing Elliott on Roads and Streets, 566, 567. To the same effect are Fort Worth St. R. Co. *v.* Rosedale, etc., R. Co., 68 Tex. 169; Jackson, etc., Horse R. Co. *v.* Interstate, etc., Co., 24 Fed. R. 306; Henderson *v.* Ogden City R. Co., 7 Utah 199, s. c. 26 Pac. R. 286; New Orleans, etc., R. Co. *v.* Crescent City R. Co., 12 Fed. R. 308; Omaha Horse R. Co. *v.* Cable Tramway Co., 30 Fed. R. 324; Booth on Street Ry's, § 108.

superior to that of the other companies which have not yet occupied any of such streets or made their location therein.[1] Notwithstanding the general rule that the grant to one company of the right to lay its track in certain streets does not prevent a grant to other companies to use the same streets, where the street is too narrow for more than one company it would seem that the company first in point of time must, of necessity, have a "physical monopoly" of the street as against other companies, and the second company, in any case, will not be allowed to so construct and operate its road as to impair the vested rights of the prior company without being held responsible therefor.[2] So, it has been said that a city "can not so multiply street railway tracks in a particular street as to interfere with the rights of the public in the street."[3]

§ 1084. **Right of one company to use another's track.**—Although, as we shall hereafter show, the tracks of a street railway company may be used by the general public for ordinary travel with vehicles in common with the rest of the street, without compensation,[4] yet a rival company can not, without

[1] This is substantially the rule laid down in Elliott on Roads and Streets, 570, which is quoted with approval in Indianapolis, etc., St. R. Co. *v.* Citizens' St. R. Co., 127 Ind. 369, s. c. 43 Am. & Eng. R. Cas. 234, and in Africa *v.* Board, 70 Fed. R. 729. See, also, Fidelity Trust, etc., Co. *v.* Mobile St. R. Co., 53 Fed. R. 687; Railway Co. *v.* Alling, 99 U. S. 463; Norristown, etc., R. Co. *v.* Citizens, etc., R. Co., 3 Montg. (Pa.) 119; Omnibus R. Co. *v.* Baldwin, 57 Cal. 160; Waterbury *v.* Dry Dock, etc., R. Co., 54 Barb. (N. Y.) 388; Titusville, etc., R. Co. *v.* Warren, etc., R. Co., 12 Phila. (Pa.) 642; Morris, etc., R. Co. *v.* Blair, 9 N. J. Eq. 635. In Homestead St. R. Co. *v.* Pittsburgh, etc., Co., 166 Pa. St. 162, it was held, under the Pennsylvania statute, that the consent of a municipality given to one company before its incorporation was of no effect as against a company which was already incorporated and which, within a reasonable time thereafter, proceeded to obtain consent to occupy the same street.

[2] See Fort Worth St. R. Co. *v.* Rosedale St. R. Co., 68 Tex. 169, s. c. 32 Am. & Eng. R. Cas. 283; Omaha Horse R. Co. *v.* Cable, etc., Co., 32 Fed. R. 727; Union Pass. R. Co. *v.* Continental R. Co., 11 Phila. (Pa.) 321.

[3] Street R. Co. of G. R. *v.* West Side St. R. Co., 48 Mich. 433. To the same effect is Canal, etc., St. R. Co. *v.* Crescent City R. Co., 41 La. Ann. 561, s. c. 40 Am. & Eng. R. Cas. 329. See, also, Dooly Block *v.* Salt Lake, etc., Co., 9 Utah 31, 33 Pac. R. 229, 8 Lewis' Am. R. & Corp. R. 327.

[4] See Booth on Street Ry's, § 110;

authority and without paying compensation, run its own cars upon and along such tracks,[1] and it has even been held that a rival omnibus line could not so run its vehicles.[2] Under its reserved power to amend or repeal, the legislature, or, when empowered to do so, the municipality may authorize one company to make a joint use of the tracks of another.[3] So, it has been held that one company may acquire the right to use the tracks of another by the exercise of the power of eminent domain.[4] But compensation must be made to the company whose tracks are so used or condemned.[5] The entire matter, however, including the procedure and method of ascertaining the compen-

Pacific R. Co. *v.* Wade, 91 Cal. 449, s. c. 27 Pac. R. 768; Smedis *v.* Brooklyn, etc., R. Co., 88 N. Y. 13; Elliott on Roads and Streets, 581. This is subject, however, to the company's superior right of passage.

[1] It may be enjoined from so doing. Metropolitan R. Co. *v.* Quincy R. Co., 12 Allen (Mass.) 262; Louisville, etc., R. Co. *v.* Central, etc., R. Co., 87 Ky. 223, s. c. 36 Am. & Eng. R. Cas. 463; Brooklyn, etc., R. Co. *v.* Brooklyn City R. Co., 33 Barb. (N. Y.) 420; Central, etc., R. Co. *v.* Fort Clark, etc., R. Co., 81 Ill. 523; Cottam *v.* Guest, L. R. 6 Q. B. Div. 70, 1 Am. & Eng. R. Cas. 474, note.

[2] Citizens Coach Co. *v.* Camden, etc., R. Co., 33 N. J. Eq. 267, s. c. 36 Am. R. 542.

[3] Kinsman, etc., R. Co. *v.* Broadway, etc., R. Co., 36 Ohio St. 239, s. c. 5 Am. & Eng. R. Cas. 227; Toledo, etc., R. Co. *v.* Toledo, etc., R. Co., 50 Ohio, 603, 1 Am. & Eng. R. Cas. (N. S.) 230; Metropolitan R. Co. *v.* Highland St. R. Co., 118 Mass. 290; South Boston R. Co. *v.* Middlesex R. Co., 121 Mass. 485; Canal, etc., St. R. Co. *v.* Crescent, etc., R. Co., 41 La. Ann. 561, s. c. 40 Am. & Eng. R. Cas. 329; New Bedford, etc., R. Co. *v.* Aclushnet St. R. Co., 143 Mass. 200; Sixth Ave. R. Co. *v.* Kerr, 45 Barb. (N. Y.) 138; North Baltimore, etc., R. Co. *v.* Mayor, etc., of Baltimore, 75 Md. 247, s. c. 23 Atl. R. 470; Union Depot Co. *v.* Southern R. Co., 105 Mo. 562 (upheld as an exercise of the police power).

[4] Sixth Ave. R. Co. *v.* Kerr, 72 N. Y. 330; Canal, etc., R. Co. *v.* Orleans, etc., R. Co., 44 La. Ann. 54, s. c. 50 Am. & Eng. R. Cas. 369; Metropolitan, etc., R. Co. *v.* Chicago, etc., R. Co., 87 Ill. 317; Metropolitan R. Co. *v.* Quincy R. Co., 12 Allen (Mass.) 262; Covington R. Co. *v.* Covington, etc., R. Co., 19 Am. L. Reg. (N.S.) 765; Pennsylvania R. Co. *v.* Baltimore, etc., R. Co., 60 Md. 263; Toledo, etc., R. Co. *v.* Toledo, etc., R. Co., 50 Ohio 603, 1 Am. & Eng. R. Cas. (N. S.) 230.

[5] Metropolitan R. Co. *v.* Highland St. R. Co., 118 Mass. 290; Second, etc., St. R. Co. *v.* Green, etc., R. Co., 3 Phila. (Pa.) 430; Louisville, etc., R. Co. *v.* Central, etc., R. Co., 87 Ky. 223; Pacific R. Co. *v.* Wade, 91 Cal. 449; Jersey City, etc., R. Co. *v.* Jersey City, etc., R. Co., 20 N. J. Eq. 61; 2 Dillon's Munic. Corp., § 727; Booth on Street Ry's, § 114, and authorities cited in preceding notes.

sation is largely regulated by express statutory provisions in most of the states.[1]

§ 1085. **Rights of abutters—Generally.**—The owner of land abutting upon a highway has, in addition to such rights to its use as belong to the members of the public generally, certain peculiar rights which belong only to abutters.[2] Where he owns the fee—which he is always presumed to own, in the absence of anything to the contrary, to the center of the street upon the side upon which his land abuts—he has in general, subject only to the public easement, all the rights and remedies of the owner of a freehold.[3] He also has, whether he owns the fee or not, a right of ingress and egress, or, as it is sometimes called, an "easement of access" to his premises.[4] This is so far in the nature of private property that it can not be taken away or materially impaired even by the legislature without compensation.[5] So, the New York courts, and others, following the de-

[1] See Booth on Street Ry's., § 115, and notes.

[2] Elliott on Roads and Streets, 519.

[3] Stevenson *v.* Mayor, 20 Fed. R. 586, s. c. 4 Am. & Eng. Corp. Cas. 503; Western Un. Tel. Co. *v.* Williams, 86 Va. 696, s. c. 19 Am. St. R. 908; Jackson *v.* Hathaway, 15 Johns. (N. Y.) 447, s. c. 8 Am. Dec. 263; Robert *v.* Sadler, 104 N. Y. 229; State *v.* Laverack, 34 N. J. L. 201; Pemberton *v.* Dooley, 43 Mo. App. 176; Perley *v.* Chandler, 6 Mass. 453, s. c. 4 Am. Dec. 159; Stackpole *v.* Healy, 16 Mass. 33, s. c. 8 Am. Dec. 121; Cole *v.* Drew, 44 Vt. 49, s. c. 8 Am. R. 363; Cox *v.* Louisville, etc., R. Co., 48 Ind. 178; Overman *v.* May, 35 Iowa 89; Goodtitle *v.* Alker, 1 Burr. 133. But see Paquet *v.* Mt. Tabor, etc., Railway Co., 18 Ore. 233, s. c. 22 Pac. R. 906; McQuaid *v.* Portland, etc., Railway Co., 18 Ore. 237, s. c. 22 Pac. R. 899.

[4] *In re* New York El. R. Co., 36 Hun (N. Y.) 427; Town of Rensselaer *v.* Leopold, 106 Ind. 29; Grafton *v.* Baltimore, etc., R. Co., 21 Fed. R. 309; Rigney *v.* Chicago, 102 Ill. 64; Hussner *v.* Brooklyn City R. Co., 114 N. Y. 433; Elizabethtown, etc., R. Co. *v.* Combs, 10 Bush. (Ky.) 382; Everett *v.* Marquette, 53 Mich. 450; Railroad Co. *v.* Schurmeir, 7 Wall. (U. S.) 272; Branahan *v.* Hotel Co., 39 Ohio St. 333, s. c. 48 Am. R. 457; Elizabethtown, etc., R. Co. *v.* Combs, 10 Bush. (Ky.) 382, s. c. 19 Am. R. 67, and authorities cited in the following notes. See, also, "An Abutters Rights in a Street," 24 Cent. L. J. 51; Elliott on Roads and Streets, 526.

[5] Haynes *v.* Thomas, 7 Ind. 38; Ross *v.* Thompson, 78 Ind. 90, 94; Common Council *v.* Croas, 7 Ind. 9; City of Indianapolis *v.* Kingsbury, 101 Ind. 200, 211; Kincaid *v.* Indianapolis, etc., Co., 124 Ind. 577, s. c. 19 Am. St. R. 113; Theobold *v.* Louisville, etc., R. Co., 66 Miss. 279, s. c. 14 Am. St. R. 564; Crawford *v.* Delaware, 7 Ohio St. 459; Burlington, etc., R. Co. *v.* Reinhackle, 15 Neb. 279, s. c. 48 Am. R. 342; Tran-

cisions in that state, have justly recognized an easement of light and air in the abutter, and have held that "above the surface there can be no lawful obstruction to the access of light and air, to the detriment of the abutting owner."[1] The right to occupy a street does not extend beyond such a reasonable occupancy and use as shall not unnecessarily interfere with its use as a highway. And for an interference arising from improper construction[2] or operation[3] of the road, an abutting owner who suffers special damage may recover.[4]

§ 1086. **Rights of land-owners other than abutters.**—Although there are many authorities which hold that one who

sylvania University *v.* Lexington, 3 B. Mon. (Ky.) 25, s. c. 38 Am. Dec. 173; Brakken *v.* Minneapolis, etc., R. Co., 29 Minn. 41; Abendroth *v.* Manhattan R. Co., 122 N. Y. 1, s. c. 19 Am. St. R. 461; Moose *v.* Carson, 104 N. Car. 431, s. c. 17 Am. St. R. 681; Adams *v.* Chicago, etc., R. Co., 39 Minn. 286, s. c. 12 Am. St. R. 644; Broome *v.* New York, etc., Tel. Co., 42 N. J. Eq. 141; Kane *v.* New York El. R. Co., 125 N. Y. 164; City of Buffalo *v.* Pratt, 131 N. Y. 293, s. c. 27 Am. St. R. 592; McCaffrey *v.* Smith, 41 Hun (N. Y.) 117. But see Textor *v.* Baltimore, etc., R. Co., 59 Md. 63, s. c. 43 Am. R. 540.

[1] Story *v.* New York El. R. Co., 90 N. Y. 122, s. c. 43 Am. R. 146, Lahr *v.* Metropolitan, etc., R. Co., 104 N. Y. 268, 288; Dill *v.* Camden Board, 47 N. J. Eq. 421, s. c. 10 L. R. A. 276, and note; Paterson R. Co. *v.* Grundy, 51 N. J. Eq. 213, s. c. 26 Atl. R. 788; Hobart *v.* Milwaukee, etc., R. Co., 27 Wis. 194; New York Elevated R. Co. *v.* Fifth Nat. Bank, 135 U. S. 432, 440; Adams *v.* Chicago, etc., R. Co., 39 Minn. 286, s. c. 12 Am. St. R. 644; Willamette Iron Works *v.* Oregon R., etc., Co., 26 Ore. 224, s. c. 46 Am. St. R. 620, citing Elliott on Roads and Streets, 526, 536; Henderson, etc., R. Co. *v.* De Champ, 95 Ky. 219, 24 S. W. R. 605. *Contra*, Garrett *v.* Lake Roland, etc., Co., 79 Md. 277, s. c. 29 Atl. R. 830.

[2] Cadle *v.* Muscatine Western R. Co., 44 Iowa 11; Brewer *v.* Boston, etc., R. Co., 113 Mass. 52; Jeffersonville, etc., R. Co. *v.* Esterle, 13 Bush. (Ky.) 667.

[3] Atchison, etc., R. Co. *v.* Garside, 10 Kan. 552; Frith *v.* Dubuque, 45 Iowa 406; Penna R. Co. *v.* Angel, 41 N. J. Eq. 316, s. c. 56 Am. R. 1; Baltimore, etc., R. Co. *v.* Fifth Baptist Church, 108 U. S. 317; Central, etc., R. Co. *v.* Twine, 23 Kan. 585, s. c. 33 Am. R. 203; White *v.* Chicago, etc., R. Co., 122 Ind. 317, s. c. 23 N. E. R. 782; Union Pacific R. Co. *v.* Foley, 19 Colo. 280.

[4] Authority to lay a railroad track in a street does not authorize the erection of a passenger depot or other structure therein by which adjoining property is specially damaged. Barney *v.* Keokuk, 4 Dill. (U. S.) 593, affirmed 94 U. S. 324; Higbee *v.* Camden, etc., R. Co., 19 N. J. Eq. 276, 20 N. J. Eq. 435; Chicago, etc., R. Co. *v.* O'Connor, 42 Neb. 90, s. c. 1 Am. & Eng. R. Cas. (N. S.) 51; Maysville, etc., R. Co. *v.* Ingram (Ky.), 30 S. W. R. 8; Tate *v.* Missouri, etc., R. Co., 64 Mo. 149.

purchases property with reference to a map or plat showing certain streets, has a right as against the donor or grantor to have all such streets kept open, we suppose no such extensive right exists as against the general public, and that the land-owner has special rights, under ordinary circumstances, only in the street upon which his property abuts. Whether that right extends, in any way, to other portions of the street than that upon which his property directly abuts is a disputed question. The vacation of a street in such a manner as to prevent access to the property of an abutting owner is held in many jurisdictions, in accordance with what we regard as the better rule, to be a taking within the rule requiring compensation, but there are authorities to the contrary, and in New York it is held that the closing of one public way to his property is no such taking as requires compensation, provided another way is left open.[1] It seems clear to us, however, that, upon principle, the land-owner's easement of access must, as a general rule, include the right to have so much of the street kept open, at least, as will give him an outlet to some connecting street, and it follows, therefore, that where a railroad is built across the mouth of a *cul de sac* so as to deprive him of his only means of access, he is entitled to damages, although his property does not abut upon that portion of the street where the railroad is constructed.[2] It would seem also, upon principle, that where the easement of access is seriously impaired, although not destroyed, and a material depreciation in value of the property is caused by the permanent obstruction of a street, the owner suffers a special injury and is entitled to damages, even though his property does not abut directly upon that portion of the street.[3] The

[1] This subject is considered and the conflicting authorities are cited in Elliott on Roads and Streets, 662, 663. See also Davis *v.* County Comrs., 153 Mass. 218, s. c. 55 Amer. & Eng. R. Cas. 52.

[2] Brakken *v.* Minneapolis, etc., R. Co., 29 Minn. 41; Brakken *v.* Minneapolis, etc., R. Co., 32 Minn. 425; Pennsylvania Co. *v.* Stanley, 10 Ind. App. 421, s. c. 37 N. E. R. 288. See, also, Johnston *v.* Old Colony R. Co., 18 R. I. 642, 29 Atl. R. 594; Jackson *v.* Kiel, 13 Colo. 378, s. c. 16 Am. St. R. 207.

[3] In Lewis' Eminent Domain, § 227, the author, comments on the case of Rude *v.* St. Louis, 93 Mo. 408, as follows: "If the plaintiff's premises were depreciated in value by reason

great weight of authority, however, is to the effect that the owner of property abutting on the street at a distance from the point obstructed suffers no special or peculiar damage and can not recover for any depreciation in the value of his property caused thereby, even where the railroad company is required by law to compensate the owner for all property *damaged*.[1] But in some jurisdictions, in most of which constitutional or statutory provisions exist requiring compensation where property is "injured" or "damaged," it has been held that a property-owner

of the obstruction complained of, then, it seems to us, both the premise and conclusion of the court are wrong. When property is so situated with respect to a public way that its permanent obstruction depreciates its market value, then the owner of the property suffers a *special* and *peculiar* damage by reason of such obstruction, different from that of the public generally. It is tacitly conceded by the Missouri court, and is unquestionably the law, that, if the plaintiff's damages were special and peculiar, then he had a right to action under the constitutional provision in question. The right to damages can not be reduced to a question of distance, but depends upon the fact of the market value of the premises being actually depreciated by reason of the obstruction or improvement. The point was fully considered in McCarthy *v.* Metropolitan Board, etc., [L. R. 8 C. P. 119, 210] and in reference to it Justice Bramwell says: 'If it is to be asked where the line is to be drawn, I answer, not by distance in point of measurement. Premises might be injuriously affected by the stopping of a landing place ten miles away, if there was no other within twenty of the premises affected.'" See, also, Fritz *v.* Hobson, 19 Am. L. Reg. (N. S.) 615, and note.

[1] Buhl *v.* Fort St., etc., Co., 98 Mich. 596, s. c. 57 N. W. R. 829, 9 Lewis' Am. R. & Corp. R. 173; Rochette *v.* Chicago, etc., R. Co., 32 Minn. 201; Shaubut *v.* St. Paul, etc., R. Co., 21 Minn. 502; Dantzer *v.* Indianapolis Union R.Co.,141 Ind. 604, s. c. 39 N. E. R. 223,11 Lewis'Am. R.& Corp. R. 249; Rude *v.* St. Louis, 93 Mo. 408; State *v.* City of Elizabeth, 54 N. J. L. 462, s. c. 24 Atl. R. 495; Morgan *v.* Des Moines, etc., R. Co., 64 Iowa 589, 52 Am. R. 462; Stanwood *v.* City of Malden, 157 Mass. 17, 31 N. E. R. 702; McGee's Appeal, 114 Pa. St. 470, 8 Atl. R. 237; City of East St. Louis *v.* O'Flynn, 119 Ill. 200, 10 N. E. R. 395; Parker *v.* Catholic Bishop,146 Ill.158, 34 N. E. R. 473; Glasgow *v.* City of St. Louis, 107 Mo. 198, 17 S. W. R. 743; Smith *v.* City of Boston, 7 Cush. 254; Whitsett *v.* Union, etc., R. Co., 10 Colo. 243, 15 Pac. R. 339; Houck *v.* Wachter, 34 Md. 265; Polack *v.* Trustees, 48 Cal. 490; Gerhard *v.* Seekonk, etc., Commissioners, 15 R. I. 334, 5 Atl. R. 199; Kings Co., etc., Insurance Co. *v.* Stevens, 101 N. Y. 411, 5 N. E. R. 353; Coster *v.* Mayor, etc., 43 N. Y. 399; Barr *v.* City of Oskaloosa, 45 Iowa 275; Heller *v.* Atchinson, etc., R. Co., 28 Kan. 625.

may be entitled to damages, although the obstruction is not directly in front of his premises, and, in some instances, even though his property may not directly abut upon the street.[1]

§ 1087. **Commercial railroad is an additional burden.**—It is generally conceded that the use of a street by an ordinary commercial railroad, may, under certain circumstances, constitute an additional servitude or burden for which the abutters are entitled to compensation. But the courts differ widely as to when it should be so considered. Some of them regard the ownership of the fee as the test, and seem to hold that the abutter is not entitled to compensation when the fee of the street is in the public;[2] but this is in conflict with the rules laid

[1] See Rigney *v.* Chicago, 102 Ill. 64; Chicago, etc., R. Co. *v.* Darke, 148 Ill. 226, s. c. 35 N. E. R. 750; Lake Erie, etc., R. Co. *v.* Scott, 132 Ill. 429, s. c. 24 N.E. R. 78. (But see City of Chicago *v.* Union, etc., Asso., 102 Ill. 379.) Railway Co. *v.* Gardner, 45 Ohio St. 309; Lake Roland, etc., R. Co. *v.* Webster, 81 Md. 529, s. c. 1 Am. & Eng. R. Cas. (N. S.) 360; Atchison, etc., R. Co. *v.* Boerner, 34 Neb. 240, s. c. 51 N. W. R. 842; Jackson *v.* Kiel, 13 Colo. 378, s. c. 16 Am. St. R. 207; Kearney *v.* Metropolitan, etc., R. Co., 13 N. Y. Supp. 608. But see Mooney *v.* New York, etc., R. Co., 16 Daly (N. Y.) 145; Morgan *v.* Des Moines, etc., R. Co., 64 Iowa 589, 52 Am. R. 462. *Ante*, § 978. And in many cases where the provision for the payment of damages is not limited to those arising solely from the construction of the road, injuries from smoke, vibration, noise and the like, have been held proper elements of damage. Omaha, etc., R. Co. *v.* Janecek, 30 Neb. 276; Gainesville, etc., R. Co. *v.* Hall, 78 Tex. 169; Henderson, etc., R. Co. *v.* Dechamp, 95 Ky. 219, 24 S. W. R. 605; Chicago, etc., R. Co. *v.* Loeb, 118 Ill. 203. See, also, Pennsylvania, etc., R. Co. *v.* Walsh, 124 Pa. St. 544, distinguishing Pennsylvania R. Co. *v.* Lippincott, 116 Pa. St. 472; Abendroth *v.* Manhattan R. Co., 122 N. Y. 1, and other New York elevated railway cases therein cited. But see Pennsylvania Co. *v.* Pennsylvania, etc., R. Co., 151 Pa. St. 334.

[2] Harrison *v.* New Orleans, etc., R. Co., 34 La. Ann. 462, s. c. 44 Am. R. 438; Hatch *v.* Vermont Cent. R. Co., 28 Vt. 142; Garnett *v.* Jacksonville, etc., R. Co., 20 Fla. 889; Railroad *v.* Bingham, 87 Tenn. 522; Houston, etc., R. Co. *v.* Odum, 53 Tex. 343; Sweet *v.* Buffalo, etc., R. Co., 13 Hun 643. Other cases are reviewed in Spencer *v.* Point Pleasant, etc., R. Co., 23 W. Va. 407, s. c. 20 Am. & Eng. R. Cas. 125. In many of the states where this doctrine was once held it is now overruled. Carson *v.* Central R. Co., 35 Cal. 325, overruled in Southern Pacific R. Co. *v.* Reed, 41 Cal. 256; Savannah, etc., R. Co. *v.* Shiels, 33 Ga. 601, overruled in South Carolina R. Co. *v.* Steiner, 44 Ga. 546; Moses *v.* Pittsburgh, etc., R. Co., 21 Ill. 516, apparently overruled in Indianapolis, etc., R. Co. *v.* Hartley, 67 Ill. 439, and Chicago, etc., R. Co. *v.* Ayres, 106 Ill.

down in the preceding section, and when the "easement of access" is destroyed or materially impaired the abutter, as correctly held in most of the more recent cases, is entitled to compensation, whether he owns the fee or not.[1] Some of the other courts seem to hold that a railroad is not, in either case, an additional burden, for which the abutters are entitled to compensation.[2] It is held in still another line of decisions that the use of streets by a commercial railroad is not an ordinary street use, and that the abutters are entitled to compensation regardless of the ownership of the fee.[3] This, we are inclined

511; Atchison, etc., R. Co. *v.* Garside, 10 Kan. 552, apparently overruled in Central Branch Union Pac. R. Co. *v.* Twine, 23 Kan. 585; Houston & T. Co. R. Co. *v.* Odum, 53 Tex. 343, overruled in Gulf, etc., R. Co. *v.* Eddins, 60 Tex. 656; Milburn *v.* City of Cedar Rapids, 12 Iowa 246, no longer expresses the law in Iowa. See Kucheman *v.* Chicago, etc., R. Co., 46 Iowa 366, and Pratt *v.* Des Moines, etc., R. Co., 72 Iowa 249.

[1] Dillon's Munic. Corp. (4th ed.) § 704; Elliott on Roads & Streets, 529; Fulton *v.* Short Route, etc., Co., 85 Ky. 640, s. c. 7 Am. St. R. 619; Hot Springs R. Co. *v.* Williamson, 136 U. 121; Lamm *v.* Chicago, etc., R. Co., 45 Minn. 71, s. c. 46 Am. & Eng. R. Cas. 42; McQuaid *v.* Portland, etc., R. Co., 18 Ore. 237, s. c. 22 Pac. R. 899, 1 Lewis' Am. R. & Corp. R. 34, and note; Kaufman *v.* Tacoma, etc., R. Co., 11 Wash. 632, 40 Pac. R. 137; Dooly Block *v.* Salt Lake, etc., Co., 9 Utah 31, 33 Pac. R. 229; Reining *v.* New York, etc., R. Co., 128 N. Y. 157; Egerer *v.* New York, etc., R. Co., 130 N. Y. 108, s. c. 14 L. R. A. 381 and note; Atchison, etc., R. Co. *v.* Davidson, 52 Kan. 739, s. c. 35 Pac. R. 787; Pennsylvania Co. *v.* Stanley, 10 Ind. App. 421, 37 N. E. R. 288. Other authorities are cited in the notes to the preceding section.

[2] Struthers *v.* Dunkirk, etc., R. Co., 87 Pa. St. 282; *In re* Philadelphia, etc., R. Co., 6 Whart. (Pa.) 25; Peddicord *v.* Baltimore, etc., R. Co., 34 Md. 463; Perry *v.* New Orleans, etc., R. Co., 55 Ala. 413; Morris, etc., R. Co. *v.* Newark, 10 N. J. Eq. 352; O'Brien *v.* Baltimore, etc., R. Co., 74 Md. 363; Nottingham *v.* Baltimore, etc., R. Co., 3 McArthur (D. C.) 517; Gaus, etc., Co. *v.* St. Louis, etc., R. Co., 113 Mo. 308, s. c. 20 S. W. R. 658; Lockwood *v.* Wabash R. Co., 122 Mo. 86, s. c. 1 Am. & Eng. R. Cas. (N. S.) 16; Montgomery *v.* Santa Ana, etc., R. Co., 104 Cal. 186, s. c. 37 Pac. R. 786. See, also, Fobes *v.* Rome, etc., R. Co., 121 N. Y. 505; People *v.* Kerr, 27 N. Y. 188; Pierce on Railroads, 234, 238. But compare Pennsylvania R. Co. *v.* Walsh, 124 Pa. St. 544, s. c. 10 Am. St. R. 611, as to the present rule in Pennsylvania.

[3] White *v.* Northwestern, etc., R. Co., 113 N. Car. 610, s. c. 18 S. E. R. 330; Theobald *v.* Louisville, etc., R. Co., 66 Miss. 279, s. c. 14 Am. St. R. 564; Omaha, etc., R. Co. *v.* Rogers, 16 Neb. 117, s. c. 20 Am. & Eng. R. Cas. 79; Burlington, etc., R. Co. *v.* Reinhackle, 15 Neb. 279, s. c. 48 Am. R. 342; Reichert *v.* St. Louis, etc., R. Co., 51 Ark. 491, s. c. 38 Am. & Eng. R. Cas. 453; Schurmeier *v.* St. Paul, etc., R. Co., 10 Minn. 82, s. c. 88 Am. Dec.

to regard as the better rule. It is the rule which generally obtains where telegraph or telephone poles are erected, and the

59; City of Denver *v.* Bayer, 7 Colo. 113, s. c. 2 Am. & Eng. Corp. Cas. 465; Inhabitants of Springfield *v.* Connecticut River R. Co., 4 Cush. (Mass.) 63; South Carolina R. Co. *v.* Steiner, 44 Ga. 546; Stewart *v.* Ohio River, etc., R. Co., 38 W. Va. 438, s. c. 18 S. E. R. 604; Railway Co. *v.* Lawrence, 38 Ohio St. 41; St. Paul, etc., Co. *v.* Schurmeier, 7 Wall. (U. S.) 272. See, also, Williams *v.* New York, etc., R. Co., 16 N. Y. 97; New Orleans, etc., R. Co. *v.* Delamore, 114 U. S. 501; Indianapolis, etc., R. Co. *v.* Hartley, 67 Ill. 439; Kucheman *v.* Chicago, etc., Railway Co., 46 Iowa 366; Enos *v.* Chicago, etc., R. Co., 78 Ia. 28, 42 N. W. R. 575, note in 1 Lewis' Am. R. Corp. Cas. 48, *et seq;* note in 6 Lewis' Am. R & Corp. Cas. 315, *et seq;* Imlay *v.* Union, etc., R. Co., 26 Conn. 249, s. c. 68 Am. Dec. 392, and note; Grand Rapids, etc., R. Co. *v.* Heisel, 38 Mich. 62, s. c. 31 Am. R. 306; 2 Dillon's Munic. Corp. (4th ed.), § 704; Parrott *v.* Cincinnati, etc., R. Co., 10 Ohio St. 624; Lawrence Railroad Co. *v.* Williams, 35 Ohio St. 168; Gulf, etc., R. Co. *v.* Eddins, 60 Tex. 656; Weyl *v.* Sonoma Valley, etc., Co., 69 Cal. 202; Southern Pac. R. Co. *v.* Reed, 41 Cal. 256; Central Branch Union Pac. *v.* Andrews, 30 Kan. 590; Hanlin *v.* Chicago, etc., R. Co., 61 Wis. 515; Carl *v.* Sheboygan, etc., R. Co., 46 Wis. 625; Henderson *v.* New York Central R. Co., 78 N. Y. 423; Fanning *v.* Osborne & Co., 34 Hun (N. Y.) 121; Wager *v.* Troy Union R. Co., 25 N. Y. 526; Chamberlain *v.* Elizabethport Steam Cordage Co., 41 N. J. Eq. 43; Starr *v.* Camden, etc., R. Co., 24 N. J. Law 592; Phipps *v.* West Maryland R. Co., 66 Md. 319; Hartz *v.* St. Paul, etc., R. Co., 21 Minn. 358; Harrington *v.* St. Paul, etc., R. Co., 17 Minn. 215; Kucheman *v.* Chicago, C. & D. R. Co., 46 Iowa 366; Cox *v.* Louisville, etc., R. Co., 48 Ind. 178; Nicholson *v.* New York, etc., R. Co., 22 Conn. 74. The opposite view is still held in some of the states. Garnett *v.* Jacksonville, etc., R. Co., 20 Fla. 889; Snyder *v.* Pennsylvania R. Co., 55 Pa. St. 340; Parry *v.* New Orleans, etc., R. Co., 55 Ala. 413; Hill *v.* Chicago, etc., R. Co., 38 La. Ann. 599; Elizabethtown, etc., R. Co. *v.* Thompson, 79 Ky. 52; McLauchlin *v.* Charlotte, etc., Railroad Co., 5 Rich. L. (S. Car.) 583; Cross *v.* St. Louis, etc., R. Co., 77 Mo. 312; Struthers *v.* Dunkirk, etc., R. Co., 87 Pa. St. 282. This is certainly the better rule where the "easement of access" is destroyed or materially impaired, but several of the courts have held that when it is not taken, as, for instance, where the road is constructed on the opposite side of the street, the abutter is not entitled to compensation. Indiana, etc., R. Co. *v.* Eberle, 110 Ind. 542; Terre Haute, etc., R. Co. *v.* Bissell, 108 Ind. 113; Haslett *v.* New Albany, etc., R. Co., 7 Ind. App. 603, s. c. 34 N. E. R. 845; Kansas, etc., R. Co. *v.* Cuykendall, 42 Kan. 234; Atchinson, etc., R. Co. *v.* Leuning, 52 Kan. 732, s. c. 35 Pac. R. 801; Cosby *v.* Owensboro, etc., R. Co., 10 Bush. (Ky.) 288; Elizabethtown, etc., R. Co. *v.* Thompson, 79 Ky. 52; Lexington, etc., R. Co. *v.* Applegate, 8 Dana (Ky.) 289, 302; Trustees First Con. Church *v.* Milwaukee, etc., R. Co., 77 Wis. 158, s. c. 43 Am. & Eng. R. Cas. 182; Florida Southern R. Co. *v.* Brown, 23 Fla. 104; Fogg *v.* Nevada, etc., R. Co., 20 Nev. 429, s. c. 43 Am. & Eng. R. Cas. 105.

use of a street by a commercial railroad, upon which freight is carried, is certainly not in furtherance of the ordinary use of the street, for which compensation may be presumed to have been made but is necessarily a detriment to ordinary local travel and the use and value of property along the street.

§ 1088. **Street railways—When an additional burden.**—An ordinary street railway is not an additional burden or new servitude for which the abutters are entitled to compensation.[1] Nor, as we have already seen, is an electric[2] or cable road.[3] But any kind of a street railway may be an additional burden if it is so constructed as to deprive the abutter of his "easement,"[4] or it may be so constructed and operated as to consti-

[1] Elfelt *v.* Stillwater St. R. Co., 53 Minn. 68, s. c. 55 N. W. R. 116; Elliott *v.* Fair Haven, etc., R. Co., 32 Conn. 579; Hinchman *v.* Paterson Horse R. Co., 17 N. J. Eq. 75; Jersey City, etc., R. Co. *v.* Jersey City Horse R. Co., 20 N. J. Eq. 61; Newark, etc., R. Co. *v.* Block, 55 N. J. L. 605, s. c. 27 Atl. R. 1067; Cincinnati, etc., St. Ry. Co. *v.* Cumminsville, 14 Ohio St. 523; Eichels *v.* Evansville St. Ry. Co., 78 Ind. 261; Attorney-General *v.* Metropolitan Ry. Co., 125 Mass. 515, s. c. 28 Am. R. 264; Brown *v.* Duplessis, 14 La. Ann. 842; Savannah, etc., R. Co. *v.* Mayor, 45 Ga. 602; Hiss *v.* Baltimore, etc., Ry. Co., 52 Md. 242, s. c. 36 Am. R. 371; Texas, etc., R. Co. *v.* Rosedale, etc., R. Co., 64 Tex. 80, s. c. 22 Am. & Eng. R. Cas. 160; State *v.* Jacksonville, etc., R. Co., 29 Fla. 590, s. c. 10 So. R. 590; Randall *v.* Jacksonville St. Ry. Co., 19 Fla. 409, s. c. 17 Am. & Eng. R. Cas. 184; Rafferty *v.* Central, etc., Co., 147 Pa. St. 579, s. c. 30 Am. St. R. 763. *Contra*, Craig *v.* Rochester, etc., R. Co., 39 N. Y. 404; People *v.* Kerr, 27 N. Y. 188. In New York no distiction is made between commercial and ordinary street railroads, but the right of the abutter to compensation in either case in made to depend upon the effect of the construction and operation of the road, and the ownership of the fee is an important consideration. See Fobes *v.* Rome, etc., R. Co., 121 N. Y. 505. Mr. Lewis also takes the position that on principle, the distinction between commercial and street railways is unsound, and is inclined to think that both ought to be considered additional burdens.

[2] *Ante*, § 8. See, also, Green *v.* City R. Co., 78 Md. 294, s. c. 44 Am. St. R. 288, and note; also, note in 2 Am. L. Reg. & Rev. (N. S.) 38. But it is an additional burden on a country road. Pennsyvania R. *v.* Montgomery, etc., Ry., 167 Pa. St. 62, s. c. 46 Am. St. R. 659. But see Heilman *v.* Lebanon, etc., R. Co., 145 Pa. St. 23.

[3] *Ante*, § 9.

[4] Nichols *v.* Ann Arbor, etc., St. R. Co., 87 Mich. 361, s. c. 49 N. W. R. 538; Hobart *v.* Milwaukee, etc., R. Co., 27 Wis. 194; Ford *v.* Santa Cruz R. Co., 59 Cal. 290; Cincinnati, etc., R. Co. *v.* Cumminsville, 14 Ohio St. 523; Carli *v.* Stillwater St. R. Co., 28 Minn. 373, s. c. 41 Am. R. 290; Fobes *v.* Rome, etc., R. Co., 121 N. Y. 505;

tute a nuisance or cause him special damage, for which he is entitled to recover.[1] The motive power does not necessarily determine the character of the use, although it may be an important element in the consideration thereof, and it has been held that a street railway for passengers may be authorized, constructed and operated in a city street without compensation to the abutters, notwithstanding the cars are propelled or drawn by steam motors, and that it is also used in transporting passengers for several miles outside of the city limits.[2]

§ 1089. Railroads in narrow streets.—Where a street is too narrow to admit of more than one track, it would seem that the company which lawfully constructs and operates its road therein, has, of necessity a practical monopoly as against other companies, unless some valid provision exists for the use of the same track by more than one company. The width of the street may also be of importance, in some cases, in determining the rights of the company as against the abutters or the public. Thus, in a recent case decided by a court which has steadly refused to consider a commercial railroad in a street an additional burden under ordinary circumstances, it was held that a city could not legally authorize the construction and op-

Detroit City R. Co. *v.* Mills, 85 Mich. 634, s. c. 46 Am. & Eng. R. Cas. 608; Louisville, etc., R. Co. *v.* Finley, 86 Ky. 294. As to elevated railroads, see *ante*, § 7.

[1] Mahady *v.* Bushwick, etc., R. Co., 91 N. Y. 148, s. c. 43 Am. R. 661; Fanning *v.* Osborne, 102 N. Y. 441; Limburger *v.* San Antonio, etc., Co. (Tex.), 30 S. W. R. 533; Smith *v.* Street R. Co., 87 Tenn. 626; Williams *v.* City, etc., Co., 41 Fed. R. 556. See, also, *ante*, § 1085. The use of a T-rail does not necessarily constitute an additional burden or entitle the abutters to damages. See Nieman *v.* Detroit, etc., St. R. Co., 103 Mich. 256, 1 Am. & Eng. R. Cas. (N. S.) 172, s. c. 61 N. W. R. 519; Easton, etc., R. Co. *v.* Easton, 133 Pa. St. 505; Randall *v.* Jacksonville St, R. Co., 19 Fla. 409, s. c. 17 Am. & Eng. R. Cas. 184, and compare State *v.* Madison St. R. Co., 72 Wis. 612.

[2] Newell *v.* Minneapolis, etc., R. Co., 35 Minn. 112, s. c. 59 Am. R. 303; Briggs *v.* Lewiston, etc., R. Co., 79 Me. 363; McQuaid *v.* Portland, etc., R. Co., 18 Ore. 237, s. c. 1 Lewis' Am. R. & Corp. R. 34; Williams *v.* City, etc., Co., 41 Fed. R. 556. But see Stange *v.* Dubuque, 62 Iowa 303, s. c. 14 Am. & Eng. R. Cas. 107; East End St. R. Co. *v.* Doyle, 88 Tenn. 747, s. c. 13 S. W. R. 936; Onset St. Co. *v.* County Comrs., 154 Mass. 395, s. c. 28 N. E. R. 286.

eration of such a road in a street so narrow that its use as a public thoroughfare would thereby be destroyed, and that an abutting owner whose easement of access was thus impaired might enjoin the railroad company from making such unlawful use of the street.[1] So, in our opinion, neither a commercial railroad nor a street railway can lawfully be constructed and operated in a street so narrow as not to admit of the passage of cars and other vehicles at the same time, without compensation to the abutting property-owners.[2] As every municipality, even if it owns the fee, holds its streets in trust for the public, it is questionable, indeed, if it has any authority or power to authorize the construction and operation of a railroad of any kind in a street so narrow that the general public could not use it at the same time, as the effect would be to practically devote the street to the exclusive use of the railroad company.[3]

[1] Lockwood *v.* Wabash R. Co., 122 Mo. 86, 26 S. W. R. 698, s. c. 1 Am. & Eng. R. Cas. (N. S.) 16; Schulenburg, etc., Co. *v.* St. Louis, etc., R. Co., 129 Mo. 455, 31 S. W. R. 796. See, also, Dubach *v.* Hannibal, etc., R. Co., 89 Mo. 483, s. c. 1 S. W. R. 86; Commonwealth *v.* City of Frankfort, 92 Ky. 149, s. c. 17 S. W. R. 287; Dooly Block *v.* Salt Lake, etc., Co., 9 Utah 31, 33 Pac. R. 229, s. c. 8 Lewis' Am. R. & Corp. R. 327.

[2] See McQuaid *v.* Portland, etc., R. Co., 18 Ore. 237, s. c. 1 Lewis' Am. R. & Corp. Rep. 34, 22 Pac. R. 899; Detroit City R. Co. *v.* Mills, 85 Mich. 634, 659; Carli *v.* Union Depot St. R. Co., 32 Minn. 101; Campbell *v.* Metropolitan R. Co., 82 Ga. 320; Ross *v.* Montreal St. R. Co. (Can.), 24 L. C. Jur. 60; Limburger *v.* San Antonio, etc., St. R. Co. (Tex. Civ. App.), 27 S. W. R. 198. But see Limburger *v.* San Antonio, etc., St. R. Co. (Tex)., 30 S. W. R. 533; Cooley's Const. Lim. (6th ed.) 677. *Contra*, Kellinger *v.* Forty-second St., etc., Co., 50 N. Y. 206. And see authorities cited in note 1, *supra*. We remember to have noticed a suggestion in one case that the abutter could not be materially injured because if he had driven up in front of his premises first, the car would be compelled to wait a reasonable time for him to load or unload and get out of the way. But the general rule is that the cars have the right of way on the track, and the suggestion made is in many respects both contrary to principle and impracticable. Under the circumstances referred to in the text an abutter could not safely drive on the street at all, for he might meet a car at any time, nor could he leave his horse hitched or get in and out of his vehicle, or load or unload goods without interruption and danger. It seems to us that his easement of access would be seriously impaired, and that, in many cases, the value of his property might be greatly lessened, especially in a wholesale or other great business locality.

[3] See Detroit City R. Co. *v.* Mills, 85 Mich. 634, 659. *Ante*, § 1083, and, *supra*, first note to this section.

But where there is room for other vehicles to pass at the same time, so that the abutter's easement of access is not materially impaired, the construction and operation of a street railway will not be enjoined merely because the track is so close to the curb that drays, express wagons and the like can not be placed at right angles with the sidewalk while being loaded and unloaded.[1]

§ 1090. **Obstruction of Highways—Nuisance.**—The construction of a railroad upon a street, without authority, is a nuisance.[2] So, if the authority be exceeded and the railroad is so constructed or operated as to obstruct travel or cause an abutter special injury.[3] Thus, as elsewhere shown,[4] a temporary obstruction by leaving cars in or across a street for an unreasonable time, may constitute a nuisance.[5] And the unau-

[1] Louisville, etc., Co. *v.* Central, etc., Co., 95 Ky. 50, 23 S. W. R. 592; Hogencamp *v.* Paterson, etc., R. Co., 17 N. J. Eq. 83; Hobart *v.* Milwaukee, etc., R. Co., 27 Wis. 194; Taylor *v.* Bay City St. R. Co., 101 Mich. 140, s. c. 1 Am. & Eng. R. Cas. (N. S.) 165. (Abutter not entitled to damages.) See, also, Louisville, etc., R. Co. *v.* Orr, 91 Ky. 109; Cosby *v.* Owensboro, etc., Co., 10 Bush (Ky.) 288. In People *v.* Fort Wayne, etc., R. Co., 92 Mich. 522, s. c. 16 L. R. A. 752, it was held by a divided bench that eight feet seven and one-half inches was sufficient space.

[2] Booth on Street Railways, § 3; Commonwealth *v.* Old Colony R. Co., 14 Gray (Mass.) 93; Hart *v.* Buckner, 54 Fed R. 925; Chicago, etc., R. Co. *v.* Loeb, 118 Ill. 203, s. c. 59 Am. R. 341; Attorney-General *v.* Lombard, etc., R. Co., 10 Phila. (Pa.) 352; Fanning *v.* Osborne, 102 N. Y. 441; Pittsburgh, etc., R. Co. *v.* Reich, 101 Ill. 157; State *v.* Troy, etc., R. Co., 57 Vt. 144. *Ante*, §§ 718, 719, 1056.

[3] Evans *v.* Chicago, etc., R. Co., 86 Wis. 597, s. c. 57 N. W. R. 354; Wellcome *v.* Leeds, 51 Me. 313; Attorney-General *v.* Chicago, etc., R. Co., 112 Ill. 520; Alabama, etc., R. Co. *v.* Bloom, 71 Miss. 247, s. c. 15 So. R. 72; Brown *v.* Cayuga, etc., R. Co., 12 N. Y. 486; Cogswell *v.* New York, etc., R. Co., 103 N. Y. 10; Hussner *v.* Brooklyn City R. Co., 114 N. Y. 433, s. c. 11 Am. St. R. 679; Randle *v.* Pacific R. Co., 65 Mo. 325; Gustafson *v.* Hamm, 56 Minn. 334; Union Pacific R. Co. *v.* Foley, 19 Colo. 280; Northern Central R. Co. *v.* Commonwealth, 90 Pa. St. 300; State *v.* Louisville, etc., R. Co., 91 Tenn. 445, s. c. 50 Am. & Eng. R. Cas. 161; Regina *v.* Great Northern, etc., R. Co., 9 Q. B. 315; Borough of Stamford *v.* Stamford, etc., Co., 56 Conn. 381; Regina *v.* Toronto, St. R. Co., 24 Up. Can. Q. B. 454. Notes in 17 Am. & Eng. R. Cas. 172, and 19 Am. & Eng. R. Cas. 433.

[4] *Ante*, §§ 718, 719.

[5] Rauch *v.* Lloyd, 31 Pa. St. 358, s. c. 72 Am. Dec. 747; Murray *v.* South Carolina R. Co., 10 Rich. (S. Car.) 227, s. c. 70 Am. Dec. 219; Marine Ins. Co. *v.* St. Louis, etc., R. Co., 41 Fed. R. 643, 650; Brownell *v.* Troy, etc., R. Co., 55 Vt. 218; State *v.* Vermont

thorized use of steam as a motor has been held to be a nuisance.[1] So, as held in many of the authorities already cited, and as elsewhere shown, the nuisance or obstruction of a highway, when caused by the negligence of the company, will generally support an action by an abutter who is specially injured, even though it may not constitute a taking of his property.[2]

§ 1091. **Bridges, viaducts and approaches.**—The subject of crossing is elsewhere treated, and the right and duties of railroad companies in regard to highway crossings are there fully considered.[3] But we propose in this section to treat briefly of the rights of the abutters and the rights and liabilities of a company which constructs a bridge or viaduct in a street. It may be stated as a general rule that "any structure on a street which is subversive of and repugnant to its use and efficiency as a public thoroughfare is not a legitimate street use, and imposes a new servitude on the rights of abutting owners, for which compensation must be made."[4] Applying this rule to the facts before the court, it was held in the case referred to that the construction by a railroad company of a bridge ap-

Cent. R. Co., 27 Vt. 103; Cleveland, etc., R. Co. *v.* Wynant, 114 Ind. 525, s. c. 5 Am. St. R. 644; note to Callahan *v.* Gilman, 1 Am. St. R. 843.

[1] North Chicago, etc., R. Co. *v.* Lake View, 105 Ill. 207, s. c. 2 Am. & Eng. Corp. Cas. 6; State *v.* Tupper, Dudley (S. Car.) 135; Jones *v.* Festiniog R. Co., L. R. 3 Q. B. 733; Smith *v.* Stokes, 4 B. & S. 84; Reg. *v.* Chittenden, 15 Cox C. C. 725, s. c. 49 J. P. 503; Commonwealth *v.* Allen, 148 Pa. St. 358, s. c. 33 Am. St. R. 830. But see Macomber *v.* Nichols, 34 Mich. 212, s. c. 22 Am. R. 522; Wabash, etc., R. Co. *v.* Farver, 111 Ind. 195.

[2] *Ante*, § 1085, and *post*, § 1096.

[3] *Post*, chapters XLIII, XLVI.

[4] Willamette Iron Works *v.* Oregon, etc., R. Co., 26 Ore. 224, s. c. 37 Pac. R. 1016, 1 Am. & Eng. R. Cas. (N. S.) 36, citing Elliott on Roads and Streets, 526; Tiedeman Municipal Corp., 301; Lewis' Em. Dom., § 126; Booth St. Ry. Law, §§ 80, 81; 2 Dill. Munic. Corp., §§ 711, 712, 723 c; McQuird *v.* Portland, etc., R. Co., 18 Ore. 237, 40 Am. & Eng. R. Cas. 308; Story *v.* New York R. Co., 90 N. Y. 122, 7 Am. & Eng. R. Cas. 596; Lahr *v.* Metropolitan, etc., R. Co., 104 N. Y. 268; Reining *v.* New York, etc., R. Co., 128 N. Y. 157; Kane *v.* New York, etc., R. Co., 125 N. Y. 164; Corning *v.* Lowerre, 6 Johns. Ch. 439; Barney *v.* Keokuk, 94 U. S. 324; State *v.* Jersey City, 52 N. J. L. 65. See, also, Jones *v.* Erie, etc., R. Co., 151 Pa. St. 30, s. c. 25 Atl. R. 134; Jones *v.* Erie, etc., R. Co., 169 Pa. St. 333, 32 Atl. R. 535, but compare Hartman *v.* Pittsburgh, etc., Co., 159 Pa. St. 442, s. c. 28 Atl. R. 145.

proach thirty feet wide in a street sixty-six feet wide, although under legislative and municipal authority, imposed a servitude for which the abutters were entitled to compensation, and that its continuance might be enjoined. So, in another case, it was held that a city was liable in damages for an injury to abutting property caused by a viaduct which it had built in a street over a railroad so as to obstruct access to the premises.[1] But in some other jurisdictions it has been held that the construction by a city of a viaduct or an approach to a bridge, occupying the full width of the street, is in effect, a mere change of grade for which the abutters are not entitled to damages or compensation as for a taking of property.[2] So, it has been held that the construction by a railroad company of a causeway, to carry its track over another railroad, within ten feet of the curb, does not constitute a taking of the abutter's property.[3] The plaintiff in the case last referred to did not own the fee of the street, but it was apparently conceded that the access to his premises was seriously interfered with, as well as the light and air, and it seems to us that the decision is of doubtful soundness to say the least.

§ 1092. **Duty of company to restore and repair street.**—It is generally provided by statute that railroad companies which cross a highway or lay their tracks therein must restore it as far as may be to its former condition of usefulness and safety, and it is held that this duty rests upon them even in the ab-

[1] City of Pueblo *v.* Strait, 20 Colo. 13, s. c. 46 Am. St. R. 273. The constitution, however, provided that property should not be taken or damaged without just compensation. To the same effect are Rigney *v.* City of Chicago, 102 Ill. 64; City of Chicago *v.* Burcky, 158 Ill. 103, s. c. 29 L. R. A. 568, and Chicago *v.* Taylor, 125 U. S. 161, 8 Sup. Ct. R. 820; Cohen *v.* City of Cleveland, 43 Ohio St. 190, s. c. 1 N. E. R. 589. But see Selden *v.* City of Jacksonville, 28 Fla. 558, s. c. 29 Am. St. R. 278. Street railway company held liable in Spencer *v.* Metropolitan, etc., Co., 120 Mo. 154, 22 L. R. A. 668, 23 S. W. R. 126.

[2] Colclough *v.* City of Milwaukee (Wis.), 65 N. W. R. 1039, and authorities there cited. See, also, Willis *v.* City of Winona, 59 Minn. 27, s. c. 60 N. W. R. 814, 26 L. R. A. 142; Home, etc., Co. *v.* Roanoke, 91 Va. 52, 27 L. R. A. 551.

[3] Garrett *v.* Lake Roland, etc., R. Co., 79 Md. 277, s. c. 29 Atl. R. 830, s. c. 10 Lewis' Am. R. & Corp. R. 39.

sence of any express statutory requirement.[1] This rule applies to street railways[2] as well as to commercial railroads. Unless otherwise provided, however, it seems that, although there may be a duty to restore or repair, there is no duty to repave and improve that portion of the street occupied by the company, at its own expense, although this admits of much doubt.[3] The duty to repair is usually imposed by statute or by the municipality, as a condition annexed to the right to use its streets,[4] and this is not performed by merely restoring the

[1] Northern R. Co. *v.* Baltimore, 46 Md. 425; People *v.* Chicago, etc., R. Co., 67 Ill. 118; Indianapolis, etc., R. Co. *v.* State, 37 Ind. 489, 502. See, also, Palatka, etc., R. Co. *v.* State, 23 Fla. 546, s. c. 11 Am. St. R. 395; Kyne *v.* Wilmington, etc., R. Co., 8 Houst. (Del.) 185,14 Atl. R.922; City of Zanesville *v.* Fannan (Ohio St.), 42 N. E. R. 703, 705, citing Elliott on Roads and Streets, 600; State *v.* Dayton, etc., R. Co., 36 Ohio St. 434; Fash *v.* Third Ave. R. Co., 1 Daly (N. Y.) 148; Worster *v.* Forty-second St., etc., R. Co., 50 N.Y. 203; Tiedeman Munic. Corp., § 306; *post*, § 1104.

[2] Memphis, etc., R. Co. *v.* State, 87 Tenn. 746, s. c. 11 S. W. R. 946; City of Harrisburg *v.* Harrisburg, etc., R. Co., 1 Pears. (Pa.) 298; Cline *v.* Crescent City R. Co., 41 La. Ann. 1031; Elliott on Roads and Streets, 591.

[3] See Western Pav., etc., Co. *v.* Citizens' St. R. Co., 128 Ind. 525, s. c. 46 Am. & Eng. R. Cas. 176; State *v.* Jacksonville, etc., R. Co., 29 Fla. 590, s. c. 10 So. R. 590, 595, (citing Elliott on Roads and Streets, 594, 595, where the subject is carefully considered). State *v.* Corrigan, etc., R. Co., 85 Mo. 263, s. c. 29 Am. & Eng. R. Cas. 591; Mayor, etc., of New York *v.* New York, etc., R. Co., 19 N. Y. Supp. 67; Chicago *v.* Sheldon, 9 Wall. (U. S.) 50; Mayor, etc., of Baltimore *v.* Scharf, 54 Md. 499; Pittsburgh, etc., R. Co. *v.* Birmingham, 51 Pa. St. 41; Booth St. Railways, § 241, *et seq.*

[4] See as to the right to impose such conditions and their construction, State *v.* Hoboken, 41 N. J. L. 71; Philadelphia *v.* Ridge Ave. Pass. R. Co. 143 Pa. St. 444; Western Pav., etc., Co. *v.* Citizens' St. R. Co., 128 Ind. 525, 46 Am. & Eng. R. Cas. 176; Robbins *v.* Omnibus R. Co., 32 Cal. 472; Sioux City St. R. Co. *v.* Sioux City, 78 Iowa 367, 742, 36 Am. & Eng. R. Cas. 143, affirmed 138 U. S. 98; Louisville, etc., R. Co. *v.* Louisville, 8 Bush (Ky.) 415; Memphis, etc., R. Co. *v.* State, 87 Tenn. 746, 38 Am. & Eng. R. Cas. 429; City of Philadelphia *v.* Empire Pass. R. Co., 3 Brews. (Pa.) 570; Mayor, etc., of New York *v.* Second Ave. R. Co., 102 N. Y. 572, 26 Am. & Eng. R. Cas. 546; McMahon *v.* Second Ave. R. Co., 75 N. Y. 231; People *v.* Fort St., etc., R. Co., 41 Mich. 413; Gulf City, etc., Co. *v.* Galveston, 69 Tex. 660, 32 Am. & Eng. R. Cas. 300; Fort Wayne, etc., R. Co. *v.* Detroit, 39 Mich. 543, 34 Mich. 78; Pittsburgh, etc., Pass. R. Co. *v.* Pittsburgh, 80 Pa. St. 72; State *v.* Canal, etc., R. Co., 44 La. Ann. 526; City of Fort Worth *v.* Allen (Tex. Civil App.), 31 S. W. R. 235, 1 Am. & Eng. R. Cas. (N. S.) 282; Philadelphia *v.* Spring Garden, etc., Co., 161 Pa. St. 522; Borough of McKeesport *v.* McKeesport R. Co., 158 Pa.

street to the condition in which it was at the time the track was laid, for it is a continuing duty to keep such portion of the street in repair so as not to unlawfully obstruct or endanger travel.[1] It is generally held that this duty may be enforced by mandamus,[2] and the neglect of the company to properly perform it will render the company liable in damages to one who, without fault on his part, is injured thereby while properly using the highway.[3] The city may also be held liable, in such a case, if it negligently suffers the defect or obstruction to remain in its street.[4] But it may have its remedy over

447, 27 Atl. R. 1006; Lehigh, etc., Co. *v.* Intercounty St. R. Co., 167 Pa. 126, 31 Atl. R. 471; Baumgartner *v.* City of Mankato, 60 Minn. 244, 62 N. W. R. 127; City of Duluth *v.* Duluth St. R. Co., 60 Minn. 178, 62 N. W. R. 267.

[1] Fitts *v.* Cream City R. Co., 59 Wis. 323; Cooke *v.* Boston, etc., R. Co., 133 Mass. 185; Little Miami R. Co. *v.* Commissioners, 31 Ohio St. 338; Burritt *v.* City of New Haven, 42 Conn. 174; Baumgartner *v.* City of Mankato, 60 Minn. 244, s. c. 62 N. W. R. 127; Wellcome *v.* Leeds, 51 Me. 313; Chicago, etc., R. Co. *v.* Moffitt, 75 Ill. 524, and authorities cited in following notes.

[2] State *v.* Jacksonville, etc., R. Co., 29 Fla. 590, s. c. 10 So. R. 590; City of Oshkosh *v.* Milwaukee, etc., Co., 74 Wis. 534, s. c. 43 N. W. R. 489; State *v.* St. Paul, etc., R. Co., 35 Minn. 131, s. c. 28 N. W. R. 3; Cummins *v.* Evansville, etc., R. Co., 115 Ind 417; Indianapolis, etc., R. Co. *v.* State, 37 Ind. 489; People *v.* Dutchess, etc., R. Co., 58 N. Y. 152; People *v.* Chicago, etc., R. Co., 67 Ill. 118; City of Halifax City *v.* R. Co., 1 Russ. Eq. (Nova Scotia) 319; mandatory injunction in Buchholz *v.* New York, etc., R. Co. (N. Y.), 43 N. E. R. 76. But see State *v.* New Orleans, etc., R. Co., 37 La. Ann. 589.

[3] Oakland R. Co. *v.* Fielding, 48 Pa. St. 320; Inhabitants of Veazie *v.* Penobscot R. Co., 49 Me. 119; Masterton *v.* New York Central R. Co., 84 N. Y. 247, s. c. 38 Am. R. 510; Wasmer *v.* Delaware, etc., R. Co., 80 N. Y. 212; McMahon *v.* Second Ave. R. Co., 75 N. Y. 231; Brookhouse *v.* Union R. Co., 132 Mass. 178; O'Connor *v.* Boston, etc., R. Co., 135 Mass. 352; Louisville, etc., R. Co. *v.* Smith, 91 Ind. 119, s. c. 13 Am. & Eng. R. Cas. 608, and note; Evansville, etc., R. Co. *v.* Crist, 116 Ind. 446; Evansville, etc., R. Co. *v.* Carvener, 113 Ind. 51; Gudger *v.* Western, etc., R. Co., 87 N. Car. 325; Atlanta St. R. Co. *v.* Walker, 93 Ga. 462, s. c. 21 S. E. R. 48; Kraut *v.* Frankford, etc., R. Co., 160 Pa. St. 327; Booth on Street Railways, § 262; *post*, § 1176.

[4] City of Zanesville *v.* Fannan, (Ohio St.) 42 N. E. R. 703; Batty *v.* Duxbury, 24 Vt. 155; Wilson *v.* Watertown, 3 Hun (N. Y.) 508; Sides *v.* Portsmouth, 59 N. H. 24; Fink *v.* St. Louis, 71 Mo. 52; Watson *v.* Tripp, 11 R. I. 98, s. c. 23 Am. R. 420; Hawks *v.* Northampton, 116 Mass. 420; Campbell *v.* Stillwater, 32 Minn. 308; Davis *v.* Leominster, 1 Allen (Mass.) 182; Norristown *v.* Moyer, 67 Pa. St. 355; Elliott on Roads and Streets, 604; 2 Dillon Munic. Corp., § 1037.

against the company.[1] If the company, after due notice, fails to repair, the city may cause the necessary repairs to be made and recover the cost from the company.[2]

§ 1093. Respective rights of the company and of the public.— As a general rule, a railroad company has the exclusive right to use its own track, and one who goes upon it, without an invitation or license from the company is a trespasser. But this rule does not apply at highway crossings, nor, under ordinary circumstances, where the track is laid longitudinally upon the surface of a street, whether it be that of a commercial or a street railroad company.[3] The public, exercising due care, still have a right to use the street. And so, the railroad company, likewise exercising due care, has also the right to use that portion of the street upon which its track is laid. Their rights are, in most respects, mutual, reciprocal and equal, neither being superior or paramount to the other, except that,

[1] Chicago City *v.* Robbins, 2 Black (U. S.) 418; Eyler *v.* County Commissioners, 49 Md. 257; City of Portland *v.* Atlantic, etc., Co., 66 Me. 485; Inhabitants of Woburn *v.* Boston, etc., R. Co., 109 Mass. 283; City of Brooklyn *v.* Brooklyn City R. Co., 47 N. Y. 475, s. c. 7 Am. St. R. 469; City of Fort Worth *v.* Allen (Tex. Civ. App.), 31 S. W. R. 235, 1 Am. & Eng. R. Cas. (N. S.) 282; Carty *v.* London, 18 Ont. R. 122, s. c. 43 Am. & Eng. R. Cas. 279; 2 Dillon Munic. Corp., § 1037.

[2] Pennsylvania R. Co. *v.* Duquesne Borough, 46 Pa. St. 223; Chesapeake, etc., R. Co. *v* Dyer Co., 38 Am. & Eng. R. Cas. 676; City of Columbus *v.* Columbus Street R. Co., 45 Ohio St. 98, s. c. 32 Am. & Eng. R. Cas. 292; District of Columbia *v.* Washington, etc., R. Co., 4 Mackey 214; City of New Haven *v.* Fair Haven, etc., R. Co., 38 Conn. 422; Philadelphia, etc., R. Co. *v.* Philadelphia, 11 Phila. (Pa.) 358. But compare Farmers' L. & T. Co. *v.* Ansonia, 61 Conn. 76; Mayor, etc., of New York *v.* Second Ave., etc., R. Co., 102 N. Y. 572, s. c. 26 Am. & Eng. R. Cas. 546. (City can not recover for extravagant and unreasonable repairs.)

[3] Louisville, etc., R. Co. *v.* Phillips, 112 Ind. 59, s. c. 2 Am. St. R. 155. (Commercial railroad extending longitudinally upon the street.) Thatcher *v.* Central Traction Co., 166 Pa. St. 66. (Electric street railway running along the street.) Rascher *v.* East Detroit, etc., R. Co., 90 Mich. 413; Byrne *v.* New York, etc., R. Co., 104 N. Y. 362, s. c. 58 Am. R. 512; Missouri Pac. R. Co. *v.* Bridges, 74 Tex. 520, s. c. 12 S. W. R. 210; Davis *v.* Chicago, etc., R. Co., 58 Wis. 646; Bennett *v.* Railroad Co., 102 U. S. 577; Kansas Pacific R. Co. *v.* Pointer, 9 Kan. 620; Adolph *v.* Central Park R. Co., 76 N. Y. 530; Bryson *v.* Chicago, etc., R. Co., 89 Iowa 677, s. c. 60 Am. & Eng. R. Cas. 50.

as the company can not so readily stop its trains or cars and is confined to its track, it has the right of way of passage thereon, and persons who are upon the track must leave it and give way until the train or car has passed.[1] Where the track is laid along a street, a traveler, although a pedestrian, in the exercise of due care, may cross it at any point and is not confined to the regular crossings.[2] But an extraordinary and improper use of the track by a member of the general public may subject him to an action for damages for an injury so caused. Thus, where a person engaged in moving a house negligently injured the track he was held liable in damages at the suit of the company.[3] This rule does not, however, prevent the ordinary use of the street, in a proper manner, even by heavy vehicles.[4]

§ 1094. **Duty to travelers upon the street.**—Where a railroad runs along the surface of a street the rights of the company and of travelers must each be exercised with a due regard

[1] Moore *v.* Kansas City, etc., R. Co., 126 Mo. 265, 29 S. W. R. 9, 11, quoting Elliott on Roads and Streets, 577; Warner *v.* People's St. R. Co., 141 Pa, St. 615; Omaha St. R. Co. *v.* Duvall, 40 Neb. 29, s. c. 58 N. W. R. 531; Ohio, etc., R. Co. *v.* Walker, 113 Ind. 196; Continental, etc., Co. *v.* Stead, 95 U. S. 161; Chicago, etc., R. Co. *v.* Lee, 87 Ill. 454; Baltimore, etc., R. Co. *v.* Sherman, 30 Gratt. (Va.) 602; Black *v.* Burlington, etc., R. Co., 38 Iowa 515; Hegan *v.* Eighth Ave. R. Co., 15 N. Y. 380; Adolph *v.* Central Park, etc., R. Co., 65 N. Y. 554; Commonwealth *v.* Temple, 14 Gray (Mass.) 69. But it is held that a street railway company has no superior right of passage at another street crossing. O'Neil *v.* Dry Dock, etc., R. Co., 129 N. Y. 125, s. c. 29 N. E. R. 84. See, also, Zimmerman *v.* Hannibal, etc., R. Co., 71 Mo. 476; Omaha St. R. Co. *v.* Cameron, 43 Neb. 297, s. c. 61 N. W. R. 606.

[2] Mitchell *v.* Tacoma, etc., R. Co., 9 Wash. 120; Louisville, etc., R. Co. *v.* Head, 80 Ind. 117, s. c. 4 Am. & Eng. R. Cas. 619; Smedis *v.* Brooklyn, etc., R. Co., 88 N. Y. 13; Frick *v.* St. Louis, etc., R. Co., 75 Mo. 595, s. c. 8 Am. & Eng. R. Cas. 280.

[3] Toronto, etc., Co. *v.* Dollery, 12 Ont. App. 679. Such a use may also be restrained by injunction where it would stop the cars an unreasonable time and destroy the wires of an electric railway company. Williams *v.* Citizens', etc., Co., 130 Ind. 71. See, also, Day *v.* Green, 4 Cush. (Mass.) 433. One who carelessly drives against a car properly moving upon the track is liable for resulting damages. Chicago, etc., R. Co. *v.* Rend, 6 Bradw. (Ill. App.) 243.

[4] Second, etc., St. R. Co. *v.* Morris, 8 Phila. (Pa.) 304; Booth on Street Railways, § 303.

to the rights of the other, in a reasonable and duly careful manner.[1] The general rule in all such cases, is that reasonable care must be exercised, but this usually depends very largely upon the peculiar circumstances of each particular case, and, in order to constitute reasonable care under the circumstances, greater care would be required of a railroad company where its cars run along a street which is continually used by travelers than where it has the exclusive use of its track.[2] Thus, it has been held gross negligence to run electric cars around the corners of streets in a populous city at a high rate of speed.[3] It is also said in the same case that greater care is required in the operation of cable and electric cars than in the operation of cars drawn by horses, because the danger is greater.[4] In another recent case a commercial railroad company was held liable to one who, in walking along the track in a street, but not at a crossing, had his foot fastened between a rail of the track and a plank inside the track, and was run over by a train.[5] The court held that he was not a trespasser, and that the company was negligent both in failing to properly construct and maintain the track and in the management of the train. A street railway company must so maintain and operate its road as not to unnecessarily impede travel or render it dangerous.[6] It is bound to know that the

[1] Omaha St. R. Co. *v.* Cameron, 43 Neb. 297, 61 N. W. R. 606; Connelly *v.* Trenton, etc., Co. (N. J.) 29 Atl. R. 438; Lynam *v.* Union R. Co., 114 Mass. 83; Shea *v.* Potrero, etc., R. Co., 44 Cal. 414; Pendleton St. R. Co. *v.* Stallman, 22 Ohio St. 1; Unger *v.* Forty-second St. R. Co., 51 N. Y. 497; O'Neil *v.* Dry Dock, etc., R. Co., 129 N. Y. 125, 130, s. c. 29 N. E. R. 84.

[2] Lott *v.* Frankford, etc., R. Co., 159 Pa. St. 471; Gilmore *v.* Federal St., etc., R. Co., 153 Pa. St. 31. See, also, Heucke *v.* Milwaukee, etc., R. Co., 69 Wis. 401; Baltimore, etc., R. Co. *v.* McDonnell, 43 Md. 534. But it must exercise reasonable care even where its tracks run through a city on an embankment, which is its own property. McGuire *v.* Vicksburg, etc., R. Co., 46 La. 1543, 16 So. R. 457.

[3] Cooke *v.* Baltimore Traction Co., 80 Md. 551, s. c. 31 Atl. R. 329.

[4] See, also, Cincinnati, etc., R. Co. *v.* Whitcomb, 66 Fed. R. 915.

[5] Louisville, etc., R. Co. *v.* Phillips, 112 Ind. 59, s. c. 2 Am. St. R. 155. See, also, Gulf, etc., R. Co. *v.* Walker, 70 Tex. 126, s. c. 7 S. W. R. 831.

[6] Wallace *v.* Detroit, etc., R. Co., 58 Mich. 231; Bowen *v.* Detroit, etc., R. Co., 54 Mich. 496, s. c. 52 Am. R. 822; Prime *v.* Twenty-third St. R. Co., 1 Abb. N. Cas. (N. Y.) 63, 71; McClain *v.* Brooklyn City R. Co., 116 N. Y. 459, s. c. 22 N. E. R. 1062; McKenna *v.*

public may use the entire street when not in actual use by its cars, and it must employ reasonable means and exercise reasonable care to prevent injury to such persons.[1] So, it must run its cars with a due regard to the rights of children and infirm persons who are not apparently capable of appreciating the danger or getting out of the way.[2]

§ 1095. **Liability for negligence—Contributory negligence.** —The violation on the part of a railroad company of any of the duties to travelers to which we have referred, will render it liable in damages for any injury proximately caused thereby to a traveler who is free from contributory negligence. So, although the person injured is himself guilty of negligence, yet if those in charge of the car discover his negligence and danger in time to avoid it by the exercise of reasonable care, but fail to exercise such care, the company may be held liable.[3] Under ordinary circumstances, however, unless it appears that he is an infant or infirm, or that for some reason he can not get out of the way, they may assume that he will do so.[4] The violation of an ordinance or statute requiring a "lookout" or limit-

Metropolitan, etc., R. Co., 112 Mass. 55; Lee *v.* Union R. Co., 12 R. I. 383; Fitts *v.* Cream City R. Co., 59 Wis. 323; Elliott on Roads and Streets, 579, 580; Booth on Street Railways, § 290, *et seq.*

[1] Government St. R. Co. *v.* Hanlon, 53 Ala. 70; Railroad Co. *v.* Norton, 24 Pa. St. 465, s. c. 64 Am. Dec. 672; Shea *v.* Protrero, etc., Co., 44 Cal. 414; Wall *v.* Helena St. R. Co., 12 Mont. 44, s. c. 29 Pac. R. 721; United Electric R. Co. *v.* Shelton, 89 Tenn. 423, s. c. 14 S. W. R. 863.

[2] Strutzel *v.* St. Paul, etc., R. Co., 47 Minn. 543, s. c. 50 N. W. R. 690; Galveston City R. Co. *v.* Hewitt, 67 Tex. 473; Mallard *v.* Ninth Ave. R. Co., 7 N. Y. Supp. 666; Indianapolis, etc., R. Co. *v.* Pitzer, 109 Ind. 179, s. c. 10 N. E. R. 70; Wallace *v.* City, etc., R. Co., 26 Ore. 174, s. c. 37 Pac. R. 477, 25 L. R. A. 663, and note; San Antonio, etc., R. Co. *v.* Mechler, 87 Tex. 628, 30 S. W. R. 899.

[3] Cincinnati, etc., R. Co. *v.* Whitcomb, 66 Fed. R. 915; Lake Roland, etc., R. Co. *v.* McKewen, 80 Md. 593, s. c. 31 Atl. R. 797; Little *v.* Superior, etc., R. Co., 88 Wis. 402, s. c. 60 N. W. R. 705; Orr *v.* Cedar Rapids, etc., R. Co. (Iowa), 62 N. W. R. 851, 1 Am. & Eng. R. Cas. (N. S.) 239; Montgomery *v.* Lansing, etc., R. Co., 103 Mich. 46, s. c. 61 N. W. R. 543; Laethem *v.* Ft. Wayne, etc., R. Co., 100 Mich. 297.

[4] Daly *v.* Detroit, etc., R. Co. (Mich.), 63 N. W. R. 73; Railroad Co. *v.* Gladmon, 15 Wall. (U. S.) 401; Bunyan *v.* Citizens' St. R. Co., 127 Mo. 12, 1 Am. & Eng. R. Cas. (N. S.) 246, and note; Louisville, etc., R. Co. *v.* Cronbach, 12 Ind. App. 666; Pennsylvania Co. *v.* Meyers, 136 Ind. 242.

ing the speed, or the like, is at least *prima facie*, if not conclusive, evidence of negligence.[1] And so an excessive rate of speed, or the failure of the driver or motorman to pay attention to his duties or give notice or warning when due care requires it may constitute negligence even in the absence of any ordinance or statutory provision upon the subject.[2] But, while it is the duty of the driver or motorman to exercise a reasonable degree of watchfulness and care, he is not necessarily negligent because he is not looking at any particular moment directly at the track in front of him.[3] Much necessarily depends upon the peculiar circumstances of each particular case, and the question is usually one of fact for the jury to determine under proper instructions.[4] It is not negligence *per se* for a cable car

[1] Omaha St. R. Co. *v.* Duvall, 40 Neb. 29; Hays *v.* Gainesville, etc., R. Co., 70 Tex. 602, s. c. 8 Am. St. R. 624; Baltimore, etc., R. Co. *v.* McDonnell, 43 Md. 534; Citizens' St. R. Co. *v.* Steen, 42 Ark. 321, s. c. 19 Am. & Eng. R. Cas. 30; Hanlon *v.* South Boston, etc., R. Co., 129 Mass. 310, s. c. 2 Am. & Eng. R. Cas. 18; Fath *v.* Tower Grove, etc., R. Co., 105 Mo. 537, s. c. 13 L. R. A. 74; Riley *v.* Salt Lake, etc., R. Co., 10 Utah 428, 37 Pac. R. 681. We think the better rule is that it is *prima facie* evidence of negligence and if unexplained, may be negligence *per se*, but when it is said to be negligence *per se*, it does not necessarily follow that it is actionable negligence and conclusive in the particular case, for the element of proximate cause must also be present and there certainly are cases in which there may be a good excuse for failing to comply with a statute or ordinance at the particular time or under the particular circumstances.

[2] Brooks *v.* Lincoln St. R. Co., 22 Neb. 816, s. c. 36 N. W. R. 529; Citizens' Pass. R. Co. *v.* Foxley, 107 Pa. St. 537; Collins *v.* South Boston R. Co., 142 Mass. 301; Mangam *v.* Brooklyn R. Co., 38 N. Y. 455; Anderson *v.* Minneapolis St. R. Co., 42 Minn. 490, 493; Sheets *v.* Connolly St. R. Co., 54 N. J. L. 518, s. c. 24 Atl. R. 483; Stone *v.* Dry Dock, etc., R. Co., 115 N. Y. 104; Johnson *v.* Hudson River R. Co., 20 N. Y. 65; Barksdull *v.* New Orleans, etc., R. Co., 23 La. Ann. 180; Thoresen *v.* LaCrosse, etc., R. Co., 87 Wis. 597.

[3] Gallaher *v.* Crescent City R. Co., 37 La. Ann. 288; Kennedy *v.* St. Louis R. Co., 43 Mo. App. 1; Citizens' St. R. Co. *v.* Carey, 56 Ind. 396; Thomas *v.* Citizens' Pass. R. Co., 132 Pa. St. 504; Bulger *v.* Albany R. Co., 42 N. Y. 459; Johnson *v.* Reading, etc., R. Co., 160 Pa. St. 647, s. c. 28 Atl. R. 1001.

[4] O'Flaherty *v.* Union R. Co., 45 Mo. 70, s. c. 100 Am. Dec. 343; Hedin *v.* City, etc., Co., 26 Ore. 155, s. c. 37 Pac. R. 540; Runyan *v.* Citizens' R. Co., 127 Mo. 12, 1 Am. & Eng. R. Cas. (N. S.) 247, and note; Doyle *v.* West End St. R. Co., 161 Mass. 533; Shenners *v.* West Side R. Co., 78 Wis. 382; Erie City, etc., R. Co. *v.* Schuster, 113 Pa. St. 412, s. c. 57 Am. R. 471; McMahon *v.* Northern Cent. R. Co., 39 Md. 438; Oldfield *v.* New York, etc.,

to follow a buggy on the track at a reasonable distance, and the question as to the reasonableness of the distance, and the rate of speed is for the jury.[1] Where the driver of a wagon is unable to escape from an electric or cable car coming at a high rate of speed, because impeded by the efforts of the driver of a vehicle coming in the same direction just ahead of the car, the company is not absolved from liability to the driver of the approaching wagon by the conduct of the driver of the second vehicle, at least in the absence of malice or negligence on his part.[2] So, it has been held that the negligent stopping of a street car in front of a funeral procession, so as to cause the carriages to stop so suddenly that the pole of the second carriage runs into and injures the first one, is the proximate cause of such injury and the company is liable therefor.[3] It was also held in the same case that the violation of a penal ordinance against obstructing the street was sufficient proof of the negligence of the company. If the negligence of the plaintiff proximately contributes to his own injury he can not, of course, recover. It is the tendency of the modern decisions to hold that it is the duty of a traveler at a regular commercial railroad crossing, as a rule of law, to look and listen, and this rule has been applied in many jurisdictions to those who cross the tracks of a street railway at any place in a street.[4] The

R. Co., 14 N. Y. 310; Weil *v.* Dry Dock, etc., R. Co., 119 N. Y. 147; Hearn *v.* St. Charles, etc., Co., 34 La. Ann. 160.

[1] Hicks *v.* Citizens', etc., R. Co., 124 Mo. 115, 27 S. W. R. 542, s. c. 25 L.R. A. 508, and note.

[2] Thatcher *v.* Central, etc., Co., 166 Pa. St. 66, s. c. 30 Atl. R, 1048.

[3] Mueller *v.* Milwaukee, etc., R.Co., 86 Wis. 340, s. c. 21 L. R. A. 721.

[4] Booth on Street Railways, §§ 312, 315; Kelly *v.* Hendrie, 26 Mich. 255; Scott *v.* Third Ave. R. Co., 16 N. Y. Supp. 350; Davenport *v.* Brooklyn City R. Co., 100 N. Y. 632, s. c. 3 N. E. R. 305; Buzby *v.* Philadelphia, etc., R. Co., 126 Pa. St. 559; Bunyan *v.* Citizens', etc., Co., 127 Mo. 12, 1 Am. & Eng. R. Cas. (N. S.) 246; Schulte *v.* New Orleans, etc., R. Co., 44 La. Ann. 509, s. c. 10 So. R. 811; Carson *v.* Federal, etc., R. Co., 147 Pa. St. 219, s. c. 23 Atl. R. 369; Ward *v.* Rochester, etc., R.Co., 17 N.Y. Supp. 427; Murray *v.* Ponchartrain, etc., R.Co., 31 La. Ann. 490; Follett *v.* Toronto R. Co., 15 Ont. App. 346. See, also, Hickey *v.* St. Paul, etc., R.Co., 60 Minn. 119, s.c. 61 N.W.R. 893. But compare Chicago City R. Co. *v.* Robinson, 127 Ill. 9, s. c. 18 N. E. R. 772; Shea *v.* St. Paul, etc., R. Co., 50 Minn. 395, 52 N. W. R. 902; Lynam *v.* Railroad Co., 114 Mass. 83. They

care required of one who goes upon the track of a horse railway is not perhaps, so great as that required of one who goes upon the track of a commercial railroad because the danger is not so great,[1] but, after all, reasonable care is required in either case, and one can not recklessly use the tracks of any kind of a railroad company or pass in front of a rapidly moving car upon "a nice calculation of the chances" without doing so at his peril.[2] It was also held in a recent case that one who rode a bicycle along the track of an electric railway without looking or listening for the approach of the cars behind him was guilty of contributory negligence as a matter of law.[3]

§ 1096. **Remedies for unlawful use of street.**—As we have elsewhere shown, mandamus will lie, in a proper case, to compel a railroad company to perform its duty to restore and repair a crossing or other portion of a street which it has rendered unsafe, and to construct and maintain its road upon or across a

are not obliged to *stop*, before crossing, as a matter of law, unless the circumstances require it in the exercise of reasonable care. Cincinnati, etc., R. Co. *v.* Whitcomb, 66 Fed. R. 915. One crossing behind a train must keep a vigilant watch and can not assume that it will not move backward. Bryson *v.* Chicago, etc., R. Co., 89 Iowa 677, s. c. 60 Am. & Eng. R. Cas. 50.

[1] Mentz *v.* Second Ave. R. Co., 3 Abbott's App. Dec. (N. Y.) 274; Lynam *v.* Union, etc., R. Co., 114 Mass. 83.

[2] McClain *v.* Brooklyn City R. Co., 116 N. Y. 459, s. c. 22 N. E. R. 1062; Barker *v.* Savage, 45 N. Y. 191; Fenton *v.* Second Ave. R. Co., 126 N. Y. 625; Sheets *v.* Connolly St. R. Co., 54 N. J. L. 518, 24 Atl. R. 483; Bunyan *v.* Citizens' St. R. Co., 127 Mo. 12, 1 Am. & Eng. R. Cas. (N. S.) 246, and note; Baltimore, etc., R. Co. *v.* Mali, 66 Md. 53. See, also, for other cases in which the plaintiff was held guilty of contributory negligence. Mercier *v.* New Orleans, etc., Co., 23 La. Ann. 264; Thomas *v.* Citizens', etc., Co., 132 Pa. St. 504; Wood *v.* Detroit, etc., R. Co., 52 Mich. 402, s. c. 50 Am. R. 259; Warner *v.* Peoples', etc., Co., 141 Pa. St. 615, s. c. 21 Atl. R. 737; Miller *v.* St. Paul, etc., R. Co., 42 Minn. 454, s. c. 44 N. W. R. 533; Brown *v.* Broadway, etc., R. Co., 50 N. Y. Super. Ct. 106; McGrath *v.* City, etc., R. Co., 93 Ga. 312, s. c. 20 S. E. R. 317; Boerth *v.* West Side R. Co., 87 Wis. 288. But compare Cross *v.* California, etc., R. Co., 102 Cal. 313; Patterson *v.* Townsend, 91 Iowa 725, 59 N. W. R. 205; Mills *v.* Brooklyn, etc., Railroad Co., 10 Misc. R. 1, 30 N. Y. Supp. 532; Reilly *v.* Third Ave. R. Co., 37 N. Y. Supp. 593. As to the care required of children see note in 1 Am. & Eng. R. Cas. (N. S.) 264, where all the recent cases are collected and reviewed.

[3] Everett *v.* Los Angeles, etc., Co., (Cal.) 43 Pac. R. 207, s. c. 42 Cent. L. J. 242. See, also, Adolph *v.* Central Park, etc., Co., 76 N. Y. 530.

highway in the manner required by statute.[1] So, if it unlawfully constructs and maintains its road in a highway without authority, or in an unauthorized manner, it may be indicted as for a nuisance,[2] or enjoined at the suit of one who is specially damaged thereby.[3] But when an abutter has an adequate remedy at law by an action for damages, as, for instance, where there is merely negligence in the construction or operation of the road, by which he is injured, he can not maintain injunction. The rule is thus stated by the supreme court of the United States: "Equitable jurisdiction may be invoked, in view of the inadequacy of the legal remedy, where the injury is destructive, or of a continuous character, or irreparable in its nature; and the appropriation of private property to public use, under color of law, but in fact without authority, is such an invasion of private rights as may be assumed to be essentially irremediable, if indeed, relief may not be awarded *ex debito justitiæ*. But where there is no direct taking of the estate itself, in whole or in part, and the injury complained of is the infliction of damage in respect to the complete enjoyment thereof, a court of equity must be satisfied that the threatened damage is substan-

[1] *Ante*, § 1092; *post*, §§ 1106, 1111.

[2] *Ante*, §§ 718, 719; Northern Cent. R. Co. *v.* Commonwealth, 90 Pa. St. 300; Cincinnati Southern R.Co.*v.* Commonwealth, 80 Ky. 137; Central R. Co. *v.* State, 32 N. J. L. 220; Commonwealth *v.* Old Colony R. Co., 14 Gray (Mass.) 93; Palatka, etc., R. Co. *v.* State, 23 Fla. 546; Regina *v.* Great North, etc., R. Co., 9 Q. B. 315.

[3] Brainard *v.* Connecticut River R. Co., 7 Cush. (Mass.) 506; Davis *v.* Mayor, etc., of New York, 14 N. Y. 506; Clarke *v.* Blackmar, 47 N. Y. 150; Williams *v.* New York Cent. R. Co., 16 N. Y. 97, s. c. 69 Am. Dec. 651; Harbach *v.* Des Moines, etc., R. Co., 80 Iowa 593, s. c. 43 Am. & Eng. R. Cas. 115; Pettis *v.* Johnson, 56 Ind. 139; Lewis *v.* Pennsylvania R. Co. (N. J.), 33 Atl. R. 932; Willamette Iron Works *v.* Oregon, etc., Co., 26 Ore. 224, s. c. 1 Am. & Eng. R. Cas. (N. S.) 36; Georgia, etc.,R. Co. *v.* Ray, 84 Ga. 376; Harrington *v.* St. Paul, etc., R. Co., 17 Minn. 215; Taylor *v.* Bay City St. R. Co., 80 Mich. 77. A mandatory injunction was granted in Buchholz *v.* New York, etc., R. Co., (N. Y.) 43 N. E. R. 76. As to when the municipality may maintain injunction, see Inhabitants of Springfield *v.* Connecticut, etc., R. Co., 4 Cush. (Mass.) 63; Town Council of Johnston *v.* Providence, etc., R. Co., 10 R. I. 365; Inhabitants of Greenwich *v.* Easton, etc., R. Co., 26 N. J. Eq. 217; Rio Grande R. Co. *v.* Brownsville, 45 Tex. 88. As to the right of an abutter to enjoin the taking of property without compensation see the following note, and *ante*, § 1049.

tial, and the remedy at law in fact inadequate, before restraint will be laid upon the progress of a public work; and if the case made discloses only a legal right to recover damages, rather than to demand compensation, the court will decline to interfere.'"[1] An abutter may also maintain ejectment where a railroad is constructed, without authority, upon a highway of which he owns the fee.[2] But he may waive his right to maintain injunction or ejectment or lose it by delay under such circumstances as to create an estoppel.[3]

[1] Osborne *v.* Missouri, etc., Railroad Co., 147 U. S. 248, 13 Sup. Ct. R. 299. See, also, Booth St. Ry. Law. 189; Elliott's Roads and Streets, 536; Tiedeman's Munic. Corp., § 307; 2 Dillon's Munic. Corp., § 723*d*; Story *v.* New York, etc., Railroad Co., 90 N. Y. 122, 179, 7 Am. & Eng. R. Cas. 596; Lahr *v.* Metropolitan, etc., Railway Co., 104 N. Y. 268; Columbus, etc., R. Co. *v.* Witherow, 82 Ala. 190; State *v.* Berdetta, 73 Ind. 185; Lorie *v.* North Chicago, etc., R. Co., 32 Fed. R. 270; Morris, etc., Railroad Co. *v.* Prudden, 20 N. J. Eq. 530; Truesdale *v.* Peoria, etc., Co., 101 Ill. 561; Stetson *v.* Chicago, etc., R. Co., 75 Ill. 74; Norfolk, etc., R. Co. *v.* Smoot, 81 Va. 495; Heath *v.* Des Moines, etc., R. Co., 61 Iowa 11; Union Pac. R. Co. *v.* Foley, 19 Colo.280; Kavanagh *v.* Mobile, etc., R. Co., 78 Ga. 271; Fogg *v.* Nevada, etc., R. Co., 20 Nev. 429.

[2] Terre Haute, etc., R. Co. *v.* Rodel, 89 Ind. 128, s. c. 46 Am. R. 164; Cox *v.* Louisville, etc., R. Co., 48 Ind. 178; Weyl *v.* Sonoma, etc., R. Co., 69 Cal. 202; Louisville, etc., R. Co. *v.* Liebfried, 92 Ky. 407, 17 S. W. R. 870; Carpenter *v.* Oswego, etc., R. Co., 24 N. Y. 655; Weisbrod *v.* Chicago, etc., R. Co., 21 Wis. 602; Phillips *v.* Dunkirk, etc., R. Co., 78 Pa. St. 177; Perry *v.* New Orleans, etc., R. Co., 55 Ala. 413, s. c. 28 Am. R. 740; Proprietors, etc., *v.* Nashua, etc., R. Co., 104 Mass. 1. But see Edwardsville R. Co. *v.* Sawyer, 92 Ill. 377.

[3] Porter *v.* Midland R. Co., 125 Ind. 476, s. c. 46 Am. & Eng. R. Cas. 70; Burkam *v.* Ohio, etc., R. Co., 122 Ind. 344; Midland R. Co. *v.* Smith, 113 Ind. 233; Reichert *v.* St. Louis, etc., R. Co., 51 Ark. 491, s. c. 38 Am. & Eng. R. Cas. 453; Hanlin *v.* Chicago, etc., R. Co., 61 Wis. 515, s. c. 20 Am. & Eng. R. Cas. 70; Haskell *v.* New Bedford, 108 Mass. 208; State *v.* Atlantic City, 34 N. J. L. 99; Baltimore, etc., R. Co. *v.* Strauss, 37 Md. 237; Merchants', etc., Co., *v.* Chicago, etc., R. Co., 79 Iowa 613; Roberts *v.* Northern Pac. R. Co., 158 U. S. 1, s. c. 15 Sup. Ct. R. 756, 758.

CHAPTER XLIII.

HIGHWAY CROSSINGS.

§ 1097. What is included in highway crossing.
1098. Right to lay out highway across railway.
1099. Right to construct railway across highway.
1100. Proceedings by municipality.
1101. Proceedings by railway company.
1102. Construction of crossing.
1103. Damages when highway is opened across a railroad.
1104. Impairing rights of railway company.
1105. Restoring condition of highway.
1106. Mandamus to compel restoration.
1107. Approaches, embankments and other structures.
1108. Grade crossings.
1109. Crossings above grade.
1110. Crossings below grade.
1111. Mandamus to compel construction of viaduct.
1112. Keeping crossing in repair.
1113. Rights of abutters.
1114. Gates, watchmen and signals at crossings.
1115. Accidents and injuries at crossings.

§ 1097. **What is included in highway crossing.**—Strictly speaking a highway crossing may be defined as the space included within the boundaries of the right of way and the boundaries of the highway. In some cases this is the recognized meaning of the term highway crossing. The class of cases to which we refer is composed of those cases which hold that where a railway company is bound to put in wing fences and cattle-guards at public crossings, the fences and cattle-guards must be erected along the margin of the highway,[1] and not recede from or encroach upon it. A crossing, however, often embraces more than the mere space included in the boundaries referred to, and it may not include so much. Crossings are constructed for the purpose of enabling persons to cross the railway tracks and all the structures, and the

[1] See *post*, § 1197.

like, reasonably necessary to enable that object to be safely accomplished are included in the crossing. Thus, embankments necessary to enable a traveler to get on and off the crossing are regarded as a part of the crossing.[1] Only such embankments, as are reasonably necessary to enable the crossing to be used can be regarded as a part of the crossing. Where the highway is nearly level with the railway track, an embankment for a distance of twenty rods can not be regarded as a part of the crossing.[2] And where a railway company is required to construct good and sufficient crossings it is held that it is not necessary to construct a crossing the full width of the highway.[3] This, perhaps, would be the rule only where a limited portion of the highway was used for the actual purpose of travel. In cities where the entire width of the highway is used for travel we are of the opinion that a crossing would, ordinarily at least, be required for the entire width of the highway. And under certain circumstances barriers and guard-rails may be such a necessary part of a railway crossing that the company will be bound to maintain them.[4]

§ 1098. **Right to lay out highway across railway.**—While the charters of railway companies are contracts within the provision of the federal constitution that no state shall pass any law impairing the obligation of contracts, the general rule

[1] Moberly *v.* Kansas City, etc., R. Co., 98 Mo. 183; Farley *v.* Chicago, etc., R. Co., 42 Iowa 234; Gulf, etc., R. Co. *v.* Greenlee, 62 Tex. 344, s. c. 23 Am. & Eng. R. Cas. 322; Moggy *v.* Canadian Pac. R. Co., 3 Manitoba 209; Beatty *v.* Central, etc., R. Co.,58 Iowa 242; Town of Roxbury *v.* Central Vermont R. R. Co., 60 Vt. 121, 14 Atl. R. 92; Maltby *v.* Chicago, etc., R. Co., 52 Mich. 108; Cincinnati, etc., R. Co. *v.* Claire, 6 Ind. App. 390. In Collier *v.* Georgia, etc., R. Co., 76 Ga. 611, it was said: "The crossing includes the width of the land on both sides of the road allowed by charter or appropriated by the company therefor, and for as many feet beyond each way as is necessary for a traveler to get on and off the crossing safely or conveniently."

[2] Beatty *v.* Central Iowa R. Co., 58 Iowa 242, s. c. 8 Am. & Eng. R. Cas. 210.

[3] Ellis *v.* Wabash, etc., R. Co., 17 Mo. App. 126.

[4] Pittsburg, etc., R. Co. *v.* Moses, 2 Atl. R. 188, 24 Am. & Eng. R. Cas. 295.

is that such charters are granted and the franchises of railway companies are acquired subject to the police power of the state and to the right of eminent domain in favor of the public.[1] The public are entitled to have highways to meet the requirements of new and increased growth in business and population and it is well settled that railway companies acquire the right to construct their tracks subject to the dominant right of the state to cross their tracks with new streets and highways whenever the public necessity demands it.[2] Under a general authority conferred upon a municipality to lay out and open streets and highways or to construct a highway from one point to another, power is implied to cross the tracks and rights of way of railway companies.[3] But under such a general power to

[1] *Ante*, § 671; Elliott on Roads and Streets, 170; State *v.* District Court, 42 Minn. 247, 7 L. R. A. 121; Chicago, etc., R. Co. *v.* City of Chicago, 140 Ill. 309.

[2] State *v.* District Court, 42 Minn. 247, 7. L. R. 121; Chicago, etc., R. Co. *v.* City of Chicago, 140 Ill. 309, s. c. 50 Am. & Eng. R. Cas. 150, 29 N. E. R. 1109; Illinois Cent. R. Co. *v.* City of Chicago, 141 Ill. 586, s. c. 30 N. E. R. 1044, 1047, citing Elliott on Roads and Streets, 598. The rule is thus expressed in the case of the City of Fort Wayne *v.* Lake Shore, etc., R. Co., 132 Ind. 558, s. c. 32 N. E. R. 215, 32 Am. St. R. 277: "Private corporations acquire the right to construct roads subject to the dominant right of the state to cross such road whenever the public necessity demands that new roads or streets shall be opened, and for this reason it is held that the general power to construct and open streets or other public highways carries with it the power to construct them across railroad tracks. Elliott on Roads and Streets, p. 169; Lake Erie, etc., R. Co. *v.* City of Kokomo, 130 Ind. 224; State *v.* Easton, etc., R. Co., 36 N. J. L.181; Morris, etc., R. Co. *v.* Central, etc.,R. Co., 31 N. J. L. 205; Baltimore, etc., Co. *v.* Union R. R. Co., 35 Md. 224; Little Miami, etc., R. Co. *v.* City of Dayton, 23 Ohio St. 510; St. Paul,etc., R. Co. *v.* City of Minneapolis, 35 Minn. 141; President, etc., Canal Co. *v.* Village of Whitehall, 90 N. Y. 21; Albany, etc., R. Co. *v.* Brownell, 24 N. Y. 345." In Chicago, etc., R. Co. *v.* Joliet, etc., R. Co., 105 Ill. 388, s. c. 14 Am. & Eng. R. Cas. 62, it was said: "Unless, therefore, every railroad corporation takes its right of way subject to the right of the public to have other roads, both common highways and railways, constructed across its track whenever the public exigency might be thought to demand it, the grant of the privilege to construct a railroad across or through the state would be an obstacle in the way of its future prosperity of no inconsiderable magnitude."

[3] St. Paul, etc., R. Co. *v.* Minneapolis, 35 Minn. 141, s. c. 24 Am. & Eng. R. Cas. 309; Lake Erie, etc., R. Co. *v.* City of Kokomo, 130 Ind. 224; City of Hannibal *v.* Hannibal, etc., Ry. Co., 49 Mo. 480.

cross a railway track a part of the railway can not be taken for the purpose of constructing a parallel or longitudinal street.[1] The right to take longitudinally is very different from the mere right to cross, for in the one case the rights of the railway company are materially impaired, while in the other the taking is such that both uses can stand together.[2] Where the two uses are such that both can not stand together the general rule is that the railroad company's property can not be taken for a street unless there is statutory authority authorizing it.[3] But under general authority to lay out streets across the tracks of a railway company it has been held that streets may be laid out across switches,[4] and even across yards where no franchise of the company is impaired thereby.[5]

§ 1099. **Right to construct railway across highway.**—The general rule is that where a railway company is chartered with authority to construct a railway between certain termini the authority to cross highways between such termini exists by necessary implication.[6] In many states the general law under

[1] *Ante*, §§ 49, 922; City of Bridgeport *v.* New York, etc., R. Co., 36 Conn. 255; City of Fort Wayne *v.* Lake Shore, etc., R. Co., 132 Ind. 558, s. c. 32 N. E. R. 215.

[2] Lewis *v.* Germantown, etc., Co., 16 Phila. 608.

[3] *Infra*, § 1104.

[4] Illinois Central R. Co. *v.* City of Chicago, 141 Ill. 586, s. c. 51 Am. & Eng. R. Cas. 528.

[5] Philadelphia, etc., R. Co. *v.* Philadelphia, 9 Phila. (Pa.) 563; Illinois Central R. Co. *v.* City of Chicago, 141 Ill. 586, s. c. 51 Am. & Eng. R. Cas. 528; Commissioners *v.* Detroit, etc., R. Co., 93 Mich. 58, 51 Am. & Eng. R. Cas. 525. But where the yards are the property of the corporation, streets can not be constructed through them without the tender or payment of compensation for, in such a case, there is a taking of private property for a public use.

[6] In Inhabitants *v.* Port Reading, etc., R. Co., 49 N. J. Eq. 11, s. c. 50 Am. & Eng. R. Cas. 169, the court said: "The defendant is incorporated under the general railroad law, and, by that statute acquires whatever rights it possesses in crossing highways; that it may cross a highway can not be questioned. The right is given by implication from the bare authority to build a railroad connecting distant points between which there exist highways that must be crossed, and as well from expressions in the statute which assumes its existence; and, as it is impossible for a railroad to cross a highway without some incidental interference with it, such interference is also of necessity made lawful." Warren R. Co. *v.* State, 29 N. J. L. 353; Appeal of Borough of South Waverly, (Pa.) 11 Atl. R. 245, 20 W. N. C. 209.

which railway companies are chartered confers upon them, in express terms, the right and authority to construct their lines across public highways.[1] The right to cross, however, is limited to the necessities of the crossing and no greater rights can be claimed than those reasonably necessary to enable the objects of the crossing to be accomplished.[2] It is the duty of the railway company constructing its line across public highways, to do so in such a manner as to interfere with the right of the public to use the highway as little as possible and to restore the highway to as safe a condition for travel as before the crossing was made so far as it can reasonably and practicably be done.[3] Where the right to cross exists and the company has acted on such right by constructing its line across the highway it may lay such additional parallel tracks as are reasonably necessary for it in the transaction of its business.[4]

§ 1100. **Proceedings by municipality.**—The proceeding by municipalities in the matter of laying out streets is so largely a matter of statutory regulation and the statutes of the different states are so different that we can not do more at this place than refer to some of the general principles governing such proceedings. Where it is sought to lay out a street across a railway company's right of way the general rule is that the railway company stands in some respects in the same position to the proceedings as any land-owner through whose lands the

[1] Clawson *v.* Chicago, etc., R. Co., 95 Ind. 152; County of Cook *v.* Great Western R. Co., 119 Ill. 218, s. c. 10 N. E. R. 564.

[2] Inhabitants *v.* Port Reading, etc., R. Co., 49 N. J. Eq. 11, s. c. 50 Am. & Eng. R. Cas. 169; Northern, etc., R. Co. *v.* Mayor, 46 Md. 425; Palatka, etc., R. Co. *v.* State, 23 Fla. 546, 11 Am. St. R. 395; Lehigh Valley R. Co. *v.* Orange Water Co., 42 N. J. Eq. 205, s. c. 7 Atl. R. 659. It has been held that the crossing should not be permitted where the usefulness of the highway will be virtually destroyed. Osborne *v.* Jersey City, etc., R. Co., 27 Hun (N. Y.) 589.

[3] See *infra*, § 1105, 1106, where the duty of the company to restore the condition of the highway is fully discussed.

[4] Commonwealth *v.* Hartford, etc., R. Co., 14 Gray (Mass.) 379; Bangor, etc., R. Co. *v.* Smith, 47 Me. 34. But the right to construct and use more than one track may often depend upon the provisions of the statute granting the corporate franchise, and upon the license granted by the local authorties.

proposed street passes. The railway company must be made a party to the proceedings,[1] and it must be served with notice the same as other land-owners.[2] But where the railway company's interest does not appear of record and the statute provides that personal service shall be made only on persons whose interests appear of record the general notice by publication is sufficient to bind the railway company.[3] And the legislature may provide that the notice as to everybody shall be constructive.[4] The statutes authorizing the proceedings usually provide a remedy for persons aggrieved by the action of the municipality. The remedy thus provided is, as a rule, exclusive and parties aggrieved must pursue the remedy provided. Thus, for example, where a remedy by appeal is provided the company must pursue that remedy for neither relief by *certiorari*,[5] nor by injunction,[6] will be granted.

[1] Detroit, etc., R. Co. *v.* Detroit, 49 Mich. 47, s. c. 12 N. W. R. 904. A mortgagee need not be made a party. Grand Rapids *v.* Grand Rapids, etc., R. Co., 58 Mich. 641.

[2] St. Paul, etc., R. Co. *v.* City of Minneapolis, 35 Minn. 141, s. c. 24 Am. & Eng. R. Cas. 309, 27 N. W. R. 500; Long Island R. Co. *v.* Silverstone, 19 N. Y. Supp. 140. Service of notice upon a station agent upon whom service in suits against the company is valid is sufficient. State *v.* O'Conner, 78 Wis. 282, s. c. 47 N. W. R. 433.

[3] State *v.* Chicago, etc., R. Co., 68 Iowa 135, 26 N. W. R. 37.

[4] In St. Paul, etc., R. Co. *v.* City of Minneapolis, 35 Minn. 141, s. c. 24 Am. & Eng. R. Cas. 309, it was said: "The plaintiff further complains that the notice of the condemnation proceedings, and the assessment of damages provided by the charter, and the only notice in fact, given in this case, was by publication. It is certainly remarkable that a matter so important to the interest of property-holders, the legislature should have made no further or more adequate provision in the charter for notice of the pendency of proceedings for the assessment of damages in this class of cases. But this was a question for the legislature, and we do not think the proceedings void because the notice provided was constructive, or by publication. The proceedings are *in rem*, and it is the rule generally recognized that in such cases the legislature may provide that the compensation due the owner of the lands taken may be ascertained upon constructive notice merely, as well as upon personal notice."

[5] Little Miami, etc., R. Co. *v.* City of Dayton, 23 Ohio St. 510: St. Paul, etc., R. Co. *v.* City of Minneapolis, 35 Minn. 141, s. c. 24 Am. & Eng. R. Cas. 309; Detroit, etc., R. Co. *v.* Graham, 46 Mich. 642, 14 Am. & Eng. R. Cas. 327; Lake Shore, etc., R. Co. *v.* Chicago, etc., R. Co., 96 Ill. 125; Western, etc., Railroad Co. *v.* Patterson, 37 Md. 125.

[6] Long Island R. Co. *v.* Silverstone, 19 N. Y. Supp. 140; Detroit, etc., R.

§ 1101. **Proceedings by railway company.**—The general rule is, as we have said, that the authority conferred upon a railway company to construct its line from one point to another carries with it by implication authority to cross intervening highways. Where there is such authority and there is no statute regulating the subject the only proceedings required by a railway company to secure crossings over highways are such as are necessary to secure the right of way. It has been held that where the right of way has been secured from the landowner, no further proceedings are, as a rule, necessary to secure the right to cross the highway.[1] In some states, however, statutes are in force which require railway companies to secure consent to construct their tracks across public highways, from the local authorities. Thus, in New York, the company must after notice to the highway commissioners, obtain the consent of the supreme court, to construct its road across the surface of any highway.[2] Where the highway sought to be crossed is owned by a private corporation, as a turnpike company, it is held that the turnpike company is entitled to compensation and in such a case the crossing should be secured either by agreement or condemnation,[3] for the crossing of such a highway is a taking of property for which compensation must be made. The crossing of a street or highway by a railway company within the limits of an incorporated village, town or city, stands on somewhat different grounds from such a crossing without such limits. Within such municipalities the authority over streets is very broad and it is generally held that the municipality has power to regulate and control the laying of railway tracks in or across the streets. The general rule is

Co. *v.* City of Detroit, 91 Mich. 444, 52 N. W. R. 52.

[1] County of Cook *v.* Great Western, etc., R. Co., 119 Ill. 218, s. c. 10 N. E. R. 564. In this case it was held that a board of county commissioners had no power to require railway companies to secure consent to cross highways.

[2] Osborne *v.* Jersey City, etc., R. Co., 27 Hun (N. Y.) 589; Schermerhorn *v.* Mt. McGregor, etc., R. Co., 52 N. Y. S. R. 892.

[3] Seneca Road Co. *v.* Auburn, etc., R. Co., 5 Hill 170; Fletcher *v.* Auburn, etc., R. Co., 25 Wend. 462; Indianapolis, etc., Co. *v.* Belt R. Co., 110 Ind. 5, s. c. 32 Am. & Eng. R. Cas. 173.

that as a condition precedent to the right to lay its tracks across streets in a municipality, consent must first be had from the proper municipal authorities.

§ 1102. **Construction of crossing.**—As a general rule it is the duty of every railway company to construct and maintain in good condition its crossings over highways so far as the same can be done without interfering with the operation of the railway.[2] This duty, as a rule, however, extends only to the crossings of such highways as were legally laid out or have become such by dedication or prescription.[3] The duty is now imposed by statute in nearly all of the states, but such duty exists independent of statute, at least as to all crossings which are in existence at the time the railway is constructed.[4] Where the duty is imposed by statute the weight of authority is to the effect that it applies to crossings of highways laid out after the construction of the railway, as well as those in existence at the time of its construction.[5] There is, however, some conflict

[1] County of Cook *v.* Great Western, etc., R. Co., 119 Ill. 218, s. c. 10 N. E. R. 564; *ante*, §§ 1076, 1081.

[2] Burlington, etc., R. Co. *v.* Koonce, 34 Neb. 479, s. c. 51 N. W. R. 1033; Lincoln *v.* St. Louis, etc., R. Co., 75 Mo. 27; Moberly *v.* Kansas City, etc., R. Co., 98 Mo. 183; State *v.* Chicago, etc., R. Co., 29 Neb. 412; Farley *v.* Chicago, etc., R. Co., 42 Iowa 234; Thayer *v.* Flint, etc., R. Co., 93 Mich. 150; Pittsburg, etc., R. Co. *v.* Dunn, 56 Pa. St. 280; Paducah, etc., R. Co. *v.* Commonwealth, 80 Ky. 147; Buchner *v.* Chicago, etc., R. Co., 60 Wis. 264; Ferguson *v.* Virginia, etc., R. Co., 13 Nev. 184.

[3] Gulf, etc., R. Co. *v.* Montgomery, 85 Tex. 64; Gurley *v.* Missouri, etc., R. Co., 104 Mo. 211. But See Kelly *v.* Southern Minn. R. Co., 28 Minn. 98, s. c. 9 N. W. R. 588.

[4] See Moberly *v.* Kansas City, etc., R. Co., 98 Mo. 183.

[5] Chicago, etc., R. Co. *v.* City of Chicago, 140 Ill. 309, 50 Am. & Eng. R. Cas. 150; Illinois Cent. R. Co. *v.* Willenborg, 117 Ill. 203, s. c. 57 Am. R. 862; Louisville, etc., R. Co. *v.* Smith, 91 Ind. 119, s. c. 13 Am. & Eng. R. Cas. 608; State *v.* Shardlow, 43 Minn, 524, s. c. 45 Am. & Eng. R. Cas. 106; State *v.* Chicago, etc., R. Co., 29 Neb. 412, s. c. 45 N. W. R. 469, 42 Am. & Eng. R. Cas. 248; Dyer Co. *v.* Railroad, 87 Tenn. 712, s. c. *sub nomine* Chesapeake, etc., R. Co. *v.* Dyer Co., 38 Am. & Eng. R. Cas. 676; State *v.* District Court, 42 Minn. 247, 42 Am. & Eng. R. Cas. 241. Most of these decision expressly, and others impliedly hold such a statute constitutional, especially where there is a reserved power to amend or repeal the charter. See, also, Albany, etc., R. Co. *v.* Brownell, 24 N. Y. 345; People *v.* Boston, etc., R. Co., 70 N. Y. 569; Boston, etc., R. Co. *v.* Greenbush, 52

in the authorities, some holding that a railway company is not bound to construct crossings over highways which are not in existence at the time of the construction of the railway.[1] We are of the opinion that the better rule is that laid down in the cases holding that the duty may be imposed upon the company to construct the class of crossings referred to. The authority to require railroad companies to construct crossings at highways, rests upon the police power of the state, and as a railway company acquires its rights subject to the police power, it seems to us that it is a just exercise of such power to hold that railway companies may be compelled to construct crossings at those highways which are afterward opened and laid out across their rights of way.[2] The doctrine which we have

N. Y. 510; Portland, etc., R. Co. *v.* Deering, 78 Me. 61, s. c. 23 Am. & Eng. R. Cas. 51, 57 Am. R. 784; Georgia, etc., R. Co. *v.* Smith, 128 U. S. 174; Town of Westbrook's Appeal, 57 Conn. 95, s. c. 17 Atl. R. 368.

[1] Rock Creek Tp. *v.* St. Joseph, etc., Co., 43 Kan. 543, s. c. 42 Am. & Eng. R. Cas. 255; State *v.* Wilmington, etc., R. Co., 74 N. Car. 143; People *v.* Lake Shore, etc., R. Co., 52 Mich, 277, s. c. 17 N. W. R. 841. In several jurisdictions it is held that the railroad company can not constitutionally be compelled to construct a crossing in such a case without compensation. See Massachusetts, etc., R. Co. *v.* Boston, etc., R. Co., 121 Mass. 124; Old Colony R. Co. *v.* Inhabitants, etc., 14 Gray (Mass.) 155; Illinois Central R. Co. *v.* Bloomington, 76 Ill. 447; Chicago, etc., R. Co. *v.* Hough, 61 Mich. 507; City of Detroit *v.* Detroit, etc., Co., 43 Mich. 140; People *v.* Detroit, etc., R. Co., 79 Mich. 471, s. c. 44 N. W. R. 934, 2 Lewis' Am. R. & Corp. R. 215; Chicago, etc., R. Co. *v.* Board of Comrs. Chautauqua Co., 49 Kan. 763, s. c. 31 Pac. R. 736; State *v.* Capner, 49 N. J. L. 555, s. c. 9 Atl. 781; Northern, etc., R. Co. *v.* Mayor, 46 Md. 425; Gulf, etc., R. Co. *v.* Rowland, 70 Tex. 298, s. c. 35 Am. & Eng. R. Cas. 286; *post*, § 1103. In Kansas City *v.* Kansas City Belt Ry. Co., 102 Mo. 633, s. c. 14 S. W. R. 808, 3 Lewis' Am. R. & Corp. R. 522, it was held that a company which had constructed a proper bridge or viaduct was entitled to compensation for the expense of altering it to conform to the street as thereafter widened by the city.

[2] Portland, etc., R. Co. *v.* Deering, 78 Me. 61, 23 Am. & Eng. R. Cas. 51; Boston, etc., R. Co. *v.* County Com's., 79 Me. 386, 32 Am. & Eng. R. Cas. 271; Toledo, etc., R. Co. *v.* Deacon, 63 Ill. 91; Chicago, etc., R. Co. *v.* City of Chicago, 140 Ill. 309, s. c. 50 Am. & Eng. R. Cas. 150; Gulf, etc., R. Co. *v.* Rowland, 70 Tex. 298, 35 Am. & Eng. R. Cas. 286. In State *v.* Chicago, etc., R. Co., 29 Neb. 412, 42 Am. & Eng. R. Cas. 248, the court said: "The respondent insists that the act is not constitutional, as it imposes a burden on the corporation that did not exist when it was incorporated. Under the general public power of the state, the legislature has authority to place new and additional burdens upon corporations, when such burdens are for the

stated is well supported by those cases which hold that railway companies may be required by laws passed subsequent to the granting of their charters, and the construction of their lines, to fence their tracks, to put in cattle-guards, to give signals or to do other acts for the safety and protection of the public.[1] The duty to construct and maintain a suitable crossing is a continuing one and the company may be compelled to perform it, so as to meet and provide for the increased needs of the traveling public.[2]

§ 1103. **Damages where highway is opened across a railroad.** —In those jurisdictions in which it is held that a railroad company is entitled to compensation, where a highway is laid out across its track, it is frequently difficult to determine the exact elements of compensation or measure of damages. It is generally held that compensation should be made both for the use of the land actually taken, or its value subject to its use by the railroad company, and for any additional expense created by the use of the right of way for the street, together with such other damages as may be sustained by injury to the track, right of way or franchise, as a natural and proximate result of the opening and use of the street across the track and right of way, but not for expenses necessary in order to comply with mere police regulations, or, in other words, the compensation should include such damages as arise in making the necessary structural changes and necessarily continue in the future operation and management of the road, but not such damages or expenses as are incurred in complying with the ordinary police

safety of the people and for the public good, although the power to do so may not be reserved in the charter."

[1] Ohio, etc., R. Co. *v.* McClelland, 25 Ill. 140; Chicago, etc., R. Co. *v.* Joliet, etc., R. Co., 105 Ill. 388; Galena, etc., R. Co. *v.* Dill, 22 Ill. 265; Illinois Central R. Co. *v.* Willenborg, 117 Ill. 203; Galena, etc., R. Co. *v.* Loomis, 13 Ill. 548.

[2] State *v.* St. Paul, etc., R. Co., 35 Minn. 131, s. c. 59 Am. R. 313; Cooke *v.* Boston, etc., R. Co., 133 Mass. 185, s. c. 10 Am. & Eng. R. Cas. 328; Burritt *v.* City of New Haven, 42 Conn. 174; Manley *v.* St. Helens, etc., R. Co., 2 Hurl. and N. 840; *post*, § 1112. See, also, Kansas City *v.* Kansas City Belt Ry. Co., 102 Mo. 633, s. c. 14 S. W. R. 808, 3 Lewis' Am. R. & Corp. R. 522, citing Elliott on Roads and Streets, 599.

regulations of the state or municipality.[1] In Massachusetts, however, while the general rule is recognized that the increased expense of ringing bells and giving signals in compliance with police regulations should not be included, it is held that the expense of erecting and maintaining signboards and cattle-guards should be included.[2] In Minnesota the contrary view is taken,[3] but the courts of both states agree in holding that the company is entitled to compensation for planking the roadway, and maintaining such planking, where the street crosses the tracks. No damages should be allowed for mere interruptions or inconveniences causing a slower movement of trains, or the like, nor for the increased danger of accidents at the crossing.[4] In Michigan, it has been held that where, by reason of the condemnation of a highway crossing over a company's tracks, an adjacent warehouse of the company, and the land on which it stands, are rendered less available and less valuable, the company is entitled to compensation for such damage.[5] Alleged benefits to the company on account of increase in its traffic or business arising from the increased facility for travel

[1] City of Grand Rapids *v.* Grand Rapids, etc., R. Co., 66 Mich. 42, s. c. 33 N. W. R. 15; State *v.* District Court, 42 Minn. 247, s. c. 7 L. R. A. 121, and note; Old Colony, etc., R. Co. *v.* Inhabitants of Plymouth County, 14 Gray (Mass.) 155; Boston, etc., R. Co. *v.* Cambridge, 159 Mass. 283, s. c. 34 N. E. R. 382. But compare Chicago, etc., R. Co. *v.* Chicago, 140 Ill. 309, s. c. 29 N. E. R. 1109, s. c. 50 Am. & Eng. R. Cas. 150; Commissioners of Parks *v.* Chicago, etc., R. Co., 91 Mich. 291, s. c. 51 N. W. R. 934.

[2] Old Colony, etc., R. Co. *v.* Inhabitants of Plymouth County, 14 Gray (Mass.) 155. See, also, State *v.* Bayonne, 51 N. J. L. 428, s. c. 17 Atl. 971; Massachusetts, etc., R. Co. *v.* Boston, etc., R. Co., 121 Mass. 124; Chicago, etc., R. Co. *v.* Hough, 61 Mich. 507; Kansas, etc., R. Co. *v.* Board of Commissioners of Jackson County, 45 Kan. 716, s. c. 26 Pac. R. 394.

[3] State *v.* District Court, 42 Minn. 247, s. c. 7 L. R. A. 121; State *v.* Shardlow, 43 Minn. 524, s. c. 46 N. W. R. 74, 45 Am. & Eng. R. Cas. 106.

[4] Chicago, etc., R. Co. *v.* Chicago, 140 Ill. 309, s. c. 29 N. E. R. 1109; Portland, etc., R. Co. *v.* Deering, 78 Me. 61, s. c. 2 Atl. R. 670, 57 Am. R. 784; Boston, etc., R. Co. *v.* County Com'rs, 79 Me. 386, s. c. 32 Am. & Eng. R. Cas. 271; Old Colony, etc., R. Co. *v.* Inhabitants of Plymouth County, 14 Gray (Mass.) 155; Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 30 Ohio St. 604; City of Bridgeport *v.* New York, etc., R. Co., 36 Conn. 255.

[5] Commissioners of Parks *v.* Chicago, etc., R. Co., 91 Mich. 291, s. c. 51 N. W. R. 934.

which the highway affords are not to be taken into consideration.[1]

§ 1104. **Impairing rights of railway company.**—The rule is that where property is already devoted to one public use it can not be taken for another public use, unless there is a statute which clearly authorizes such taking. Where property is already devoted to one public use it can, as a rule, be taken for another public use, only where authority is clearly conferred by statute, and then upon just compensation paid or tendered. Where a street is laid out across the right of way of a railway company at a point where the company has only a track or switch, no question can justly arise as to an impairment of the company's franchise by such taking, for under such circumstances both the use as a highway and the use as a railway can stand together and do not interfere with each other.[2] But where it is sought to lay out a highway through a depot of a railway company, the use is such as to destroy or materially impair the franchise or property rights of the company, and

[1] State *v.* Shardlow, 43 Minn. 524, s. c. 46 N. W. R. 74; Old Colony, etc., R. Co. *v.* Inhabitants of Plymouth County, 14 Gray (Mass.) 155; Boston, etc., R. Co. *v.* County of Middlesex, 1 Allen (Mass.) 324.

[2] In Cincinnati, etc., R. Co. *v.* City of Anderson, 139 Ind. 490, it was said: "Under the general law permitting cities to establish streets, we have no doubt of the implied power to extend streets transversely across the right of way of a railroad when in so doing the uses for which such right of way is employed are not materially injured or destroyed, and where such uses and those for a street may coexist without impairment of the first uses. But where such uses can not so coexist, or where the first use is materially impaired or destroyed, it is well settled in this state and elsewhere, that the second public use will be denied. Lake Erie, etc., Ry. Co. *v.* Town of Boswell, 137 Ind. 336; City of Ft. Wayne *v.* Lake Shore, etc., Ry. Co., 132 Ind. 558; City of Seymour *v.* Jeffersonville, etc., R. R. Co., 126 Ind. 466; City of Valparaiso *v.* Chicago, etc., Ry. Co., 123 Ind. 467; Prospect Park, etc., R. R. Co. *v.* Williamson, 91 N. Y. 552; *In re* City of Buffalo, 68 N. Y. 167; *In re* Boston, etc., R. R. Co., 53 N. Y. 574; Albany, etc., R. R. Co. *v.* Brownell, 24 N. Y. 345: Milwaukee, etc., Ry. Co. *v.* City of Faribault, 23 Minn. 167; Hannibal, etc., R. R. Co. *v.* Muder, 49 Mo. 165; Mohawk, etc., R. R. Co. *v.* Artcher, 6 Paige 83; St. Paul, etc., Co. *v.* City of St. Paul, 30 Minn. 359; New Jersey, etc., Ry. Co. *v.* Long Branch Comrs., 39 N. J. L. 28."

the construction of the street or highway, except where the statute authorizes the taking and makes provision for the payment of compensation, will not be permitted.[1] The location and construction of a highway through ground intended for a station-house or engine-house may, in the proper case, be enjoined;[2] and so may the location and construction of a highway through a round-house,[3] or a park used exclusively as a place for amusement and accommodation of passengers.[4] A highway may, however, be laid out over a mere collection of tracks used for switching, handling and storing cars.[5] A railway company having acquired lands and erected thereon permanent structures to enable it to transact its business, to permit a street to be opened through such lands and structures would have the effect to destroy franchises of the company, and prevent it from performing its public duties, and in all such cases the company's property can never be taken for a street, unless the right to take is clearly conferred upon the municipality,[6] and provision made for compensation.

§ 1105. **Restoring condition of highway.**—The right of a railway company to lay out its right of way and construct its tracks across public highways does not carry with it the right to destroy the highway.[7] Where a railway company con-

[1] Chicago, etc., R. Co. *v.* Wilson, 17 Ill. 123; *In re* New York, etc., R. Co. *v.* Kip, 46 N. Y. 546; Hannibal, etc., R. Co. *v.* Muder, 49 Mo. 165; St. Paul, etc., R. Co. *v.* City of St. Paul, 30 Minn. 359.

[2] *In re* New York, etc., R. Co., 77 N. Y. 248; Low *v.* Galena, etc., R. Co., 18 Ill. 324.

[3] Cincinnati, etc., R. Co. *v.* City of Anderson, 139 Ind. 490.

[4] Prospect Park, etc., R. Co., *v.* Williamson, 91 N. Y. 552.

[5] Philadelphia, etc., R. Co. *v.* Philadelphia, 9 Phila. (Pa.) 563; Illinois Central R. Co. *v.* City of Chicago, 141 Ill. 586, 51 Am. & Eng. R. Cas. 528; Commissioners *v.* Detroit, etc., R. Co., 93 Mich. 58, 51 Am. & Eng. R. Cas. 525; Commissioners *v.* Michigan, etc., R. Co. 90 Mich. 385, 50 Am. & Eng. R. Cas. 144. See Boston, etc., R. Co. *v.* Greenbush, 52 N. Y. 510.

[6] Milwaukee, etc., R. Co. *v.* City of Faribault, 23 Minn. 167; City of Fort Wayne *v.* Lake Shore, etc., R. Co., 132 Ind. 558, 32 N. E. R. 215; City of Valparaiso *v.* Chicago, etc., R. Co., 123 Ind. 467; Winona, etc., R. Co. *v.* City of Watertown, 4 S. Dak. 323, 56 N. W. R. 1077; Housatonic R. Co. *v.* Lee, etc., R. Co., 118 Mass. 391.

[7] "A grant to a railroad company of the right to construct its road along, upon, or across, or to use, an existing highway, is not to be construed as a

structs its tracks over a public highway the rule is that it must be done with as little injury as is practicably possible to the highway.[1] In the very nature of things it is of course impossible to lay out and construct a railway across a public highway without doing some injury to the highway and to a reasonable extent injury is to be expected, but the authorities are all to the effect that the construction must be such as to not unnecessarily interfere with or impair the usefulness of the highway.[2] As a rule the duty rests upon the railway company to restore every highway crossed by its line to as safe a condition for travel as it was in before the construction of the line, so far as it is reasonably practicable for it to be done.[3] It is not always possible to make a highway as safe for travel as it was before the construction of the highway, but this must be done so far as it is practicable to do so. The duty imposed upon railway companies to restore highways to their former condition of usefulness is usually imposed by general statute[4] although the duty may be imposed by the

power to destroy the highway as such." Palatka, etc., R. Co. *v.* State, 23 Fla. 546, s. c. 11 Am. St. R. 395.

[1] Northern, etc., R. Co. *v.* Baltimore, 46 Md. 425; Palatka, etc., R. Co. *v.* State, 23 Fla. 546, s. c. 11 Am. St. R. 395.

[2] People *v.* Dutchess & C. R. R. Co., 58 N. Y. 152; People *v.* New York, etc., Co., 74 N. Y. 304; Northern Central R. Co. *v.* Commonwealth, 90 Pa. St. 300; City of Kansas *v.* Kansas City, etc., R. Co., 102 Mo. 633, s. c. 47 Am. & Eng. R. Cas. 157, 14 S. W. R. 808; State *v.* Hannibal, etc., R. Co., 86 Mo. 13; Town of Roxbury *v.* Central Vermont R. Co., 60 Vt. 121, s. c. 14 Atl. R. 92; Paducah, etc., R. Co. *v.* Commonwealth, 80 Ky. 147, s. c. 10 Am. & Eng. R. Cas. 318; City of Chester *v.* Baltimore, etc., R. Co., 140 Pa. St. 275, s. c. 21 Atl. R. 320; Osborne *v.* Jersey City, etc., R. Co., 27 Hun (N. Y.) 589.

[3] Cott *v.* Lewiston, etc., R. Co., 36 N. Y. 214; Gale *v.* New York, etc., R. Co., 76 N. Y. 594; Masterson *v.* New York, etc., R. Co., 84 N. Y. 247; Peoria, etc., R. Co. *v.* Lyons, 9 Ill. App. 350; Louisville, etc., R. Co. *v.* Pritchard, 131 Ind. 564; Cooke *v.* Boston, etc., R. Co., 133 Mass. 185, s. c. 10 Am. & Eng. R. Cas. 328.

[4] Little Miami Railroad *v.* Commissioners, 31 Ohio St. 338; Palatka, etc., R. Co. *v.* State, 23 Fla. 546; Evansville, etc., R. Co. *v.* Crist, 116 Ind. 446, s. c. 9 Am. St. R. 865; Dallas, etc., R. Co. *v.* Able, 72 Tex. 150, s. c. 37 Am. & Eng. R. Cas. 453; Schermerhorn *v.* Mt. McGregor R. Co., 52 N. Y. St. R. 892; People *v.* Troy, etc., R. Co., 37 How. Pr. (N. Y.) 427; Roberts *v.* Chicago, etc., R. Co., 35 Wis. 679; Chicago, etc., R. Co. *v.* Payne, 59 Ill. 534; Inhabitants *v.* Port Reading R. Co. 49 N. J. Eq. 11, 50 Am. & Eng. R. Cas. 169; Town Council of Johnston *v.* Providence, etc., R. Co., 10 R. I. 365; Mis-

charter granted to the company.[1] The duty, however, rests upon the company at common law, and it may be compelled to restore highways although there is no statute upon the subject and the company's charter is silent in reference to the matter.[2] In restoring the highway the company may, if that be necessary and no private rights are invaded, change the location of the highway, or, slightly change its course, if that be necessary to make the highway reasonably safe for travel[3] and it has been held that the company may condemn property for the purpose of the necessary approaches and abutments to

souri, etc., R. Co. *v.* Long, 27 Kan. 684, 6 Am. & Eng. R. Cas. 254.

[1] People *v.* Chicago, etc., R. Co., 67 Ill. 118; Dyer County *v.* Railroad, 87 Tenn. 712; s. c. *sub nomine* Chesapeake, etc., R. Co. *v.* Dyer County, 38 Am. & Eng. R. Cas. 676; People *v.* Chicago, etc., R. Co., 67 Ill. 118.

[2] People *v.* Chicago, etc., R. Co., 67 Ill. 118; State *v.* St. Paul, etc. R. Co., 35 Minn. 131, 28 N. W. R. 3; Northern, etc., R. Co. *v.* City of Baltimore, 46 Md. 445; Louisville, etc., R. Co. *v.* State, 3 Head (Tenn.) 523; Pierce on Railroads, 245. In Palatka, etc., R. Co. *v.* State, 23 Fla. 546, 11 Am. St. R. 395, the court said: "Where the statute is silent, the common law applies, and a statute which expresses specifically no further exaction than a restoration of the highway to its former condition is not to be construed as abridging the common law duty of maintaining the crossing in such plight as to make it reasonably safe. Maltby *v.* Chicago, etc., Ry. Co. 52 Mich. 108." In Dyer County *v.* Railroad, 87 Tenn. 712; s. c. *sub nomine* Chesapeake, etc., R. Co. *v.* Dyer County, 38 Am. & Eng. R. Cas. 676, the court said: "It is a well-settled rule of the common law resting upon the most obvious consideration of fairness and justice, that, where a new highway is made across another one already in use, the crossing must not only be made with as little injury as possible to the old way, but whatever structures may be necessary to the convenience and safety of the crossing must be erected and maintained by the person or corporation constructing and using the new way."

[3] Clawson *v.* Chicago, etc., R. Co., 95 Ind. 152, s. c. 20 Am. & Eng. R. Cas. 56; Warren R. Co. *v.* State, 29 N. J. L. 353; Schermerhorn *v.* Mt. McGregor R. Co., 52 N. Y. S. R. 892; Township of North Manheim *v.* Reading, etc., R. Co., 18 Phila. (Pa.) 650; Davis *v.* County Commissioners, 153 Mass. 218, s. c. 26 N. E. R. 848. But we think the rule asserted by the authorities referred is to be carefully applied and that it can not on principle be extended. The public and private rights can not in such cases be sacrificed for the mere convenience of railroad companies. Much depends, it is obvious, upon the facts of the particular case and it is not easy to frame general rules that will justly apply to all cases.

the new crossing.[1] Whether the railway company has properly restored the highway is ordinarily a question for the jury.[2]

§ 1106. **Mandamus to compel restoration.**—Mandamus is the appropriate remedy to compel a railroad company to perform its duty to restore a highway over which it crosses to its former condition of usefulness.[3] It has also been held that a mandatory injunction may be granted in such a case.[4] But where the railroad company has a discretion or option as to the manner of crossing, if it properly exercises its discretion and constructs and maintains an adequate crossing, mandamus will not lie to compel it to construct the crossing in a different manner, nor, as a general rule in such a case, will the court determine which of two or more modes within the discretion of the company it shall adopt.[5] The railroad company, however, has no discretion as to whether it will or will not restore the highway, and if it "elects a manner that is not effectual, and the act remains substantially undone," it is still "under liability to do it." The discretion is a ministerial one, and "the act of restoration must be done." If the com-

[1] Clawson *v.* Chicago, etc., R. Co., 95 Ind. 152, s. c. 20 Am. & Eng. R. Cas. 56.

[2] Roberts *v.* Chicago, etc., R. Co., 35 Wis. 679.

[3] Cummins *v.* Evansville, etc., R. Co., 115 Ind. 417; Indianapolis, etc., R. Co. *v.* State, 37 Ind. 489; Clawson *v.* Chicago, etc., R. Co., 95 Ind. 152; State *v.* Hannibal, etc., R. Co., 86 Mo. 13; Pittsburgh, etc., R. Co. *v.* Commonwealth, 101 Pa. St. 583; City of Moundsville *v.* Ohio River, etc., R. Co., 37 W. Va. 92, s. c. 20 L. R. A. 161, 167, 168, citing Elliott on Roads and Streets, 33, 600; People *v.* Chicago, etc., R. Co., 67 Ill. 118; State *v.* Northeastern R. Co., 9 Rich. L. 247, s. c. 67 Am. Dec. 551; Boggs *v.* Chicago, etc., R. Co., 54 Iowa 435; State *v.* Missouri Pac. R. Co., 33 Kan. 176; Inhabitants of Cambridge *v.* Charlestown, etc., R. Co., 7 Met. (Mass.) 70; State *v.* Chicago, etc., R. Co., 29 Neb. 412, s. c. 45 N. W. R. 469, 2 Lewis' Am. R. & Corp. R. 664.

[4] City of Moundsville *v.* Ohio River R. Co., 37 W. Va. 92, s. c. 20 L. R. A. 161; Town of Jamestown *v.* Chicago, etc., R. Co., 69 Wis. 648; City of Oshkosh *v.* Milwaukee, etc., R. Co., 74 Wis. 534, s. c. 39 Am. & Eng. R. Cas. 681.

[5] King *v.* Bristol Dock Co., 6 Barn. & Cress. 181; Reg. *v.* South Eastern R. Co., 4 H. L. Cas. 471, affirmed in Southeastern Ry. Co. *v.* Reg., 17 Q. B. 485; People *v.* New York, etc., R. Co., 74 N. Y. 302. See, also, Illinois Cent. R. Co. *v.* Chicago, 141 Ill. 586, s. c. 30 N. E. R., 1044; Village of Jamaica *v.* Long Island R. Co., 21 N. Y. Supp. 327.

pany has adopted an ineffectual mode, "the court will and should point out to it in what it has failed, and direct it particularly what it must do so as not to fail again."[1]

§ 1107. Approaches, embankments and other structures.— We have seen that there is a general duty resting upon railway companies to restore all highways crossed by their lines to a reasonably safe condition for travel, and, as near to their former condition as can practically be done. Where the railway crosses the highway at a different grade, and even where the crossing is exactly at the same grade, the highway is, however, always disturbed to a greater or less degree. Some change in the highway is always necessary, and as a rule the greater the difference in the grades of the highway and the railway, the greater the change required. At every crossing something must be done to make the highway safe for travel, and the duty, as a rule, rests upon the railway company to make such changes and to erect such structures as will make the highway safe for use. The railway company must erect and maintain such structures as are reasonably necessary to enable the traveler to get on, over and off the crossing in safety. Proper approaches and embankments necessary to enable a traveler to reach and leave the crossing are a part of the crossing and the railway company must construct and maintain them.[2] The embankments are to be constructed and maintained for only such a distance from the crossing as is reasonably necessary to enable the traveler to reach or pass the crossing,[3] by the exercise of ordinary care with reasonable convenience and safety. Approaches and embankments need not as a rule be constructed over the entire width of the highway. The company has performed its duty when it has constructed approaches and embankments for the width of the portion of the highway available and actually in use.[4] An ad-

[1] People *v.* Dutchess, etc., R. Co., 58 N.Y. 152, approved in City of Moundsville *v.* Ohio River R. Co., 37 W. Va. 92, s. c. 20 L. R. A. 161, 166; State *v.* Minneapolis, etc., R. Co., 39 Minn. 219, s. c. 35 Am. & Eng. R. Cas. 250, 39 N. W. R. 153.

[2] *Ante*, § 1097.

[3] *Ante*, § 1097.

[4] Appeal of Township of North Man-

ditional use of the highway for an increased width will, however, necessitate an increased width in the approaches and embankments.[1] And where the construction of the railway causes a cut or fill in the highway so as to make it dangerous for travelers unless protected, it will be the duty of the company to erect proper guards or barriers to prevent travelers from falling into the cut or off the embankment.[2] Barriers are regarded as a reasonable part of a necessary restoration of the highway to a safe condition for travel. Where the railway crosses the highway through a deep cut, the company may be required to make the highway safe by building a bridge over the railway track.[3] It is impossible to lay down any rule defining just what kind of structures shall be used in any particular case. Each particular crossing presents different conditions, but the general rule governing all is the same, and that rule is that the company must erect whatever structures are reasonably necessary to the safety and convenience of the travelers using the crossing.[4]

heim (Pa.), 22 W. N. C. 149, 14 Atl. R. 137, s. c. 36 Am. & Eng. R. Cas. 194; Queen *v.* Rigby, 14 Q. B. 687, 14 Jur. 329. See Queen *v.* Birmingham, etc., R. Co., 2 Q. B. 47, 2 Eng. Ry. & Canal Cas. 694; Moggy *v.* Canadian Pac. R. Co., 3 Manitoba 209.

[1] Queen *v.* Rigby, 14 Q. B. 687, 6 Eng. Ry. & Canal Cas. 479, 14 Jur. 329. The rule stated in the text is, however, a general one, and we suppose that railroad companies must adapt their crossings to the reasonable requirements of the public, and to a reasonable extent conform to the necessities created by the growth and improvement of the country. *Ante*, § 671; *post*, § 1112.

[2] Township of Aston *v.* McClure, 102 Pa. St. 323; Inhabitants of Veazie *v.* Penobscot Railway Co., 49 Me. 119; Atlanta, etc., R. Co. *v.* Wood, 48 Ga. 565; Oliver *v.* North Eastern Railroad Co., L. R. 9 Q. B. 409; Wharton on Negligence, § 819; Pittsburg, etc., R. Co. *v.* Moses, (Pa.) 2 Atl. R. 188, 24 Am. & Eng. R. Cas. 295.

[3] Dyer Co. *v.* Railroad, 87 Tenn. 712; s. c. *sub nomine* Chesapeake, etc., R. Co. *v.* Dyer County, 38 Am. & Eng. R. Cas. 676.

[4] Elliott on Roads and Streets, 599; City of Kansas *v.* Kansas City, etc., R.. Co., 102 Mo. 633, s. c. 47 Am. & Eng. R. Cas. 157; Dyer County *v.* Railroad, 87 Tenn. 712; s. c. *sub nomine* Chesapeake, etc., R. Co. *v.* Dyer County, 38 Am. & Eng. R. Cas. 676. Mr. Pierce says: "The laying of a railroad across highways often requires excavations and erections, and a greater or less change in the surface. The duty, however, to restore the highway as far as may be to its former condition, and to erect and maintain structures necessary for such restoration, is presumed to be incumbent on the company, even without any express requirement imposed by statute." Pierce on Railroads, 245.

§ 1108. **Grade crossings.**—Where a railway company has the right to construct its track across public highways and there is no statute prescribing how the crossing shall be made the company may exercise its discretion as to the manner in which the crossing shall be constructed.[1] As a rule railway lines are constructed so as to conform in a great degree to the surface of the ground over which they pass and where the country through which a railroad passes is comparatively level nearly all crossings will be found to be grade crossings. Unless there be a statute forbidding grade crossings the railway company may so construct its line as to cross the highway on the same level.[2] Grade crossings are as a rule more dangerous than crossings above or below grade and the company is held to the exercise of a greater degree of care in the operation of its trains at such crossings than at those where the highway is on a different level. Statutes conferring upon railway companies the right to cross highways with their tracks usually provide that the crossings shall be constructed in such a manner as to be safe for travel and if the company fails to construct them in the manner prescribed by the statute it will be liable for maintaining a nuisance.[3] The company may, to a reasonable degree, change the grade or surface of the highway provided the same be kept in good repair and safe for travel.[4]

§ 1109. **Crossings above grade.**—The modern policy in reference to the construction of railways over highways is to avoid grade crossings wherever it is possible to do so.[5] It is a

[1] Illinois, etc., R. Co. *v.* Bentley, 64 Ill. 438.

[2] Morris *v.* Chicago, etc., R. Co., 26 Fed. R. 22. See Connecticut, etc., R. Co. *v.* Town of St. Johnsbury, 59 Vt. 320, 10 Atl. R. 573.

[3] Commonwealth *v.* Erie, etc., R. Co., 27 Pa. St. 339; Wasmer *v.* Delaware, etc., R. Co., 80 N. Y. 212; People *v.* New York Central, etc., R. Co., 74 N. Y. 302, Evansville, etc., R. Co. *v.* Crist, 116 Ind. 446.

[4] Davis *v.* Chicago, etc., R. Co., 46 Iowa 389; Commonwealth *v.* Hartford, etc., R. Co., 14 Gray 379.

[5] In Doolittle *v.* Braford, 59 Conn. 402, s. c. 49 Am. & Eng. R. Cas. 279, it was said: "In the light of these reiterated expressions of the legislative will, it is undeniable that it has become the settled policy of the legislature to abolish grade crossings. This policy has been recognized and seconded by the courts in numerous cases. Town of Suffield *v.* New Haven, etc., Co., 53 Conn. 367; Woodruff *v.*

valid exercise of the police power for the legislature to require railway companies to construct crossings other than at grade. And the legislature may even compel the company, after the construction of its line, to change grade crossings so as to make the track pass above or below the highway.[1] An act of the kind just referred to is a valid exercise of the police power, and is constitutional.[2] Where the street is constructed by the municipality after the railway has been built, the municipal officers have the right to determine whether the street shall be carried over or under the railway tracks.[3] And where the railway is constructed across a highway, and the crossing must be above or below grade, the company may choose for itself which crossing shall be constructed, and where it exercises an election in good faith it is not subject to review.[4] Where the company constructs its track over the highway above grade it must not obstruct the highway by piers, abutments, or the like, but must restore it to safe condition for use; and it has been held that at such a crossing the company must bridge the entire width of the highway,[5] unless the highway be such that only a small portion is used for actual travel, when the abutments to support the railway may encroach upon the highway.[6] The crossing must be so constructed that parts of the

Catlin, 54 Conn. 277; New York, etc., R. Co. *v.* City of Waterbury, 55 Conn. 19; Town of Westbrook's Appeal, 57 Conn. 95, 37 Am. & Eng. R. Cas. 446; Town of Fairfield's Appeal, 57 Conn. 167, 39 Am. & Eng. R. Cas. 689."

[1] *Ante*, § 671; New York, etc., R. Company's Appeal, 62 Conn. 527; New York, etc., R. Co. *v.* Town of Bristol, (Conn.) 55 Am. & Eng. R. Cas. 38, affirmed 151 U. S. 556, s. c. 60 Am. & Eng. R. Cas. 577, 14 Sup. Ct. R. 437; *In re* Mayor of City of Northampton, 158 Mass. 299, 55 Am. & Eng. R. Cas. 31; City of Waterbury's Appeal, 57 Conn. 84, 17 Atl. R. 355.

[2] See authorities in last preceding note; Pennsylvania R. Co. *v.* Braddock, etc., R. Co., 152 Pa. St. 116, 25 Atl. R. 780.

[3] Illinois Central R. Co. *v.* City of Chicago, 141 Ill. 586, s. c. 30 N. E. R. 1044, 51 Am. & Eng. R. Cas. 528; Smith *v.* New Haven, 59 Conn. 203, 22 Atl. R. 146.

[4] People *v.* New York, etc., R. Co., 74 N. Y. 302. See Regina *v.* South Eastern R. Co., 6 Eng. L. & Eq. 214.

[5] Inhabitants of Township of Raritan *v.* Port Reading, etc., R. Co., 49 N. J. Eq. 11, s. c. 50 Am. & Eng. R. Cas. 169; Town of Windsor *v.* President, etc., of Delaware, etc., Co., 36 N. Y. S. 863. See Jones *v.* Erie, etc., R. Co., 169 Pa. St. 333, 32 Atl. R. 535.

[6] Inhabitants of Township of Raritan *v.* Port Reading, etc., R. Co., 49

crossing or material connected with the crossing will not fall and injure persons passing along the highway under the railroad.[1]

§ 1110. **Crossings below grade.**—Of the crossings above and below grade by far the greater number are below grade. Owing to the great weight of railway trains as compared with the weight of vehicles using the highway, it is as a rule much cheaper and safer to construct the crossing so that the highway passes above and over the railway track. We have already seen that where the highway is carried over the track it is the duty of the company to construct a proper bridge and proper approaches and barriers thereto.[2] A company is under no obligation to construct a tunnel for its road under a highway, where the tunnel is such that it would be flooded at intervals, and be an interference with travel on the company's trains.[3] Where the company constructs its track below the grade of the highway and carries the highway across its track by an overhead bridge, it is only bound to construct such a bridge as will meet the demands of ordinary travel.[4] Where a railway company has constructed its tracks at grade and the use of the street afterward becomes so great as to require an overhead crossing as a matter of public safety the railroad company may be compelled to construct an overhead crossing at its own expense.[5]

§ 1111. **Mandamus to compel construction of viaducts.**—Where it is the duty of a railroad company to construct a viaduct or bridge over its tracks, it may be compelled to do so by mandamus.[6] This duty may exist and be enforced by manda-

N. J. Eq. 11, s. c. 50 Am. & Eng. R. Cas. 169.

[1] Kearney *v.* London, etc., R. Co., L. R. 5 Q. B. 411.

[2] *Ante*, § 1107.

[3] Kyne *v.* Wilmington, etc., R. Co., 8 Hous. (Del.) 185, 14 Atl. R. 922.

[4] The company is not required to maintain a bridge of sufficient strength to support the weight of heavy electric cars. People *v.* Adams, 34 N. Y. S. 579, 88 Hun 122.

[5] People *v.* Union Pacific, etc., R. Co., 20 Colo. 186, 37 Pac. R. 610.

[6] People *v.* Chicago, etc., R. Co., 67 Ill. 118; State *v.* Missouri Pac. R. Co., 33 Kan. 176; Boggs *v.* Chicago, etc., R. Co., 54 Iowa 435; State *v.* Savannah,

mus even though there is no express provision in the charter or statute, in regard to the erection of bridges or viaducts. It may arise out of, or be embraced in the duty to restore and keep the highway in repair. Thus, in a leading case, it appeared that the railroad company's charter empowered the company to lay its track across any public highway or street, if necessary, on condition that it should put such highway or street "in such condition or state of repair, as not to impair or interfere with its free and proper use." It was held that this was a continuing duty, and that, although the crossing might have been adequate when constructed, yet, if by reason of the increase of the business of the railroad, or of the travel upon the street the crossing became dangerous or obstructed such travel, the railway company was bound to provide some other mode of crossing; and as it appeared that the only safe and convenient mode was to carry the street by viaduct under the tracks, it was further held that mandamus would lie to compel the railway company to construct such viaduct, including the abutments and approaches, as well as the bridge for its tracks.[1] So, where a petition for mandamus to compel certain railroad companies to erect a bridge across their tracks showed that the street at that point was crossed by more than twenty tracks, on which trains were continually running; that it was in a populous part of the city; that there were only four streets of which the street in question was one, connecting a part of the city on one side of the tracks, consisting of over twenty

etc., R. Co., 26 Ga. 665; *In re* Trenton, etc., Co., 20 N. J. L. 659; State *v.* Minneapolis, etc., R. Co., 39 Minn. 219, s. c. 39 N. W. R. 153, 35 Am. & Eng. R. Cas. 250. See State *v.* New Haven, etc., Co., 45 Conn. 331, 348.

[1] State *v.* St. Paul, etc., R. Co., 35 Minn. 131, s. c. 59 Am. R. 313, 28 N. W. R. 3; State *v.* Minneapolis, etc., R. Co., 39 Minn. 219, s. c. 35 Am. & Eng. R. Cas. 250; Elliott on Roads and Streets, 660. To the same effect are Cooke *v.* Boston, etc., R. Co., 133 Mass. 185, s. c. 10 Am. & Eng. R. Cas. 328; English *v.* New Haven, etc., R. Co., 32 Conn. 240; Town of Johnston *v.* Providence, etc., 10 R. I. 365; Manley *v.* St. Helens, etc., R. Co., 2 Hurl. & N. 840; Maltby *v.* Chicago, etc., Railway Co., 52 Mich. 108, s. c. 17 N. W. R. 717. See, also, New York, etc., R. Co. *v.* State, 50 N. J. L. 303, s. c. 32 Am. & Eng. R. Cas. 186; City of Newton *v.* Chicago, etc., R. Co., 66 Iowa 422, s. c. 23 Am. & Eng. R. Cas. 298.

thousand inhabitants with the part on the other side, consisting of much a larger number of inhabitants, and that the nearest of the other three streets was several blocks away, it was held that necessity for the construction of a bridge clearly appeared.[1] But it has been held that a railroad company, at least where it erects a bridge at the crossing of a county road, can not be compelled to construct and maintain it so as to meet the needs of an electric street railway company.[2]

§ 1112. **Keeping crossing in repair.**—The duty of a railroad company in regard to the restoration and repair of highway crossings is not fully performed and ended by the mere restoration of the highway or the construction of a proper crossing in the first instance. It should keep the crossing in reasonably safe condition and repair, with reference both to the use of the same for its own purposes and for ordinary travel upon the highway. Indeed, as to passengers upon its trains it may owe a still higher duty. This duty to keep the crossing in repair is a continuing duty,[3] which rests not only upon the original company, but also upon its successors in the ownership and possession of the road.[4] We have already considered this general subject,[5] and will treat of the liability of the company for injuries to travelers upon the highway by reason of the failure

[1] People *v.* Union Pac. R. Co., 20 Colo. 186, 37 Pac. 610, s. c. 10 Lewis' Am. R. & Corp. R. 371.

[2] Conshohocken R. Co. *v.* Pennsylvania R. Co., 15 Pa. Co. Ct. R. 445; People *v.* Adams, 88 Hun (N. Y.) 122.

[3] Wellcome *v.* Leeds, 51 Me. 313; Chicago, etc., R. Co. *v.* Moffitt, 75 Ill. 524; People *v.* New York, etc., R. Co., 74 N. Y. 302; Town of Windsor *v.* President, etc., 36 N. Y. Supp. 863; Hatch *v.* Syracuse, etc., R. Co., 50 Hun (N. Y.) 64; Town of Roxbury *v.* Central Vermont R. Co., 60 Vt. 121, s. c. 14 Atl. R. 92; Pennsylvania, etc., R. Co. *v.* Frund, 4 Ind. App. 469, s. c. 30 N. E. R. 1116; Paducah, etc., R. Co. *v.* Commonwealth, 80 Ky. 147, s. c. 10 Am. & Eng. R. Cas. 318; State *v.* Hannibal, etc., R. Co., 86 Mo. 13, s. c. 29 Am. & Eng. R. Cas. 604.

[4] Wasmer *v.* Delaware, etc., R. Co., 80 N. Y. 212; People *v.* Chicago, etc., R. Co., 67 Ill. 118; Little Miami, etc., R. Co. *v.* Commissioners, 31 Ohio St. 338; Dyer County *v.* Chesapeake, etc., R. Co., 87 Tenn. 712, s. c. 11 S. W. R. 943. As to when the duty begins, see Buchner *v.* Chicago, etc., R. Co., 60 Wis. 264; Pittsburgh, etc., R. Co. *v.* Commonwealth, 101 Pa. St. 192; City of Chester *v.* Baltimore, etc., R. Co., 140 Pa. St. 275, s. c. 21 Atl. R. 320.

[5] *Ante*, §§ 1092, 1102, 1105.

to perform this duty, in a subsequent chapter.[1] It may be well, however, to state in this connection that the obligation to maintain and keep the crossing in repair usually extends only to lawful highways,[2] but if the company has constructed a crossing, and invited or induced people to use it as a public crossing, the duty rests upon the company to use reasonable care to keep it in repair, and it has even been held that this is so where it has merely licensed or acquiesced in the use of a crossing by the public, although it is not in a public road or street.[3] It seems to us that this doctrine is, at best, questionable, and that, in the absence of some governing statute, it should not be extended to private crossings or those which are used only occasionally by certain members of the public without anything in the form of an invitation express or implied.[4] Whether the company has so constructed and maintained a crossing as to make it reasonably safe and convenient, is usually a question for the jury to determine.[5]

§ 1113. **Rights of abutters.**—We have already considered the rights and remedies of abutters where a railroad is constructed along a street[6] and where viaducts and bridges are built at crossings.[7] We will here consider the rights of abutters at ordinary crossings. The erection and maintenance of

[1] *Post*, Chap. XLVI.

[2] International, etc., R. Co. *v.* Jordan, (Tex.) 10 Am. & Eng. R. Cas. 301; Missouri, etc., R. Co. *v.* Long, 27 Kan. 684; Flint, etc., R. Co. *v.* Willey, 47 Mich. 88. Duty to restore exists where town is platted and street dedicated. City of Racine *v.* Chicago, etc., R. Co. (Wis.), 65 N. W. R. 857.

[3] See Kelly *v.* Southern, etc., R. Co., 28 Minn. 98, s. c. 9 N. W. R. 588, 6 Am. & Eng. R. Cas. 264, distinguished in Missouri, etc., R. Co. *v.* Long, 27 Kan. 684, s. c. 6 Am. & Eng. R. Cas. 254, and compare Missouri Pac. R. Co. *v.* Bridges, 74 Tex. 520, s. c. 15 Am. St. R. 856; Cross *v.* Lake Shore, etc., R. Co., 69 Mich. 363; Hanks *v.* Boston, etc., R. Co., 147 Mass. 495.

[4] See Gurley *v.* Missouri Pac. R. Co., 104 Mo. 211, s. c. 16 S. W. R. 11; Redigan *v.* Boston, etc., R. Co., 155 Mass. 44, s. c. 28 N. E. R. 1133, 14 L. R. A. 276; Wright *v.* Boston, etc., R. Co., 142 Mass. 296, s. c. 7 N. E. R. 866; Louisville, etc., R. Co. *v.* Miller, 12 Ind. App. 414, s. c. 40 N. E. R. 539; Breneman *v.* Burlington, etc., R. Co. (Iowa), 60 N. W. R. 176.

[5] Roberts *v.* Chicago, etc., R. Co., 35 Wis. 679. See Galveston, etc., R. Co. *v.* Matula, 79 Tex. 577, s. c. 15 S. W. R. 573.

[6] *Ante*, §§ 1085, 1090.

[7] *Ante*, § 1091.

gates in a street at the crossing, in compliance with a valid ordinance for the safety of the public, is not a taking for which the abutting owners are entitled to compensation.[1] Nor is a railroad company which crosses a highway, under due authority, on a level, without change of grade, liable to the abutters for damages on account of mere inconveniences, such as stoppages or the like, incident to such crossing.[2] In the absence of any constitutional or statutory provision requiring compensation for change of grade or consequential damages it has been held that a railroad company is not liable on account of a mere change of grade, rendered necessary by the construction of its road across a highway in the authorized manner,[3] and this rule has been applied in some cases where it constructed embankments or viaducts, although there is much conflict among the authorities upon the subject.[4] Indeed, it has been said in general terms that "a railroad can not be laid across a highway without compensation to the owner of the fee."[5] This is a different question, however, from the question of liability for change of grade, for if the construction of a railroad track across a highway is an additional burden and

[1] Trustees *v.* Milwaukee, etc., R. Co., 77 Wis. 158, s. c. 45 N. W. R. 1086.

[2] Wood *v.* Stourbridge R. Co., 16 C. B. N. S. 222; Caledonia R. Co. *v.* Ogilvy, 2 Macq. H. L. Cas. 229; Morgan *v.* Des Moines, etc., R. Co., 64 Iowa 589, s. c. 52 Am. R. 462, 20 Am. Eng. R. Cas. 67. See also Morris, etc., R. Co. *v.* Newark, 10 N. J. Eq. 352.

[3] Whittier *v.* Portland, etc., R. Co., 38 Me. 26; Wead *v.* St. Johnsbury, etc., R. Co., 64 Vt. 52, s. c. 24 Atl. R. 361; Slatten *v.* Des Moines, etc., R. Co., 29 Iowa 148; Rauenstein *v.* New York, etc., R. Co., 136 N. Y. 528; Uline *v.* New York, etc., R. Co., 101 N. Y. 98; Newport, etc., R. Co. *v.* Foote, 9 Bush (Ky.) 264; Robinson *v.* Great Northern, etc., R. Co., 48 Minn. 445; Conklin *v.* New York, etc., R. Co., 102 N. Y. 107.

[4] See *ante*, § 1091; Buchner *v.* Chicago, etc., R. Co., 60 Wis. 264, s. c. 14 Am. & Eng. R. Cas. 447; Shealy *v.* Chicago, etc., R. Co., 72 Wis. 471; Alabama, etc., R. Co. *v.* Williams, 92 Ala. 277; Nicks *v.* Chicago, etc., R. Co., 84 Iowa 27, s. c. 50 N. W. R. 222; Burritt *v.* New Haven, etc., R. Co., 42 Conn. 174; Indianapolis, etc., R. Co. *v.* Smith, 52 Ind. 428.

[5] Lewis' Em. Dom., § 118, citing Trustees *v.* Auburn, etc., R. Co., 3 Hill 567; Starr *v.* Camden, etc., R. Co., 24 N. J. L. 592. But where the railroad company owns its right of way in fee on each side of the street, the adjoining land-owners are not strictly abutters upon that portion of the street crossed by the railroad.

there are any abutters who are entitled to compensation it may still be true that damages occasioned by a change of grade are not an element of such compensation, and, on the other hand, damages might be recovered for a change of grade, as for instance, where the constitution or statute so provides, even if there could be no recovery on account of the construction of a crossing without change of grade. We have elsewhere treated so fully of the rights and remedies of abutters where their easement of access or light and air is destroyed and where they are especially injured by the unlawful or negligent acts of the railroad company that nothing further need be said in this connection.

§1114. **Gates, watchmen and signals at crossings.**—Under its police power, a state or municipality may require railroad companys to keep gates or flagmen at highway crossings, or to give signals, at or near such places by ringing a bell or blowing a whistle.[1] The failure to comply with such a police regulation is considered *prima facie* evidence of negligence in some jurisdictions and negligence *per se* in others, but in either case it must be a proximate cause of the injury in order to render the company liable, and even where it is said to be negligence *per se* it is not, as we understand it, conclusive evidence of actionable negligence in the sense that it may not be open to explanation and excuse. On the other hand, it may be the duty of the company to do more than to merely comply with the statute in order to escape liability, and, even where no such statute or regulation exists, the failure to give signals or to otherwise exercise reasonable care, under the circumstances, may constitute negligence for which the company will be liable to a traveler who is injured thereby while exercising reason-

[1] *Ante*, §§ 668, 721, 724; Kaminitzky *v.* Northeastern R. Co., 25 S. Car. 53; Pittsburgh, etc., R. Co. *v.* Brown, 67 Ind. 45; Illinois, etc., R. Co. *v.* Slater, 129 Ill. 91, s. c. 21 N. E. R. 575; State *v.* East Orange, 41 N. J. L. 127; People *v.* Boston, etc., R. Co., 70 N. Y. 569. The New York statute authorizing the court, or judge on application of the local authorities, to order a flagman to be stationed, or gates to be erected, at such crossings is held to be constitutional. People *v.* Long Island R. Co., 134 N. Y. 506, s. c. 31 N. E. R. 873.

able care on his part.[1] It is frequently provided by statute that sign-boards shall be erected at crossings, and the failure to comply with the statute is evidence of negligence,[2] but is not necessarily conclusive of the liability of the company, for it may not be a proximate cause of the injury,[3] or the plaintiff may be guilty of such contributory negligence as will defeat him. Thus, it has been held that the failure to erect a sign-board in compliance with the statute is not, of itself sufficient to justify a recovery by one who is familiar with the crossing,[4] or, by the exercise of ordinary care, ought to have discovered it in time without any sign-board,[5] and, in the absence of any statute upon the subject, it has been held that it is for the jury to say whether reasonable care required the erection of such a board at the particular crossing in question, and whether its absence was a proximate cause of the injury.[6]

[1] See Chicago, etc., R. Co. *v.* Dillon, 123 Ill. 570, s. c. 15 N. E. R. 181; Gates *v.* Burlington, etc., R. Co., 39 Iowa 45; Pennsylvania Co. *v.* Krick, 47 Ind. 368; Winstanley *v.* Chicago, etc., R. Co., 72 Wis. 375, s. c. 39 N. W. R. 856; Loucks *v.* Chicago, etc., R. Co., 31 Minn. 526, s. c. 18 N. W. R. 651; Hinkle *v.* Richmond, etc., R. Co., 109 N. Car. 472, s. c. 13 S. E. R. 884; Lapsley *v.* Union Pac. R. Co., 50 Fed. R. 172; Vandewater *v.* New York, etc., R. Co., 135 N. Y. 583, s. c. 32 N. E. R. 636; Chicago, etc., R. Co. *v.* Netolicky, 67 Fed. R. 665; Atchison, etc., R. Co. *v.* Hague, 54 Kan. 284, s. c. 38 Pac. 257; note in 45 Am. St. R. 278; Grand Trunk R. Co. *v.* Ives, 144 U. S. 408, s. c. 12 Sup. Ct. R. 679; Linfield *v.* Old Colony R. Co., 10 Cush. (Mass.) 562, s. c. 57 Am. Dec. 124, and note; *post*, §§ 1157, 1158. But see New York, etc., R. Co. *v.* Hackett (N. J.), 32 Atl. R. 265.

[2] Dodge *v.* Burlington, etc., R. Co., 34 Iowa 276; Lang *v.* Holiday, etc., R. Co., 49 Iowa 469; Denver, etc., R. Co. *v.* Robbins, 2 Colo. App. 313.

[3] Field *v.* Chicago, etc., R. Co., 14 Fed. R. 332, s. c. 8 Am. & Eng. R. Cas. 425. See, also, Denver, etc., R. Co. *v.* Robbins, 2 Colo. App. 313; Jennings *v.* St. Louis, etc., R. Co., 99 Mo. 394, s. c. 11 S. W. R. 999; East Tennessee, etc., R. Co. *v.* Feathers, 10 Lea (Tenn.) 103, s. c. 15 Am. & Eng. R. Cas. 446. But compare Beisiegel *v.* New York, etc., R. Co., 34 N. Y. 622; O'Mara *v.* Hudson River, etc., R. Co., 38 N. Y. 445.

[4] Haas *v.* Grand Rapids, etc., R. Co., 47 Mich. 401, s. c. 8 Am. & Eng. R. Cas. 268.

[5] Gulf, etc., R. Co. *v.* Greenlee, 62 Tex. 344, s. c. 23 Am. & Eng. R. 322; Payne *v.* Chicago, etc., R. Co., 39 Iowa 523, s. c. 44 Iowa 236.

[6] Shaber *v.* St. Paul, etc., R. Co., 28 Minn. 103, s. c. 2 Am. & Eng. R. Cas. 185; Heddles *v.* Chicago, etc., R. Co., 77 Wis. 228, s. c. 46 N. W. R. 115; Baltimore, etc., R. Co. *v.* Whitacre, 35 Ohio St. 627; Elkins *v.* Boston, etc., R. Co., 115 Mass. 190.

§ 1115. **Accidents and injuries at crossings.**—The subject of injuries at crossings and the relative rights and duties of the company and of travelers, will be treated in a subsequent chapter. The company is liable to a traveler upon the highway who is injured by a collision with its train at a crossing on account of its negligence, where he is not guilty of contributory negligence, and is also liable for willfully injuring him, notwithstanding he may be guilty of contributory negligence, or where the exercise of reasonable care upon its part would have prevented the injury after it discovered, or ought to have discovered, his danger and inability to take care of himself. So, it is generally liable where a traveler, without contributory negligence, is injured by defects in the track or crossing which it was the duty of the company to keep in repair.[1]

[1] *Post*, Chap. XLVI.

CHAPTER XLIV.

CROSSING OF RAILROADS BY RAILROADS.

§ 1116. Right of one railroad to cross another.
1117. Crossings secured by agreement of companies.
1118. Enforcing agreement as to crossing.
1119. Crossings secured under statutory authority.
1120. Location of crossing.
1121. Franchise must not be impaired.
1122. Crossings at grade.
1123. Crossings above or below grade.
1124. Number of crossings.
1125. Enjoining construction of crossings.
§ 1126. Compensation—Taking property.
1127. Damages—Elements of.
1128. Expense of constructing crossings.
1129. Watchmen and flagmen at crossings.
1130. Stopping at crossings—Duty imposed by contract.
1131. Stopping at crossings—Duty imposed by statute.
1132. Collisions at crossings.
1133. Priority of passage.
1134. Maintenance and repair of crossings.
1135. Street railway crossings of steam railroads.

§ 1116. **Right of one railroad to cross another.**—The general rule is that every railway company acquires its franchises, rights and privileges upon condition that its tracks may be crossed by the tracks of other railway companies. Rights of way are acquired subject to the right of the public to have other roads, and whenever it is necessary for one railway company in the construction of its line to cross the right of way of another company, the right to cross that company's line, subject to certain conditions hereafter referred to, always exists.[1]

[1] Buffalo, etc., R. Co. *v.* New York, etc., R. Co., 25 N. Y. S. 155, 72 Hun 587; Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 30 Ohio St. 604, 16 Am. Ry. R. 291; 6 Am. & Eng. Encyc. Law, p. 537; Newcastle, etc., R. Co. *v.* Peru, etc., R. Co., 3 Ind. 464; St. Louis, etc., R. Co. *v.* Springfield, etc., R. Co., 96 Ill. 274; Grand Rapids, etc., R. Co. *v.* Grand Rapids, etc., R. Co., 35 Mich. 265; Matter of Boston, etc., R. Co., 79 N. Y. 64; South Carolina, etc., R. Co. *v.* Columbia, etc., R. Co., 13 Rich. Eq. (S. Car.) 339; Morris, etc., R. Co. *v.* Central, etc., R. Co., 31 N. J. L. 205; St. Louis,

This right is based on public interest and necessity. The rights of the public are superior to the interests of any particular railroad company, and the public have a right to demand the construction of railroads across the lines of other railway companies so long as the rights of the companies crossed are not materially and unlawfully impaired. The right which any particular company acquires to its line and right of way is not, in this sense, exclusive; it is taken subject to the exercise of the right of eminent domain in favor of the public or public corporations.[1] And the fact that a proposed crossing may inconvenience the company whose line is crossed is no excuse

etc., R. Co. *v.* St. Louis, etc., R. Co., 111 Mo. 666, 55 Am. & Eng. R. Cas. 17; Jersey City, etc., R. Co. *v.* Central, etc., R. Co., 48 N. J. Eq. 379, 49 Am. & Eng. R. Cas. 256; Central, etc., R. Co. *v.* Woodstock R. Co., 50 Vt. 452; Western Penn. R. Co.'s Appeal, 99 Pa. St. 155; Fitchburg R. Co. *v.* New Haven, etc., R. Co., 134 Mass. 547. "The right of one railroad to cross another which is intersected by its route, is so plainly essential to its construction for any considerable distance that it has become indisputably established by implication from mere authority to build a railroad between given points." National Docks, etc., Ry. Co. *v.* State, 53 N. J. L. 217, 4 Lewis' Am. R. R. Corp. R. 560, 47 Am. & Eng. R. Cas. 87, citing Morris, etc., R. Co. *v.* Central R. Co., 31 N. J. Law 205; State *v.* Easton, etc., R. Co., 36 N. J. Law 182; New Jersey, etc., R. Co. *v.* Long Branch Commissioners, 39 N. J. Law 28; State *v.* Drummond, 46 N. J. L. 644. "There is no doubt as to the right of one railroad company, upon the payment of compensation, to construct its road across that of another road already in existence, but the terms and conditions upon which it can be done are such as the law prescribes." Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 116 Ind. 578.

[1] The rule is very clearly expressed in the recent case of Kansas City, etc., R. Co. *v.* Kansas City, etc., R. Co., 118 Mo. 599, 57 Am. & Eng. R. Cas. 624, in the following language: "The rights of defendants in building their road, and the acquisition of their right of way and switch grounds, were by no means exclusive. They accepted their charter and franchises, and own and use their tracks, subject to the power of the state to authorize the construction of other railroads across their tracks, whenever the public welfare may require. Neither priority in the date of one charter over another, nor the prior location or construction of the one road over the other, affects this right." The court cited the following cases: Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 30 Ohio St. 604; East St. Louis, etc., Ry. Co. *v.* East St. Louis, etc., Ry. Co., 108 Ill. 265, 17 Am. & Eng. R. Cas. 163; Lake Shore, etc., R. Co. *v.* Chicago, etc., R. Co., 97 Ill. 506, 2 Am. & Eng. R. Cas. 440; Kansas City, etc., R. Co. *v.* St. Joseph, etc., R. Co., 97 Mo. 457; City of Hannibal *v.* Hannibal, etc., R. Co., 49 Mo. 480.

for not granting the crossing.[1] The right of one railway company to cross the right of way of another company does not necessarily depend on express authority contained in the charter of the company seeking the crossing; it may exist, although no such express power is given in its charter.[2] But where a company was given power by its charter to cross all railroads laid or to be laid on a certain street, it was held that an unlimited right to cross was not conferred, but only such as would enable the company to build along the street; and that if the track could be built along the street without crossing the tracks of other companies, the company seeking the crossings would be permanently enjoined from attempting to cross.[3] The right to cross exists in cases where the line sought to be crossed was acquired by purchase the same as in cases where it was acquired by the right of eminent domain, and property devoted to a railroad use is entitled to the same protection against an impairment of that use, whether acquired by purchase or by the right of eminent domain.[4] The question as to whether or not a railway company is entitled to invoke the exercise of the right of eminent domain in its favor or to have the right of eminent domain exercised in the matter of railway crossings, is not conclusively determined by the fact that the road may have been organized for private

[1] Butte, etc., R. Co. *v.* Montana, etc., R. Co. 16 Mont. 504, 41 Pac. R. 248, where it was said: "That railroad crossings are inconvenient, particularly where they are on grade, and frequent, is indisputable. But the law in regarding railroads as public necessities has not extended its generous privileges to them altogether without some possible attending inconveniences. Among the latter are lawful crossings, intersections, and connections of a rival company legally competing for the transportation of freight."

[2] Morris, etc., R. Co. *v.* Central, etc., R. Co., 31 N. J. L. 205. The right to construct a railroad between certain *termini* carries with it, by necessary implication, the right to cross other railway tracks between those *termini*. Perry County, etc., R. Co. *v.* Newport, etc., R. Co., 150 Pa. St. 193, 24 Atl. R. 709.

[3] Market Street, etc., R. Co. *v.* Union, etc., R. Co., 10 Phila. (Pa.) 43. But we suppose that under the settled rule that a railroad company acting in good faith may choose its own location, it may cross an existing road at such places and as often as it may be necessary to enable it to discharge its duty to the public.

[4] See *In re* Providence, etc., R. Co., 17 R. I. 324, 21 Atl. R. 965.

purposes. The true test is whether or not the road is one that the public have a right to use and enjoy. If the road is such a one it may successfully invoke the aid of the right of eminent domain to secure a crossing over the tracks of another road.[1]

§ 1117. **Crossings secured by agreement of companies.**—The right of one railway company to cross the track of another may be acquired in either one of two ways, that is, by contract between the companies, or under the provisions of statutes, authorizing the condemnation of such crossings.[2] In this section we propose to discuss the question of crossings secured by agreement of the companies. Crossings secured under statutory authority will be discussed in a subsequent section.[3] Railroad companies being free to contract in reference to the matters concerning the purposes for which they are organized and matters connected with their legitimate business, it follows that they may properly and lawfully contract with each other in reference to crossing each other's tracks and lines. Courts look with favor upon contracts by which two railway companies mutually agree upon the place, manner, compensation, and other matters connected with a crossing of their lines.[4] Indeed, it is expressly provided in many of the statutes giving one railroad company the right to cross the line of another that the statutory right thereby given can not be invoked until the companies have made an effort to agree and have failed or are unable to agree.[5] The location and manner of crossing may be

[1] Colorado, etc., R. Co. *v.* Union Pac. R. Co., 41 Fed. R. 293; Butte, etc., R. Co. *v.* Montana, etc., R. Co., 16 Mont. 504, 41 Pac. R. 232. If, however, the railroad is a purely private one, and can not be used or enjoyed by the public, it can not exercise the right of eminent domain. See *ante*, § 961.

[2] Chicago, etc., R. Co. *v.* Cincinnati, etc., R. Co., 126 Ind. 513.

[3] *Post*, § 1119.

[4] The supreme court of Pennsylvania thus expressed itself on the wisdom of such contracts: "The litigant parties to this contention undertook, wisely, to settle the terms upon which the crossing of their tracks should be conducted, by an agreement which seems to us to be extremely sensible, plain and simple." Appeal of Cornwall, etc., R. Co., 125 Pa. St. 232, s. c. 42 Am. & Eng. R. Cas. 233.

[5] Richmond, etc., R. Co. *v.* Durham, etc., R. Co., 104 N. Car. 650, 40 Am. & Eng. R. Cas. 488; Chicago, etc., R. Co. *v.* Cincinnati, etc., R. Co., 126

determined by agreement, provided the agreement contemplates such a crossing as the law allows, and the company which desires the crossing may agree not only to construct the crossing at its own expense, but to keep and maintain it in good order and repair.[1] A stipulation that the company desiring the crossing shall have the "perpetual and free use of the right of way" of the other company at such point not only contemplates its uninterrupted use, but also, relieves the crossing company from the payment of compensation other than that agreed upon for the crossing.[2] So, where one company agreed for a certain consideration that another should have the right to cross its main and side tracks and afterwards permitted the latter to construct its road and locate its right of way over a strip of ground owned by the former, but not devoted to public use, it was held that the first company could not thereafter enjoin the second company from constructing a side-track on said strip of ground within the limits of its right of way, so long, at least, as the same did not affect the operation of trains on the first company's road or in any way interfere with the transaction of its business.[3]

§ 1118. **Enforcing agreement as to crossing.**—Since railway companies may lawfully contract in reference to crossings over each other's tracks it follows that there must be a remedy for the aggrieved party in case of a breach of such contract.

Ind. 513; Matter of Boston, etc., R. Co., 79 N. Y. 69; Matter of Boston, etc., R. Co., 79 N. Y. 64; Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 116 Ind. 578. "The petitioner had no right to resort to the court, *until* a *failure* to agree as to the matter specified. Such failure was a condition precedent to any standing in court; and there could be no failure or inability to agree, within the meaning of the statute, until some efforts to agree had in good faith been made." Matter of Lockport, etc., R. Co., 77 N. Y. 557, 563. See *post*, § 1119.

[1] See Chicago, etc., R. Co. *v.* Joliet, etc., R. Co., 105 Ill. 388, s. c. 14 Am. & Eng. R. Cas. 62; Seattle, etc., R. Co. *v.* State, 7 Wash. 150, 34 Pac. R. 551.

[2] Alabama, etc., R. Co. *v.* South, etc., R. Co., 84 Ala. 570, s. c. 3 So. R. 286, 5 Am. St. R. 401. See Illinois Cent. R. Co. *v.* Chicago, etc., 122 Ill. 473.

[3] Chicago, etc., R. Co. *v.* Cincinnati, etc., R. Co., 126 Ind. 513, s. c. 26 N. E. R. 204.

The general rule is that the law applicable to ordinary contracts is applicable to such contracts and that the remedies are, in the main, the same as in cases of breach of contracts between individuals. A contract between two railway companies by which one receives the right to construct its line over the right of way of the other is, however, usually of such a nature that it is not possible to redress the breach of such a contract by a mere recovery of money damages.[1] The usual remedy in a case of this kind is by a resort to equity for a specific performance of the contract. This remedy has been sought and applied in a number of cases.[2] Where the two companies have voluntarily entered into the contract, equity will not refuse to enforce the contract on the ground that it is not equitable in all its parts. The courts will not decide whether the contract was for the best interests of the parties, or wise or discreet, or profitable or unprofitable or otherwise, as those were questions for the companies to decide before entering into the contract.[3] But where two companies entered into a contract concerning a crossing of their tracks, by the terms of which one company was bound to keep the crossing in repair, the contract providing that if such company failed, after thirty days notice, to renew or repair the crossing, the other company could do so at the expense of the former company, the court held that a breach of that part of the contract entailed only a money liability and a court of equity would not retain jurisdiction of a case involving the validity of the contract for the sole purpose of enforcing the clause referred to.[4]

[1] Appeal of Cornwall, etc., R. Co., 125 Pa. St. 232, s. c. 42 Am. & Eng. R. Cas. 233.

[2] South & North, etc., R. Co. *v.* Highland Avenue, etc., R. Co., 98 Ala. 400, 57 Am. & Eng. R. Cas. 271; Rome, etc., R. Co. *v.* Ontario, etc., R. Co., 16 Hun (N. Y.) 445. "The enforcement of such a contract as the one made between these parties can only be secured by means of a decree in equity, an action at law for breach of its terms would be of no avail. It would not be possible to represent the consequences of a breach by money damages, and a literal performance of its stipulations is essential, not only in the interests of the contracting parties, but also in the interests of the traveling public." Appeal of Cornwall, etc., R. Co., 125 Pa. St. 232, s. c. 42 Am. & Eng. R. Cas. 233.

[3] South & North, etc., R. Co. *v.* Highland Avenue, etc., R. Co., 98 Ala. 400, 57 Am. & Eng. R. Cas. 271.

[4] South & North, etc., R. Co. *v.* Highland Avenue, etc., R. Co., 98 Ala. 400, 57 Am. & Eng. R. Cas. 271.

§ 1119. **Crossings secured under statutory authority.**— Where companies fail, or are unable to agree upon the terms on which their lines shall cross, resort must be had to statutory proceedings to secure the crossing. In nearly all of the states statutes are in force prescribing the terms upon which one company may secure a crossing over another company's line or right of way.[1] Such statutes are valid so long as they do not violate some constitutional provision against the taking of property without due compensation, or take away from the person in whose favor damages may be assessed the constitutional right to a hearing. But it has been held that a statute which does not provide for compensation to the company whose line is crossed is unconstitutional upon the ground that the crossing is deemed such a taking of property within the provision of the constitution that compensation must be made.[2] So a statute which provided that the assessment of damages should be made by commissioners, but did not provide that there should be an appeal from their decision, was held unconstitutional on the ground that it violated a provision of the constitution which prohibited the general assembly from depriving any person of an appeal from any preliminary assessment of damages made by reviewers or otherwise.[3] Statutes authorizing one company to condemn a crossing over another company's line usually provide that an attempt must be

[1] In Texas the state constitution contains a provision that railroads shall have the right to cross each other's lines. It was held that this did not of itself give the right to cross, but that there must be some act of the legislature fixing the manner in which the right should be exercised. Missouri, etc., R. Co. *v.* Texas, etc., R. Co., 10 Fed. R. 497. See San Antonio, etc., R. Co. *v.* State, 79 Tex. 264, 14 S. W. R. 1063, 45 Am. & Eng. R. Cas. 586.

[2] Memphis, etc., R. Co. *v.* Birmingham, etc., R. Co., 96 Ala. 571, s. c. 11 So. R. 642; Pennsylvania R. Co. *v.* Baltimore, etc., R. Co., 60 Md. 263; Georgia, etc., R. Co. *v.* Columbus, etc., R. Co., 89 Ga. 205, 51 Am. & Eng. R. Cas. 538. A statute which provides that the company whose road is crossed shall bear part of the expense of making the crossing has been held unconstitutional. Toledo, etc., R. Co. *v.* Detroit, etc., R. Co., 62 Mich. 564, 29 N. W. R. 500. *Contra*, Baltimore, etc., R. Co. *v.* Walker, 45 Ohio St. 577, s. c. 16 N. E. R. 475.

[3] Memphis, etc., R. Co. *v.* Birmingham, etc., R. Co., 96 Ala. 571, s. c. 11 So. R. 642, 57 Am. & Eng. R. Cas. 639.

made by the companies to agree upon the matter of the crossing between themselves. Where such a provision is found in the statute, it has the effect of a condition precedent to the right to invoke the aid of the statute, and a complaint or instrument to condemn under the statute must show that the companies failed or were unable to agree.[1] The things which the statute requires are in their nature jurisdictional, and the petitioner must affirmatively show that the provisions of the statute have been complied with or the court will not assume jurisdiction.[2] If there is a waiver of an agreement or of an effort to agree, that fact should be alleged in the petition.[3] Negotiations had with officers of the road sought to be crossed, who assume to act in its behalf, although they have no authority to so act, will be sufficient to constitute an effort to agree, unless the person with whom such officers act has knowledge of their lack of authority.[4] The burden of proof is upon the petitioner to show that there was a failure to agree.[5] It must be made to appear before a crossing will be granted when so required by the statute authorizing the condemnation, that the crossing is necessary.[6]

[1] Seattle, etc., R. Co. *v.* State, 7 Wash. 150, 34 Pac. R. 551; Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 116 Ind. 578; Matter of Lockport, etc., R. Co., 77 N. Y. 557; Matter of Boston, etc., R. Co., 79 N. Y. 64; Matter of Boston, etc., R. Co., 79 N. Y. 69; Richmond, etc., R. Co. *v.* Durham, etc., R. Co., 104 N. Car. 658; Toledo, etc., R. Co. *v.* Detroit, etc., R. Co., 62 Mich. 564. See Chicago, etc., R. Co. *v.* Kansas City, etc., R. Co., 110 Mo. 510.

[2] Lewis' Eminent Domain, § 348. "The road seeking the right to cross another must affirmatively show that it has performed the acts which the statute requires." Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 116 Ind. 578.

[3] Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 116 Ind. 578.

[4] *In re* Saratoga, etc., R. Co., 58 Hun 287, 12 N. Y. Supp. 318.

[5] *In re* Lockport, etc., R. Co., 77 N. Y. 557.

[6] *In re* St. Paul, etc., R. Co., 37 Minn. 164, s. c. 30 Am. & Eng. R. Cas. 294. An absolute necessity need not appear. If it appear that the proposed crossing is reasonably necessary to enable the company seeking the crossing to carry out the project of the construction of its line, the right to cross will be adjudged. Colorado, etc., R. Co. *v.* Union Pac. R. Co., 41 Fed. R. 293. In Butte, etc., R. Co. *v.* Montana, etc., R. Co., 16 Mont. 504, 41 Pac. R. 232, the following statement from Mobile, etc., R. Co., *v.* Alabama, etc., R. Co., 87 Ala. 501, 6 S. R. 404, was quoted with approval: "It may be observed generally that 'necessary,' in this connection, does not mean an

The company seeking the crossing must ordinarily state in its petition to condemn the point and manner of crossing, so as to afford to the commissioners sufficient information to form a basis on which they can calculate the compensation to be paid.[1] After the filing of such a petition or instrument to condemn as is sufficient to give the court jurisdiction, the determination of the place of crossing and the amount of damages is usually left with commissioners appointed for that purpose. Since the procedure in these cases depends so largely upon the terms of the statute under which the proceedings to condemn are prosecuted, and since the statutes in the different states are so dissimilar, it is unsafe to attempt to lay down rules that will be applicable to all cases. As a general rule, a commission appointed to determine a crossing and to fix the amount of damages, has no power to change the location described in the petition,[2] unless the statute expressly confers upon the commission power to locate the crossing.[3] A broad discretion is usually vested in the commissioners as to the manner in which the crossing shall be made. It has also been held that

absolute or indispensable necessity, but reasonable, requisite, and proper for the accomplishment of the end in view, under the particular circumstances of the case." See, also, Anniston, etc., R. Co. *v.* Jacksonville, etc., R. Co., 82 Ala., 297, 2 So. R. 710; Peoria, etc., R. Co., *v.* Peoria, etc., R. Co., 66 Ill. 174; New York, etc., R. Co. *v.* Boston, etc., R. Co., 36 Conn. 196. But in Pennsylvania it is held that to justify such a taking, there must be "a necessity so absolute that without it the grant itself will be defeated. It must also be a necessity that arises from the very nature of things over which the corporation has no control. It must not be created by the company for its own convenience, or for the sake of economy." Pennsylvania Railroad Co.'s Appeal, 93 Pa. St. 150. See, also, to the same effect. Appeal of Sharon R. Co., 122 Pa. St. 533, 17 Atl. R. 234; Appeal of Pittsburgh, etc., R. Co., 122 Pa. St. 511, 6 Atl. R. 564. It seems to us that the Pennsylvania cases go a little too far in declaring and enforcing the doctrine of absolute necessity. The cases of that state, at least, go much further than the cases in any other jurisdiction, and are opposed to the weight of authority.

[1] Lake Shore, etc., R. Co. *v.* Chicago, etc., R. Co., 100 Ill. 21; Lake Shore, etc., R. Co. *v.* Chicago, etc., R. Co., 97 Ill. 506, 2 Am. & Eng. R. Cas. 440.

[2] *In re* Central, etc., R. Co., 1 Thomp. & C. (N. Y.) 419.

[3] A decision of the commissioners as to the necessity for the manner of crossing and the award therefor, is final unless appealed from. Union Terminal, etc., R. Co. *v.* Board, 54 Kan. 352, s. c. 38 Pac. R. 290.

the award of the commissioners stands in the place of a contract between the companies, and may be enforced in the same way as if it had been made by voluntary agreement,[1] and in such award it is proper for the commissioners to provide for all the details of construction and operation of the crossing which the companies might have agreed upon between themselves in case they had been able to agree.[2] It is the duty of the commissioners, after they have agreed upon the crossing and the matters for which they were appointed, and have prepared their report, to present it to the court by which they were appointed, or in which the petition seeking the crossing was filed. Such report will not be held invalid for any informal defect. Thus it has been held that the report of the commissioners need not show that the commissioners viewed the premises,[3] and a report showing that the commissioners allowed the company seeking the crossing a latitude of ten feet in which to make their connections, explaining that this latitude was necessary in order to secure the proper alignment and connections of the frogs, was held valid.[4] When the report of the commissioners has been filed, the matter may be said to be in the hands of the court until action is taken on the report, either confirming or disaffirming it, and the safest course for a condemning company to pursue would be to wait until action is taken on the commissioners' report before commencing the actual construction of the crossing.[5]

[1] In Chicago, etc., R. Co. *v.* Kansas City, etc., R. Co., 110 Mo. 510, s. c. 19 S. W. R. 826, it was said: "It is perfectly clear, we think, that the statute intended the award of the commissioners to stand as a contract between the parties; and we are also of the opinion that the parties have the same rights, and we may enforce the award, the same as if it had been their voluntary agreement." See Winona, etc., R. Co. *v.* Chicago, etc., R. Co., 50 Minn. 300, 52 N. W. R. 657.

[2] Chicago, etc., R. Co. *v.* Kansas City, etc., R. Co., 110 Mo. 510, s. c. 19 S. W. R. 826. In this case it was held that the commissioners had power to award that temporary pile piers should be replaced within a year by stone masonry.

[3] St. Louis, etc., R. Co. *v.* St. Louis, etc., R. Co., 100 Mo. 419, 13 S. W. R. 710.

[4] St. Louis, etc., R. Co. *v.* St. Louis, etc., R. Co., 100 Mo. 419, 13 S. W. R. 710.

[5] See Richmond, etc., R. Co. *v.* Durham, etc., R. Co., 104 N. Car. 658, where the crossing company proceeded without attempting to agree or to con-

§ 1120. **Location of crossing.**—Where two companies agree upon a crossing of their lines the location of the crossing can be fixed once for all by the agreement. But where the companies are not able to agree upon a crossing and resort must be had to statutory authority to condemn a crossing the point of crossing often becomes a matter of much contention between the parties and can only be settled by the courts, unless the statute confers upon one company the power to name the point of crossing. The general rule is that the point of crossing sought should be designated in the petition or instrument to condemn and that point is usually the point at which the crossing is made.[1] The point of crossing may be subject to slight change by the commissioners for it is not always possible in a petition to condemn to designate with mathematical certainty the exact point of crossing.[2] A crossing should be so located as to do no unnecessary injury to the line to be crossed and the theory of some of the cases is that in giving a company power to cross another company's line and to locate the point of crossing the condemning company will always seek a point where the injury will be as small as possible. So far as consistent with the performance of the object for which the condemning company is organized its interest, as well as the interest of the company whose line is to be crossed demands that the condemning company should locate a crossing, where the least injury will be done and where the consequential damages will be as small as possible.[3] Where there is dispute as to the best point

demn under the statute. See, also, Toledo, etc., R. Co. *v.* Detroit, etc., R. Co., 63 Mich. 645, s. c. 30 N. W. R. 595.

[1] *In re* Central, etc., R. Co., 1 Thomp. & C. (N. Y.) 419.

[2] The court is not bound to fix the exact point mentioned in the petition as the point of crossing. If there is an identity of purpose of the crossing petitioned for and that fixed by the court that will be sufficient. State *ex rel. v.* District Court, 35 Minn. 461, s. c. 29 N. W. R. 60.

[3] The supreme court of Illinois in speaking of the power of the condemning company to designate the point of crossing, said: "The security against a wanton and arbitrary exercise of this power, upon mere whim or caprice, and that in all cases the point and manner of taking selected will be that least injurious to the owner and yet suited to the public necessity, is found in the fact that such corporations will be induced by considerations of their own best interest to select, in making such crossings, that prac-

of crossing and the location of the crossing is left to the court the matter is to be determined as a question of fact upon all the evidence in the case.[1]

§ 1121. **Franchise must not be impaired.**—The general rule is that one railroad will not be allowed to cross another at such a place or in such a manner as to impair the franchise of the company across whose line the crossing is sought.[2] When there is a mere crossing of one railroad over another at a point where there is nothing but the track of the company whose line is crossed the franchise is not thereby impaired for the crossing can be used by both companies, and the ability of both companies to perform their public duties does not come in conflict.[3] In such a case the trains of both companies can

tical place and that practical mode which will be the least detrimental to the owner, because the corporation so selecting is required by law to make the owner full compensation, and the more injurious to the owner the place selected and the mode chosen the greater will be the amount of necessary compensation to be paid. It is assured that no corporation formed under this act will ever do so foolish a thing as to demand, under these proceedings, from the owners of an intervening railroad, the privilege of crossing at a point and in a mode so destructive of the interests of such owners, that full compensation therefor will be so enormous that the new company could get no profit or gain by the payment thereof." Lake Shore, etc., R. Co. *v.* Chicago, etc., R. Co., 97 Ill. 506, s. c. 2 Am. & Eng. R. Cas. 440.

[1] California, etc., R. Co. *v.* Southern Pac. Railroad Co., 67 Cal. 59; *In re* Minneapolis, etc., R. Co., 36 Minn. 481, 30 Am. & Eng. R. Cas. 279.

[2] The rule is thus stated in National Docks, etc., Ry. Co. *v.* State, 53 N. J. L. 217, 21 Atl. R. 570, 4 Lewis' Am. R. R. & Corp. R. 560: "As has been stated, in the acquisition of a right to cross, the ability of the existing company to fully, fairly and freely exercise its franchises is not to be destroyed. It is not the policy of the law to cripple or destroy one highway for the purpose of erecting another. The purpose is to preserve, multiply and maintain highways for the development of the country and the general public benefit, and this purpose is especially manifested in the general railroad law, where there exists a prohibition against the condemnation of land, used for railroad purposes, except for a mere crossing. But it does not follow that the precise existing use of the land crossed may not be interfered with. There can be no reason why such use should not yield, if the proposed interference with it is necessary, and of a character that will not destroy the reasonably fair enjoyment and exercise of the franchise of the company whose road is crossed."

[3] *In re* Boston, etc., R. Co., 79 N. Y. 64; State *v.* Dover, etc., R. Co., 43 N. J. L. 528, s. c. 14 Am. & Eng. R. Cas.

run subject only to the slight inconvenience of being required to stop at the crossing. Such an inconvenience does not amount to an impairment of a company's franchise. But where a crossing is sought at such a point that some permanent improvement of the company whose line is already constructed will be taken and completely destroyed, this is held to be an impairment of the franchise, and a crossing at such a point and in such a manner, will usually be denied.[1] "The manner of crossing is not to be destructive of the ability of the road crossed to fully and freely exercise its franchises."[2] Where, however, the proposed crossing was near the edge of a yard of the company whose line was to be crossed so that about 180 feet of storage track was destroyed, it was held that such a crossing would not constitute an impairment of the franchise of the company crossed.[3] It is no excuse for the impairment of a company's franchise that the company seeking the crossing is not able to pay the expense of such a crossing as would not impair the franchise of the company crossed.[4] No distinction can be made on the basis of the wealth of the company seeking the crossing. In those cases where the proposed crossing would totally destroy a part of a permanent yard or permanent buildings or structures the condemnation of the crossing will as a rule be enjoined. But it must clearly appear that such impairment of the franchise will take place. A mere prospective permanent use of the grounds or lands across

87; New Jersey, etc., R. Co. *v.* Long Branch Commissioners, 39 N. J. Law 28; Hornellsville, etc., Ry. Co. *v.* New York, etc., R. Co., 31 N. Y. Supp. 745.

[1] Pittsburgh, etc., R. Co.'s Appeal, 122 Pa. St. 511; Boston, etc., R. Co. *v.* Lowell, etc., R. Co., 124 Mass. 368; Central, etc., Ry. Co. *v.* Ft. Clark, etc., Ry. Co., 81 Ill. 523.

[2] National Docks, etc., Ry. Co. *v.* State, 53 N. J. L. 217, 4 Lewis' Am. R. R. & Corp. R. 560. See, also, State *v.* Easton, etc., R. Co., 36 N. J. L. 181; New Jersey, etc., R. Co. *v.* Long Branch Commissioners, 39 N. J. L. 28; State *v.* Dover, etc., R. Co., 43 N. J. L. 528; State *v.* Drummond, 46 N. J. L. 644; Jersey City, etc., R. Co. *v.* Central R. Co., 48 N. J. Eq. 379, 49 Am. & Eng. R. Cas. 256.

[3] Kansas City, etc., R. Co. *v.* Kansas City, etc., R. Co., 118 Mo. 599, 57 Am. & Eng. R. Cas. 628.

[4] Pittsburgh Junction R. Co.'s Appeal, 122 Pa. St. 511, s. c. 28 Am. & Eng. R. Cas. 266; Pennsylvania Co.'s Appeal, 93 Pa. St. 150; Perry County R. Co. *v.* Newport, etc., R. Co., 150 Pa. St. 193, s. c. 55 Am. & Eng. R. Cas. 12.

which the crossing is sought must give way to the necessities of the petitioning company.[1] "Mere priority of acquisition, or even of occupation, gives no exclusive right, except in so far as the condemnation trenches upon the greater necessities of the other franchise."[2]

§ 1122. **Crossings at grade.**—The tendency of modern legislation and judicial authority is to discourage the construction of grade crossings of railways whenever it is possible to avoid the same.[3] Crossings at grade are not only a source of inconvenience and delay to the companies operating trains over the crossings but they are also a source of danger on account of collisions between trains and consequent injuries to employes and passengers. In a great many parts of the country where the surface of the ground over which railway grades are constructed is level and unbroken, it is almost impossible to avoid crossings at grade. But whenever it is practicable to avoid a crossing at grade equity may interfere to prevent such a crossing.[4] In Pennsylvania the courts are

[1] Colorado, etc., R. Co. *v.* Union Pac. R. Co., 41 Fed. R. 293; Board, etc., Illinois, etc., Canal *v.* Chicago, etc., R. Co., 14 Ill. 314; Easton R. Co. *v.* Boston, etc., R. Co., 111 Mass. 125; Grand Rapids, etc., R. Co. *v.* Grand Rapids, etc., R. Co., 35 Mich. 265.

[2] Colorado, etc., R. Co. *v.* Union Pac. R. Co., 41 Fed. R. 293, citing East St. Louis, etc., R. Co. *v.* East St. Louis, etc., R. Co., 108 Ill. 265; Lake Shore, etc., R. Co. *v.* Chicago, etc., R. Co., 97 Ill. 506.

[3] The supreme court of Pennsylvania thus expresses itself: "The evident intendment of the statute is to discourage crossings at grade. This is a question in which the company, whose road is to be crossed, is not the only party liable to injury thereby. It involves the safety and security of the public. Crossings at grade are always attended with danger. As our population becomes more dense, travel and traffic will increase, and the injuries resulting from grade crossings will be multiplied. Each succeeding year will increase the necessity for avoiding them. Their construction should now and henceforth be discouraged." Pittsburgh, etc., R. Co. *v.* Southwest, etc., R. Co., 77 Pa. St. 173. See, also, Delaware, etc., Co. *v.* Lackawana, etc., R. Co., (Pa. Com. Pl.) 3 Lack. Jur. 413; Appeal of Pennsylvania R. Co., 116 Pa. St. 55, 8 Atl. R. 914. In many of the states there are positive statutes interdicting the construction of grade crossings wherever it is found practicable to cross in any other way. See Pennsylvania R. Co. *v.* Braddock Electric R. Co., 152 Pa. St. 116.

[4] Missouri, etc., R. Co. *v.* Texas, etc., R. Co., 10 Fed. R. 497; Toledo, etc., R. Co. *v.* Detroit, etc., R. Co., 63 Mich.

imperatively required by statute to enjoin the crossing of one railroad of another at grade whenever it is reasonably practicable to avoid a crossing at grade.[1] Where the point at which a crossing was sought was on a grade of the line crossed, the track extending both directions from such point on a down grade, and it appearing that a crossing at grade would endanger life and be of great harm to the company whose line was being crossed on account of being compelled to start its trains on an up-grade after stopping for such crossing and that a crossing below grade could be constructed at a somewhat larger expense than the grade crossing, it was

645, s. c. 28 Am. & Eng. R. Cas. 280; Central Vermont R. Co. *v.* Woodstock R. Co., 50 Vt. 452; Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 6 Biss. 219; Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 30 Ohio St. 604; Fort Street, etc., Co. *v.* State Railroad Board, 81 Mich. 248, 45 Am. & Eng. R. Cas. 113. The *prima facie* presumption of law is that a crossing at grade can be reasonably avoided, and the burden of proof is on the company seeking the crossing to show that in the particular case a crossing at grade can not be avoided. In Appeal of Baltimore, etc., R. Co., (Pa.) 10 W. N. C. 530, 3 Am. & Eng. R. Cas. 244, it was said: "Where the public safety can be reasonably secured at a grade crossing by appliances of signals and watchmen and stoppage of trains, and the expense of an over-grade crossing would be so considerable as to seriously interfere with the profitable construction of the new line, it is not, as we view it, reasonably practicable to avoid the grade crossing."

[1] Baltimore, etc., R. Co's Appeal, (Pa.) 10 W. N. C. 530, 3 Am. & Eng. R. Cas. 242; Pittsburgh, etc., R. Co.'s Appeal, (Pa.) 28 Am. & Eng. R. Cas. 266; Appeal of Moosic, etc., R. Co., (Pa.) 13 Atl. R. 915; Pennsylvania R. Co. *v.* Braddock, etc., R. Co., 152 Pa. St. 116, 55 Am. & Eng. R. Cas. 1. The Pennsylvania supreme court in the very recent case of Perry Co. R. Extension Co. *v.* Newport, etc., R. Co., 150 Pa. St. 193, gave its reasons why grade crossings should be avoided in the following language: "The time for grade crossings in this state has passed. They ought not to be permitted, except in case of imperious necessity. They admittedly involve great danger to life and property. In the earlier period of railroads, this danger was overlooked, or at least disregarded. The desire of the people for this species of improvements tended to close their eyes to the dangers involved. The traffic then upon railroads was comparatively light, and trains ran at long intervals. The rapid development of the country, the enormous growth in wealth, population, and business, have materially changed the relations of railroads to the public and to each other. The result is, that we now see railroad companies and municipalities spending enormous sums in correcting the defects of earlier railroad construction, and especially in avoiding grade crossings."

held that a crossing at grade would be permanently enjoined.[1] The fact that the company seeking the crossing is unable to pay the expense of constructing a crossing above or below the grade of the company whose line is crossed will not justify the condemnation of a grade crossing.[2] In New Jersey the road seeking the crossing may decide for itself whether it will cross at grade or otherwise, the right to cross at grade being subject only to the restrictions that the crossing shall not be made at less than a certain angle and shall not impair the franchises of the road crossed.[3] Where a crossing can not be made otherwise than at grade it will not be denied because it will necessitate the raising of spur tracks of the company crossed eighteen inches, it appearing that the new grade is necessary because of another crossing.[4] But to authorize such a crossing it must appear that such a change in the grade of the company whose line is crossed can be made and that without such a change the crossing would be defeated. The general rule is that the company seeking the crossing where it is to be made at grade must adopt such plans as will make its grade conform to that of the line to be crossed.[5]

§ 1123. **Crossings above or below grade.**—Railroad crossings may be made in one of three ways, by an underground way or tunnel, by an overhead crossing or by a crossing at grade.[6] In the preceding section we have seen that the ten-

[1] Humeston, etc., R. Co. *v.* Chicago, etc., R. Co., 74 Iowa 554, s. c. 35 Am. & Eng. R. Cas. 263.

[2] Perry County, etc., R. Co. *v.* Newport, etc., R. Co., 150 Pa. St. 193.

[3] Jersey City, etc., R. Co. *v.* Central, etc., R. Co., 48 N. J. Eq. 379, 49 Am. & Eng. R. Cas. 256.

[4] Butte, etc., R. Co. *v.* Montana, etc., R. Co., 16 Mont. 504, 41 Pac. R. 248.

[5] United New Jersey, etc., Co. *v.* National Docks, etc., R. Co., 52 N. J. Law 90, s. c. 44 Am. & Eng. R. Cas. 226.

[6] "Such a crossing will be effected by a tunnel which leaves the surface intact, and provides support for the use it has been applied to; or by an overhead bridge at such a height as will not interfere with the free use of its route by the existing railroad; or by a passage on the surface, and at grade, where the rails of the existing railroad are temporarily cut, and frogs inserted, which thereafter permit the continuous use of the route by the existing railroad, except when the trains of the new railroad are crossing." United New Jersey, etc., Co. *v.* National

dency is to discourage the use of grade crossings, so that it follows that where a grade crossing will not be allowed the crossing must be made either by a tunnel or an overhead way. In those jurisdictions where the policy of the law is to avoid grade crossings, an overhead or tunnel crossing will be ordered wherever it is reasonably practicable to avoid a crossing at grade. In determining whether it is reasonably practicable to avoid a grade crossing many factors enter into a consideration of the subject. The location and surroundings of the proposed crossing, the character and use of the intersecting lines, the increased cost of construction and operation; public safety and convenience and the interest and convenience of the road to be crossed are all proper matters to be considered in determining whether an overhead crossing should be ordered.[1] Where it appeared that the increased cost of an overhead crossing would be from $300,000 to $600,000, that a troublesome grade would result and the construction of switches and side-tracks be prevented and other inconveniences result the court refused to order an overhead crossing.[2] Tunnel crossings or under way crossings stand on the same basis as overhead crossings, within the policy of avoiding grade crossings, and will be ordered to avoid a crossing at grade whenever it appears that it is practicable to construct such a crossing. Thus, where a crossing was sought at such a point on a company's line as to cause it great inconvenience because of a heavy grade, if a

Docks, etc., R. Co., 52 N. J. Law 90, s. c. 44 Am. & Eng. R. Cas. 226.

[1] Northern Central R. Co.'s Appeal, 103 Pa. St. 621.

[2] Northern Central R. Co.'s Appeal, 130 Pa. St. 621. And where the costs of an overhead crossing would be so great as to compel an abandonment of the new road a crossing at grade will be permitted. Pennsylvania, etc., R. Co. *v.* Philadelphia, etc., R. Co., 160 Pa. St. 277, s. c. 28 Atl. R. 784. Where it is practicable for an electric street railroad to cross the tracks of a steam railroad by an overhead viaduct at an expense not greatly exceeding $7,000, an injunction will issue to restrain the street railroad from constructing a grade crossing which would be extremely perilous to human life, by reason of the descending grade and curvature of the tracks of the steam railroad, the obstructed view, the large number of trains (over two hundred daily) passing over such tracks, and the difficulty of keeping electric cars at all times under perfect control. Pennsylvania R. Co. *v.* Braddock Electric R. Co., 152 Pa. St. 116.

crossing at grade should be ordered, it was held that the company seeking the crossing should be compelled to cross by an underway, it appearing that such a way could be constructed at a somewhat greater expense than a grade crossing.[1] And under similar conditions as to expense an overhead crossing will be ordered.[2]

§ 1124. **Number of crossings.** — Ordinarily the company seeking the crossing is not limited to a single crossing. More than one crossing may be secured, but each crossing must be secured on the ground that it is necessary. In the absence of any statute regulating the subject there is no limit to the number of crossings which one company may secure across another company's line, provided it be made to appear that all the crossings are necessary to the construction and operation of the company seeking the crossings,[3] and do not materially impair the franchises of the company whose line is crossed. But where it appears that the crossings which a company seeks are not necessary, but are sought for the mere convenience of the new company, the number will be limited. Thus, where a company sought two crossings at near intervals over another company's line, and it appeared that neither of the crossings was necessary, and that both could be avoided by constructing the new line over a route nearly as practicable as that sought, at a slight additional expense, it was held that both crossings would be denied.[4]

§ 1125. **Enjoining construction of crossings.**—Where one railway company seeks to condemn and construct a crossing over the right of way and tracks of another at a place or in a manner not authorized by law resort may often be had to

[1] Humeston, etc., R. Co. *v.* Chicago, etc., R. Co., 74 Iowa 554, 35 Am. & Eng. R. Cas. 263; Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 91 Iowa 16, 58 N. W. R. 918.

[2] Pennsylvania R. Co. *v.* Braddock, etc., Ry. Co., 152 Pa. St. 116, s. c. 25 Atl. R. 780; Altoona, etc., R. Co. *v.* Tyrone, etc., R. Co., 160 Pa. St. 623, 28 Atl. R. 997.

[3] Matter of Boston, etc., R. Co., 79 N. Y. 64.

[4] Perry County R. Co. *v.* Newport, etc., R. Co., 150 Pa. St. 193, s. c. 55 Am. & Eng. R. Cas. 12.

equity for relief. If a company seeks a crossing at an improper place, or seeks an unnecessary crossing or attempts to erect one in such a manner as to materially interfere with the franchises of the company whose line is crossed or in excess of lawful authority the remedy by injunction is appropriate.[1] The general principles applicable to the remedy by injunction are applicable to such cases and a plaintiff who seeks such relief must bring his case within those principles. The cases in which injunctions have been granted are numerous. Thus, where a crossing at grade is sought injunction is held to be the appropriate remedy to prevent such a crossing where it appears that it is practicable to construct an overhead or underway crossing.[2] Injunction is the appropriate remedy to prevent the condemnation of a crossing through another's yards or permanent structures.[3] And equity will interfere to prevent a company from constructing a crossing before condemnation proceedings have been had and terminated, or the condemnation of more crossings than are necessary.[4] But where a complainant has an adequate remedy at law equity will not interfere by injunction.[5] Thus, where one railway company, pending an appeal from an award establishing a crossing and fixing the amount of compensation to which the older company was entitled, without paying or depositing the compensation

[1] See Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 6 Biss. (U. S.) 219, 5 Federal Cases 590. A court of equity will always interfere in a proper case and control the rights of two railway companies in reference to a proposed crossing of their tracks. National Docks, etc., R. Co. *v.* State, 53 N. J. L. 217, 21 Atl. R. 570; National Docks, etc., R. Co. *v.* Pennsylvania R. Co., (N. J.), 30 Atl. R. 1102; Cincinnati, etc., R. Co. *v.* Chattanooga, etc., R. Co., 44 Fed. R. 470.

[2] Humeston, etc., R. Co. *v.* Chicago, etc., R. Co., 74 Iowa 554, 35 Am. & Eng. R. Cas. 263; Reynoldsville, etc., R. Co. *v.* Buffalo, etc., R. Co., 134 Pa. St. 541, 19 Atl. R. 674; Pittsburg Junction R. Co.'s Appeal, (Pa.), 6 Atl. R. 564, 28 Am. & Eng. R. Cas. 266; Pennsylvania R. Co.'s Appeal, 93 Pa. St. 150; Central Vermont R. Co. *v.* Woodstock R. Co., 50 Vt. 452; Toledo, etc., R. Co. *v.* Detroit, etc., R. Co., 63 Mich. 645; Missouri, etc., R. Co. *v.* Texas, etc., R. Co., 4 Woods (U. S.) 360, 10 Fed. R. 497.

[3] See Cincinnati, etc., R. Co. *v.* City of Anderson, 139 Ind. 490, 38 N. E. R. 167.

[4] Pennsylvania R. Co. *v.* Consolidated Coal Co., 55 Md. 158.

[5] Anniston, etc., R. Co. *v.* Jacksonville, etc., R. Co., 82 Ala. 297; Tennessee, etc., R. Co. *v.* East Alabama, etc., R. Co., 75 Ala. 516.

required by law, entered upon the right of way and constructed its tracks it was held that its action was a mere naked trespass for the redress of which there was an adequate legal remedy.[1] And a crossing will not be enjoined where it appears that all damage caused can be adequately compensated in money.[2] Where commissioners have been appointed to condemn a right of crossing of one railway over another, they will not be enjoined from considering a certain plan of crossing, which presents slight but not material differences from that described in the petition seeking to condemn.[3] Injunction will also be denied where there is an adequate remedy by appeal or *certiorari*.[4]

§ 1126. **Compensation—Taking property.**—The right of one railroad company to lay and operate its tracks across the roadway of another company is well established. As we have seen, every railroad company takes its right to construct its road upon the implied contract that other railroad companies may lay their tracks across its tracks and right of way. It is held by many of the adjudged cases that the right of one company to cross the tracks of another rests upon the power of eminent domain, and that in constructing a crossing there is a "taking" of property within the meaning of the constitution. It seems to us that some of the cases state the doctrine too broadly.[5] While it is perhaps true that there is a "taking" within the meaning of the constitution, still there is not in all cases

[1] Mobile, etc., R. Co. *v.* Alabama Midland, etc., R. Co., 87 Ala. 520, 6 So. R. 407.

[2] Chicago, etc., R. Co. *v.* Illinois, etc., R. Co., 113 Ill. 156.

[3] Pennsylvania R. Co. *v.* National Docks, etc., R. Co., 56 Fed. R. 697.

[4] Pennsylvania R. Co. *v.* National Docks, etc., R. Co., 56 Fed. R. 697.

[5] A very thoughtful author thus states the law: "Where a company's location is subjected to a railroad crossing, in a manner not substantially interfering with the use thereof, or causing damage to the roadbed, its property is not taken in the constitutional sense. But the use of its rails for running trains, or the laying of tracks upon its location by another company, under authority of law, is such a taking. The grant of a right to one company to lay a track on a highway is not exclusive, and similar rights may be given to other companies without compensation for injury to the earlier franchise." Pierce on Railroads, 194.

a "taking" in the same sense that there is where private property is appropriated. If it be true, as unquestionably it is, that a railroad company secures its franchise subject to the right of the public to have other railroads constructed across its tracks, then it can not be true that the mere fact that another company constructs a track across its roadway is a "taking" in the strict sense. We think that there is a "taking" only in a very narrow and limited sense, and that the right to compensation is very different from that which exists in favor of a private owner whose property is seized under the right of eminent domain. The mere fact of crossing does not add a burden, since the company took its franchise subject to the right of crossing by other railroads; but where there is an interference with the roadway or tracks, or where there is an injury to the prior railroad, or where there is expense caused by the crossing, then there may be right to compensation. As we have said, in such cases, the construction of a crossing by one company over the tracks of another is generally regarded as a taking of private property for public use, and compensation must be made before the right to cross can be exercised.[1]

[1] Anniston, etc., R. Co. *v.* Jacksonville, etc., R. Co., 82 Ala. 297; Chicago, etc., R. Co. *v.* Springfield, etc., R. Co., 67 Ill. 142; Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 30 Ohio St. 604; Mobile, etc., R. Co. *v.* Alabama, etc., R. Co., 87 Ala. 501, 6 So. R. 404; Massachusetts, etc., R. Co. *v.* Boston, etc., R. Co., 121 Mass. 124; Grand Rapids, etc., R. Co. *v.* Grand Rapids, etc., R. Co., 35 Mich. 265; Chicago, etc., R. Co. *v.* Englewood, etc., R. Co., 115 Ill. 375; National Docks, etc., R. Co. *v.* State, 53 N. J. L. 217; Flint, etc., R. Co. *v.* Detroit, etc., R. Co., 64 Mich. 350; Cincinnati, etc., R. Co. *v.* Chattanooga, etc., R. Co., 44 Fed. R. 470; Georgia, etc., R. Co. *v.* Columbus, etc., R. Co., 89 Ga. 205, 51 Am. & Eng. R. Cas. 538; Chicago, etc., R. Co. *v.* Englewood, etc., R. Co., 17 Ill. App. 141. In Memphis, etc., R. Cc. *v.* Birmingham, etc., R. Co., 96 Ala. 571, 57 Am. & Eng. R. Cas. 639, in a railway crossing case, the court, after referring to the constitutional limitations and restrictions that private property shall not be taken for public use without just compensation, said: "If, therefore, the crossing or intersecting of the road of one railway company by the road of another is taking, injuring or destroying private property, by the construction or enlargement of the works, highways or improvements of such company, within the meaning of the constitution, then the constitutional restrictions or limitations to which we have referred are applicable; and the exercise of such right can only be sustained when it is claimed under a valid legislative enactment by which the rights contemplated by

Since such a crossing is a taking of private property for public use, it follows that just compensation must be made.[1] Where, however, there is no damage, no compensation need be made; but the fact that there may be no damage, and therefore no compensation, does not change the nature of the right under which the crossing is secured. It seems to us that under such circumstances the crossing would still be secured under the right of eminent domain, and might still be, in a sense, a taking of private property for public use.

§ 1127. **Damages—Elements of.**—We have seen in the preceding section that the condemnation and construction of a railroad across the right of way and tracks of another company may be a taking of property within the constitutional limitations that just compensation must be made. Since compensation must be made in such cases it follows that there must be some rule for estimating the compensation and defining what elements shall be considered in making up such estimate. In the very nature of things there must usually be some injury to a railway company by constructing another railway

these constitutional restrictions are secured to the owner of the property so taken, injured or destroyed. There is abundant authority in the text-books and adjudicated cases for the proposition that the crossing or intersecting of the road of one railway company by that of another is the taking of property, within the meaning of constitutional provisions requiring compensation to be made." In Lake Shore, etc., R. Co. *v.* Chicago, etc., R. Co., 97 Ill. 506, s. c. 2 Am. & Eng. R. Cas. 440, the court, in speaking of the right to condemn a railway crossing over another line under the Illinois constitution, said: "This 14th section of article 11 was inserted out of abundant caution, and simply declares such property to be subject to the recognized power of eminent domain, and, like other private property, protected by the limitation that private property shall not be taken without just compensation, to be ascertained by a jury, unless the same is to be made by the state. * * * In so far as the private rights of the railroad company in such property are concerned, such rights, like other private property, are subject to the power of the state to condemn and take the same for the new use, upon the payment of just compensation."

[1] Memphis, etc., R. Co. *v.* Birmingham, etc., R. Co., 96 Ala. 571, s. c. 57 Am. & Eng. R. Cas. 639; Georgia, etc., R. Co. *v.* Columbus, etc., R. Co., 89 Ga. 205, 51 Am. & Eng. R. Cas. 538; Jersey City, etc., R. Co. *v.* Central R. Co., 48 N. J. Eq. 379, 49 Am. & Eng. R. Cas. 256; authorities cited next preceding note.

line across its tracks and right of way. While there are many elements of injury, which result in greater or less damage and loss to the company whose line is crossed, compensation for every such element will not be allowed. The general rule is that the company whose line is crossed is entitled to recover compensation for everything which renders its property less valuable, causes it additional expense in restoring its property to a safe condition for use, renders it less able to transact its business or makes the transaction of its business more expensive.[1] Thus a recovery can be had for the land or property actually taken,[2] for the destruction of buildings, fences or the like,[3] for the cost of restoring the tracks and right of way to a safe condition,[4] for the expense of the erection of new structures made

[1] The rule is thus stated in the case of Peoria, etc., R. Co. *v.* Peoria, etc., R. Co., 105 Ill. 110, s. c. 10 Am. & Eng. R. Cas. 129: "It is the injury which depreciates the value of the property, whether by taking a portion of it or rendering the portion left less useful, or, in case of a railroad company or other corporate body, less capable of transacting its business, such a hindrance and inconvenience as to occasion loss, or diminish and limit its capacity to transact its business, by decreasing the power to transact as much, or necessarily, the expense of what may be done, although not diminished." See, also, Chicago, etc., R. Co. *v.* Springfield & N. R. Co., 67 Ill. 142; Chicago, etc., R. Co. *v.* Englewood, etc., R. Co., 115 Ill. 375. In Michigan the rule is laid down as follows: "Any additional expense created in the ordinary use of respondent's track, or any other injury or damage to its track, right of way, or franchises, occasioned by the crossing, and which may properly be considered as the natural, necessary and approximate cause thereof, should be allowed the respondent in all cases of this kind." Toledo, etc., R. Co. *v.* Detroit, etc., R. Co., 63 Mich. 645, 28 Am. & Eng. R. Cas. 272. The delay, interference and obstruction while the crossing is being put in is a proper element of damage. Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 15 Ill. App. 587.

[2] Chicago, etc., R. Co. *v.* Englewood, etc., R. Co., 115 Ill. 375, 4 N. E. R. 246, s. c. 23 Am. & Eng. R. Cas. 56; Memphis, etc., R. Co. *v.* Birmingham, etc., R. Co., 96 Ala. 571, s. c. 57 Am. & Eng. R. Cas. 639; Chicago, etc., R. Co. *v.* Springfield, etc., R. Co., 67 Ill. 142; *In re* Lockport, etc., R. Co., 19 Hun (N. Y.) 38. But see Flint, etc., R. Co. *v.* Detroit, etc., R. Co., 64 Mich. 350.

[3] Mills on Eminent Domain, § 44*a*; City of Kansas *v.* Kansas City, etc., R. Co., 102 Mo. 633, 57 Am. & Eng. R. Cas. 624. See, also, Kansas Cent. R. Co. *v.* Board, etc., Jackson County, 45 Kan. 716; Old Colony, etc., R. Co. *v.* County of Plymouth, 14 Gray (Mass.) 155.

[4] St. Louis, etc., R. Co. *v.* Springfield, etc., R. Co., 96 Ill. 274.

necessary by reason of the crossing,[1] and, also, it seems, on account of contingent loss which may result because of additional exposure to hazards by fire or otherwise.[2] Compensation is not confined to such elements of damage, as may arise at the actual place of crossing. It has been held that a company whose line is crossed is entitled to recover damages for a diminution in its capacity to do business,[3] or for increased expense[4] in transacting its business caused by the construction of the crossing. Where a large part of the line is rendered less useful or practically valueless, this should be considered in estimating the damages.[5] Where new structures, such as embankments, abutments or the like must be erected because of the crossing the expense of maintaining these and keeping them in repair may be considered as an element of damage.[6] And it has also been held that the additional expense of providing a watchman, where the same has been rendered necessary because of the great hazard resulting from the construction of the crossing, may be taken into account in estimating the measure of damages.[7] There are many things, however, which result in more or less damage to a railway company whose line is crossed by the line of another company which can not be considered as elements of damage for which compensation must be made. No damages will be allowed for mere interruption or inconvenience occasioned in the transaction of its business,[8] for increased liabil-

[1] Old Colony, etc., R. Co. *v.* County of Plymouth, 14 Gray 155; St. Louis, etc., R. Co. *v.* Springfield, etc., R. Co., 96 Ill. 274; Flint, etc., R. Co. *v.* Detroit, etc., R. Co., 64 Mich. 350, 31 N. W. R. 281.

[2] St. Louis, etc., R. Co. *v.* Springfield, etc., R. Co., 96 Ill. 274.

[3] Lake Shore, etc., R. Co. *v.* Chicago, etc., R. Co., 100 Ill. 21. See, also, Chicago, etc., R. Co. *v.* Englewood, 115 Ill. 375.

[4] Lake Shore, etc., R. Co. *v.* Chicago, etc., R. Co., 100 Ill. 21.

[5] *In re* Poughkeepsie, etc., R. Co., 63 Barb. 151.

[6] St. Louis, etc., R. Co. *v.* Springfield, etc., R. Co., 96 Ill. 274.

[7] St. Louis, etc., R. Co. *v.* Springfield, etc., R. Co., 96 Ill. 274. But, see Massachusetts Cent. R. Co. *v.* Boston, etc., R. Co., 121 Mass. 124.

[8] Boston, etc., R. Co. *v.* Old Colony R. Co., 3 Allen 142; Massachusetts R. Co. *v.* Boston R. Co., 121 Mass. 124; Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 30 Ohio St. 604; Old Colony R. Co. *v.* Inhabitants, etc., 14 Gray 155; Boston R. Co. *v.* Old Colony R. Co., 12 Cush. 605; Flint, etc., R. Co. *v.* Detroit, 64 Mich. 350; St. Louis, etc., R. Co. *v.* St. Louis, etc., R. Co., 111 Mo. 666

ity to accidents at the crossing,[1] for being required by statute or ordinance to stop at the crossings, while the trains of the other company pass or before crossing,[2] for the additional expense and trouble of ringing the bell on approaching the crossing,[3] for the risk of being ordered to provide additional safeguards at such crossings, nor for the probable loss or decrease of business, which may result because of such crossing.[4] A company seeking the crossing and against whom the damages are assessed can not set off as an element of gain to the company crossed, a supposed benefit which may result to it in the way of securing additional business because of such crossing.[5]

§ 1128. **Expense of constructing crossing.**—The expense of constructing the crossing must as a rule be borne by the company seeking the crossing. In the absence of any statutory enactments regulating the subject, the rule seems to be

[1] Peoria, etc., R. Co. *v.* Peoria, etc., R., 105 Ill. 110, 10 Am. & Eng. R. Cas. 129. In this case it was said: "Accidents can be avoided by proper care. Nor are we warranted in presuming the employes would be negligent of their duty. If they observe their duty, a collision need never occur. To allow damages on this claim would violate the rule that they can not be allowed on mere conjecture, speculation, fancy or imagination; they must be real, tangible and proximate." See, also, Kansas City, etc., R. Co. *v.* Kansas City, etc., R. Co., 118 Mo. 599, 57 Am. & Eng. R. Cas. 624; Old Colony, etc., R. Co. *v.* Inhabitants, etc., 14 Gray (Mass.) 155; City of Bridgeport *v.* New York, etc., R. Co., 36 Conn. 255. The opinions of witnesses as to the probability of collisions and accidents at crossings is inadmissible in fixing the damages. Kansas City, etc., R. Co. *v.* Kansas City, etc., R. Co., 118 Mo. 599, 57 Am. & Eng. R. Cas. 624.

[2] Kansas City, etc., R. Co. *v.* Kansas City, etc., R. Co., 118 Mo. 599, 57 Am. & Eng. R. Cas. 624; Kansas City, etc., Co. *v.* St. Joseph, etc., Co., 97 Mo. 457; St. Louis, etc., R. Co. *v.* St. Louis, etc., R. Co., 111 Mo. 666; Massachusetts, etc., R. Co. *v.* Boston, etc., R. Co., 121 Mass. 124; Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 30 Ohio St. 604; Peoria, etc., R. Co. *v.* Peoria, etc., R. Co., 105 Ill. 110, 10 Am. & Eng. R. Cas. 129; Flint, etc., R. Co. *v.* Detroit, etc., R. Co., 64 Mich. 350, 31 N. W. R. 281.

[3] Peoria, etc., R. Co. *v.* Peoria, etc., R. Co., 105 Ill. 110, 10 Am. & Eng. R. Cas. 129; Old Colony, etc., R. Co. *v.* Inhabitants, etc., 14 Gray (Mass.) 155. Or operating gates. Boston, etc., R. Co. *v.* Cambridge, 159 Mass. 283.

[4] Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 30 Ohio St. 604.

[5] Old Colony, etc., R. Co. *v.* Inhabitants, etc., 14 Gray 155; Boston, etc., R. Co. *v.* County of Middlesex, 1 Allen 324.

that the latest company must at its own expense construct the crossing. In several states it is provided by statute that the original expense of constructing the crossing shall be borne by the newer or latest company. We have before seen that all such expenses as result from the construction of the crossing must either be borne by the crossing company or allowed as an element of damages to the company whose line is crossed.[1] And in some cases it has been held that the company seeking the crossing may make a valid agreement in the condemnation proceedings not only to put in the crossing, at its own expense, but also to keep and maintain all necessary frogs and crossing appliances.[2] In the state of Ohio there is a statute in force which provides that where "the tracks of two railroads cross each other, or in any way connect, at a common grade, the crossing shall be made, and kept in repair * * * at the joint expense of the companies owning the track." This statute has been held valid and enforced by the supreme court of the state of Ohio.[3]

§ 1129. **Watchmen and flagmen at crossings.**—In the absence of statutory enactments requiring a watchman to be kept at the crossing of two railway tracks, no duty rests upon the companies to provide such watchman.[4] But where there is a statutory provision to the effect that such watchman must be maintained, the statute must be complied with by the companies.[5] And where the statute provides that watchmen must be furnished at the joint expense of the companies whose lines cross, it has been held that the expense of keeping such watch-

[1] § 1127, *ante*. See, also, Chicago, etc., R. Co. *v.* Joliet, etc., R. Co., 105 Ill. 388, s. c. 14 Am. & Eng. R. Cas. 62.

[2] Chicago, etc., R. Co. *v.* Joliet, etc., R. Co., 105 Ill. 388, s. c. 14 Am. & Eng. R. Cas. 62; Seattle, etc., R. Co. *v.* State, 7 Wash. 150, 34 Pac. R. 551.

[3] Baltimore, etc., R. Co. *v.* Walker, 45 Ohio St. 577, s. c. 16 N. E. R. 475, 35 Am. & Eng. R. Cas. 271; Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 30 Ohio St. 604. But see Toledo, etc., R. Co. *v.* Detroit, etc., R. Co., 62 Mich. 564, s. c. 29 N. W. R. 500.

[4] See Sellars *v.* Richmond, etc., R. Co., 94 N. Car. 654, 25 Am. & Eng. R. Cas. 451.

[5] Baltimore, etc., R. Co. *v.* Walker, 45 Ohio St. 577, s. c. 35 Am. & Eng. R. Cas. 271; Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 30 Ohio St. 604.

man must be borne equally by the two companies, notwithstanding the fact that one company runs more trains and uses the crossing more frequently than the other company.[1] Companies may, and often do, for their own protection keep watchmen at crossings to notify employes in charge of trains when the crossings are safe and when trains may pass without danger. Though not absolutely required, the maintenance of such watchmen is an effective means of preventing accidents and facilitating the transaction of business, and for that reason companies often so equip their crossings. The expense of maintaining such watchmen may be arranged between the companies by contract, or in some cases it may be that the services of a watchman has been rendered so imperatively necessary by the construction of the crossing that the latter company in point of time will be required to bear the expense of keeping a watchman at the crossing. In some cases it has been held that the cost of maintaining a watchman at the crossing is a proper element of damages to be taken into account in estimating the compensation to which the company whose line is crossed is entitled,[2] but there is also authority to the effect that such an outlay can not be placed upon the condemning company.[3] The company seeking the crossing may agree as a condition precedent to the right to cross that it will keep a watchman at the crossing at its own expense.[4] Where such is the case, the contract is a valid one, and the company making it will be held liable for its breach.

§ 1130. Stopping at crossings—Duty imposed by contract.—As a precaution against collisions and consequent injuries, railway companies are usually required to stop their trains before crossing the tracks of another company. This duty is ordinarily imposed by statute, but it may, in some cases, be

[1] Baltimore, etc., R. Co. *v.* Walker, 45 Ohio St. 577, s. c. 35 Am. & Eng. R. Cas. 271.

[2] Flint, etc., R. Co. *v.* Detroit, etc., R. Co., 64 Mich. 350, s. c. 31 N. W. R. 281.

[3] Massachusetts, etc., R. Co. *v.* Boston, etc., R. Co., 121 Mass. 124.

[4] New York, etc., R. Co. *v.* Grand Rapids, etc., R. Co., 116 Ind. 60.

imposed by contract between the two companies whose lines cross. Such contracts are valid and will be enforced by the courts. Where two companies whose lines crossed agreed upon the manner and order in which their trains should cross and adopted a code of signals to be observed, it was held that one company which violated the code of signals, thereby causing injury to the other company was liable for damages for breach of the contract.[1] The companies may agree that the trains of one company shall have priority over the trains of the other company,[2] and such a contract may be enforced in equity by a decree for specific performance.[3] Where two companies by an agreement in reference to the use of a crossing stipulated that one of the companies should bring its trains to a stop at least two hundred feet from the crossing before attempting to cross, it was held that it was not a sufficient compliance with the contract to stop at a point eight hundred or nine hundred feet from the crossing, but that such stop should be made at a point from two hundred to three hundred feet from the crossing notwithstanding the fact that the stop at the farther point was more convenient because of the curve and grade.[4]

§ 1131. **Stopping at crossings—Duty imposed by statute.**—In nearly every state in the Union statutes are in force which

[1] New York, etc., R. Co. *v.* Grand Rapids, etc., R. Co., 116 Ind. 60, s. c. 35 Am. & Eng. R. Cas. 283. In the course of the opinion, in commenting on the contract, the court said: "It is obvious that what the parties intended was that the appellant should secure a way across the track of the appellee, and should provide means of making and keeping the crossing safe for the use of both parties. Whatever was reasonably necessary to carry into execution this object was implied, and it was therefore entirely competent for the parties to give effect to the contract by establishing a code of signals. As they did establish such a code under the contract, and the appellant refused or failed to obey them, there was a breach of contract, and hence a clear right of action. This right of action came into existence the moment the contract was violated and loss resulted."

[2] Appeal of Cornwall, etc., R. Co., 125 Pa. St. 232, 17 Atl. R. 427, s. c. 42 Am. & Eng. R. Cas. 233.

[3] Appeal of Cornwall, etc., R. Co., 125 Pa. St. 232, 17 Atl. R. 427, s. c. 42 Am & Eng. R. Cas. 233.

[4] Appeal of Cornwall, etc., R. Co., 125 Pa. St. 232, 17 Atl. R. 427, s. c. 42 Am. & Eng. R. Cas. 233.

provide that where two railways cross each other at grade the employes engaged in operating trains on either of the lines shall bring them to a full stop at a specified distance from the crossing before attempting to cross.[1] In some of the states the statutes excuse the companies from stopping at crossings, where interlocking switches or other devises for the safety of trains are erected and maintained.[2] These statutes are applicable to all railway companies and in some of the states they have been held to apply to dummy lines.[3] But where a steam railway company's line is crossed by the track of a mere street railway the steam railway company is not required to stop its trains before attempting to cross.[4] There seems to be a distinction made between a dummy line operated by steam and the ordinary street railway, the former being classed as an ordinary commercial railway.[5] Statutes requiring companies to stop their trains at railway crossings are generally penal and a failure to comply with them renders the company or the employes liable to a criminal prosecution.[6]

§ 1132. **Collisions at crossings.**—What will be said here regarding collisions at crossings refers more particularly to

[1] Stimson's Am. Stat., § 8813.

[2] Stimson's Am. Stat., § 8813.

[3] Birmingham, etc., R. Co. *v.* Jacobs, 92 Ala. 187, s. c. 49 Am. & Eng. R. Cas. 263. In that case was said, in speaking of the statute requiring railroads to stop at crossings: "The purpose of the statute was to guard against collisions at these crossings. Prior to the adoption of the code of 1886, the distance within which trains were required to stop was fifty feet, and the distance was extended to one hundred feet on account of the difficulty of controlling the large engines and heavily loaded trains. The purpose of the statute, as we have said, is to prevent collision, and the fact that engines and trains, by reason of their structure and appliances, are more easily managed than others, and may be stopped within a distance of twenty, thirty or fifty feet, is no reason why the law should not apply to them." In Katzenberger *v.* Lawo, 90 Tenn. 235, 16 S. W. Rep. 611, it was said: "A train pulled by a small engine called a 'dummy,' although exclusively engaged in carrying passengers, is a railroad, within the meaning of the statute prescribing precautions to be observed by railroads. The evil intended to be remedied pertains as much to this sort of railways as to the ordinary railroads of commerce."

[4] Byrne *v.* Kansas City, etc., R. Co., 61 Fed. R. 605, 24 L. R. A. 693.

[5] Byrne *v.* Kansas City, etc., R. Co., 61 Fed. R. 605.

[6] See Commonwealth *v.* Chesapeake, etc., R. Co., (Ky.), 29 S. W. R. 136.

rights and liabilities as they exist between the companies whose trains collide. The rights of employes, passengers and other persons who are injured in railway collisions at crossings will be fully treated in a subsequent portion of this work, and that branch of the subject will be only incidentally referred to at this place. It is generally provided by agreement, statute or custom, the order and manner in which trains shall cross at grade crossings. The necessity for some system regulating the passage of trains at crossings grows out of the great danger which would result to life and property if no system were adopted. As a general rule, it may be stated that where the tracks of two railway companies cross at grade, and there is in force a system regulating the manner and order in which trains shall pass, the company which violates the provisions of the rules governing the crossing will be liable for all damages resulting from such failure.[1] Where a rule was in force which provided that the train which first reached and stopped at the stopping-post maintained at a certain specified distance from the crossing had the right of way, it was held to be actionable negligence on the part of a company to attempt to cross when a train on the other line had first reached the stopping-post and was in the act of starting to make the crossing.[2] In an action brought to recover for injuries sustained in a collision of trains at a railway crossing, both companies may be liable,[3] and where the action is brought against one company only, it can not escape liability by setting up the fact that the other company was also guilty of negligence.[4] A presumption of negligence may arise against one or both companies where

[1] New York, etc., R. Co. *v.* Grand Rapids, etc., R. Co., 116 Ind. 60. In the case cited the companies had agreed upon a code of rules governing the order and manner in which trains should cross. A violation of the code of rules resulting in injury to the other company was held to be a breach of the contract, and damages were awarded the complaining company. Compare Albert *v.* Sweet, 116 N. Y. 363, 42 Am. & Eng. R. Cas. 216. See Grand Rapids, etc., R. Co. *v.* Ellison, 117 Ind. 234.

[2] Chicago, etc., R. Co. *v.* Chambers, 68 Fed. R. 148.

[3] Downey *v.* Philadelphia, etc., R. Co., 161 Pa. St. 588, 58 Am. & Eng. R. Cas. 594; Kansas City, etc., R. Co. *v.* Stoner, 49 Fed. R. 209.

[4] Kansas City, etc., R. Co. *v.* Stoner, 51 Fed. R. 649.

a collision occurs on a level grade crossing in broad daylight, and the companies each seek to fasten the blame upon the other.[1]

§ 1133. **Priority of passage.**—Where two trains approach a railway crossing at the same time, as is often the case, it is necessary that there be some regulation defining which train shall have the prior right to cross. It is obvious that without some regulation defining the rights of the respective companies confusion and injury would often result. The matter is usually regulated by statutes of the different states and we can here give only a reference to such statutes. These statutes are very different in their provisions and the statute of the particular state should be examined to find the ultimate rule in force in that state. Among these statutes will be found provisions giving the road first built priority, trains on a main track precedence over trains on side tracks, passenger trains precedence over freight trains, regular trains precedence over trains behind time, and engines with cars precedence over engines without cars.[2] Companies whose lines cross may and often do agree upon rules governing the crossing of their trains and which trains shall have priority. Such contracts are valid and will be enforced.[3] A violation of such contract will make the violator liable for all damages which result,[3] and a violation of such a contract may be enjoined in a court of equity,[4] or the contract may be specifically enforced by a decree in equity.[5] Where by the rules governing priority of passage the company whose train first reaches the stopping post has prior right of passage it is negligence for the employes of the other company to attempt to cross in advance of the train on the other track.[6]

[1] Kansas City, etc., R. Co. *v.* Stoner, 49 Fed. R. 209.

[2] Stimson's Am. Stat., § 8813; Moulder *v.* Cleveland, etc., R. Co., (Ohio C. P.) 1 Ohio N P. 361, 2 Ohio Leg. News 540.

[3] New York, etc., R. Co. *v.* Grand Rapids, etc., R. Co., 116 Ind. 60.

[4] Appeal of Cornwall, etc., R. Co., 125 Pa. St. 232, s. c. 17 Atl. R. 427, 42 Am. & Eng. R. Cas. 233.

[5] Appeal of Cornwall, etc., R. Co., 125 Pa. St. 232, s. c. 17 Atl. R. 427, 42 Am. & Eng. R. Cas. 233.

[6] Chicago, etc., R. Co. *v.* Chambers, 68 Fed. R. 148.

§ 1134. **Maintenance and repair of crossings.**—In a former section[1] we discussed the duty of constructing a railway crossing; here we propose to discuss the duty of keeping up and repairing crossings after they have been constructed. As a general rule the duty rests upon both companies to see that a crossing of their tracks is kept in proper repair. This duty does not rest upon any obligation which one company owes to the other, but upon the duty which both companies owe to the public. Safety of property and passengers carried on railway trains demands that the company should use every reasonable precaution for their safety, and it is for this reason that the duty is imposed upon both companies to see that crossings are properly maintained and kept in repair.[2] In some of the states there are express statutory provisions imposing upon both companies the duty of keeping the crossing in proper repair,[3] but we are of the opinion that this duty, at least, so far as the public is concerned, rests upon both companies independent of any statute.[4] Where the duty is imposed by statute,

[1] § 1128, *ante*.

[2] Indiana, etc., R. Co. *v.* Barnhart, 115 Ind. 399. In Chicago, etc., R. Co. *v.* Joliet, etc., R. Co., 105 Ill. 388, s. c. 14 Am. & Eng. R. C. 62, it was said: "Both parties are common carriers of passengers and freight and both are under the highest obligations to the public to observe that this crossing is kept in repair, so that it may be entirely safe for the passage of trains, and it may reasonably be presumed both companies will omit no duty in that regard. One party is as much interested in its maintenance in a suitable condition as is the other, and should it become unsafe through use, or for other cause, either party might, and it would be its duty to, make all needed repairs, and on the party obligated to maintain such crossing would rest the expense of such repairs, and the same might be recovered in an action."

[3] Indiana, etc., R. Co. *v.* Barnhart, 115 Ind. 399; Baltimore, etc., R. Co. *v.* Walker, 45 Ohio St. 577, 35 Am. & Eng. R. Cas. 271; Baltimore, etc., R. Co. *v.* Walker, 45 Ohio St. 577, s. c. 36 Am. & Eng. R. Cas. 492.

[4] The companies may, of course, provide by contract for constructing and maintaining the crossing, and designate what portion of the expense shall be borne by each, but the companies can not by a contract between themselves absolve themselves from the duty owing the public. If there is a violation of the contract, the company in the wrong may doubtless be held liable for all damages resulting to the other from the breach, but the rights of the public are not affected.

it has been held negligence *per se* to disregard it.[1] The obligation to repair may rest upon a lessee operating a line the same as upon an owner.[2] As between the two companies using a crossing, the expense of maintaining and repairing the crossing may be provided for either by statute or by contract. Where the statute provides that the expense of keeping up the crossing after it is constructed shall be borne by both companies, both companies are bound to contribute to such expense.[3] If the statute is silent as to the proportion of the expense which should be borne by each company, it would seem that the true rule would be to make the older company contribute at least such a proportion of the expense as it would have cost to have kept in repair the portion of the track affected by the crossing, if the crossing had not been made.[4] The duty of contributing to the expense exists whether the crossing is made on, above, or below grade.[5] As a condition precedent to the right to construct a crossing, the company seeking the crossing may legally bind itself to maintain and keep in repair the crossing at its own expense.[6] Where one of the companies, jointly bound to keep in repair the crossing, at its own expense makes

[1] Indiana, etc., R. Co. *v.* Barnhart, 115 Ind. 399.

[2] Baltimore, etc., R. Co. *v.* Walker, 45 Ohio St. 577, 35 Am. & Eng. R. Cas. 271; Baltimore, etc., R. Co. *v.* Walker, 45 Ohio St. 577, s. c. 36 Am. & Eng. R. Cas. 492.

[3] Toledo, etc., R. Co. *v.* Detroit, etc., R. Co., 62 Mich. 564, 28 Am. & Eng. R. Cas. 272; Baltimore, etc., R. Co. *v.* Walker, 45 Ohio St. 577, s. c. 36 Am. & Eng. R. Cas. 492.

[4] In Toledo, etc., R. Co. *v.* Detroit, etc., R. Co., 62 Mich. 564, 28 Am. & Eng. R. Cas. 272, it was said: "The provision of the section which requires that the company whose road is crossed shall bear some proportion of the expense of keeping the crossing in repair after it is made can only be justified by the necessities of the case growing out of the connecting of the two tracks, for the reason that no repairs can be made at the point of crossing which will not extend to both tracks; and the extent of such expense required to be borne by the company whose track is crossed should always be limited as near as may be to what would have been necessary to keep the respondent's track in repair at the crossing had the same not been made." See, also, Baltimore, etc., R. Co. *v.* Walker, 45 Ohio St 577, s. c. 36 Am. & Eng. R. Cas. 492.

[5] Toledo, etc., R. Co. *v.* Detroit, etc., R. Co. 62 Mich. 564, 28 Am. & Eng. R. Cas. 272.

[6] Seattle, etc., R. Co. *v.* State, 7 Wash. 150, 34 Pac. Rep. 551; Chicago, etc., R. Co. *v.* Joliet, etc., R. Co., 105 Ill. 388, s. c. 14 Am. & Eng. R. Cas. 62.

repairs, it may enforce contribution from the other company,[1] or where one company has bound itself by contract to keep up the crossing at its own expense and fails to do so, the other company may make the repairs and recover from the company upon which the duty of making the repairs legally rested.[2]

§ 1135. **Street railways crossing steam railroads.**—Street railways have a right to cross steam railways and it has been held that the general statutes in force regulating the manner in which steam railways shall cross each other are applicable in such cases.[3] And under a statute which authorizes a court to order a crossing other than at grade a street railway may be ordered to construct an overhead crossing.[4] So where a street railway has lawfully laid its track across the track of a steam railway in conformity to the grade thereof the steam railroad company will be enjoined from tearing up or injuring the street railway company's track.[5] Where a steam railway crosses a highway or a street, a street railway which has a right to lay its track in the street or highway may cross the track of the steam railway,[6] and the steam railway is not entitled to re-

[1] Baltimore, etc., R. Co. *v.* Walker, 45 Ohio St. 577, s. c. 36 Am. & Eng. R. Cas. 492.

[2] Chicago, etc., R. Co., 105 Ill. 388, s. c. 14 Am. & Eng. R. Cas. 62, 68.

[3] Elizabethtown, etc., R. Co. *v.* Ashland, etc., R. Co., 96 Ky. 347, 26 S. W. R. 181; Pennsylvania R. Co. *v.* Braddock Electric R. Co., 152 Pa. St. 116, 25 Atl. Rep. 780, s. c. 55 Am. & Eng. R. Cas. 1; Port Richmond, etc., R. Co. *v.* Staten Island, etc., R. Co., 144 N. Y. 445; Buffalo, etc., R. Co. *v.* New York, etc., R. Co., 25 N. Y. Supp. 265; Pennsylvania R. Co. *v.* Conshohocken R. Co., 15 Pa. Co. Ct. 454. The right to cross, however, is not acquired by acquiescence of the steam railroad during a short period in which the street railroad is allowed to use the crossing, while the matter is in negotiation between the companies. Port Richmond, etc., R. Co. *v.* Staten Island, etc., R. Co., 144 N. Y. 445.

[4] Pennsylvania, R. Co. *v.* Braddock, etc., R. Co., 152 Pa. St. 116, 25 Atl. Rep. 780, s. c. 55 Am. & Eng. R. Cas. 1. See, also, New York, etc., R. Co. *v.* Bridgeport Traction Co., 65 Conn. 410, 32 Atl. Rep. 953.

[5] Buffalo, etc., R. Co. *v.* DuBois, etc., R. Co., 149 Pa. St. 1, 24 Atl. Rep. 179.

[6] Chicago, etc., R. Co. *v.* Whiting, etc., R. Co., 139 Ind. 297, 38 N. E. R. 604, 26 L. R. A. 337, 1 Am. & Eng. R. Cas. (N. S.) 181. The same view is taken in Chicago, etc., R. Co. *v.* West Chicago Street R. Co., 156 Ill. 255, s. c. 29 L. R. A. 485 and note. In the last case it was held that an injunction would not lie at the suit of the steam railroad company. See, also, Morris, etc., R. Co. *v.* Newark, etc.,

cover any compensation for such crossing, as for an additional burden.[1] This rule rests on the theory that where a steam railroad crosses a street or public highway it takes its right subject to the rights of the public to use the street in a reasonable and lawful manner, and since a street railway is not an additional burden to the street, but such a use as the public are entitled to have made of the street, therefore the railroad takes its right in the street subject to the right of street railway companies to lay their tracks across its tracks. The construction of a street railway under such circumstances imposes no additional burden upon the steam railway for which compensation must be made.[2] After a street railroad has constructed its track across the track of a steam railroad the crossing does not become such a railroad crossing as to require the steam railroad to stop its trains before attempting to cross.[3] It has been held that at such crossings the same duty rests upon the street railway to stop and look and listen, before attempting to cross that rests upon persons riding in ordinary vehicles, and where the employe in charge of a street car fails to take such precautions and injury results, the street railway company will be liable to its passengers for all resulting injury.[4]

R. Co., 51 N. J. Eq. 379. But compare Cincinnati, etc., R. Co. *v.* Chattanooga, etc., R. Co., 44 Fed. R. 470.

[1] Chicago, etc., R. Co. *v.* Whiting, etc., R. Co., 139 Ind. 297, 38 N. E. R. 604, 26 L. R. A. 337, 1 Am. & Eng. R. Cas. (N. S.) 181. But see People's R. Co. *v.* Syracuse, etc., R. Co., 22 Abb. N. Cas. (N. Y.) 427. As to the right of one street railroad to cross another, see Brooklyn, etc., R. Co. *v.* Brooklyn, etc., R. Co., 33 Barb. (N. Y.) 420; Citizens, etc., R. Co. *v.* East Harrisburg, etc., R. Co., 164 Pa. St. 274; Market St. R. Co. *v.* Central R. Co., 51 Cal. 583; Omaha Horse R. Co. *v.* Cable, etc., Co., 32 Fed. R. 727. As to the right of a commercial railroad to cross a street railway, see Lynn, etc., R. Co. *v.* Boston, etc., Co., 114 Mass. 88, and compare Georgia, etc., R. Co. *v.* Columbus, etc., R. Co., 89 Ga. 205.

[2] Braddock, etc., R. Co. *v.* Braddock Ry. Co., 1 Pa. Dist. R. 44, 49 Leg. Intel. 25; Pennsylvania, etc., R. Co. *v.* Braddock, etc., R. Co., 1 Pa. Dist. 626, 49 Leg. Intel. 74; Chicago, etc., R. Co. *v.* Whiting, etc., R. Co., 139 Ind. 297, 38 N. E. R. 604, 26 L. R. A. 337, 1 Am. & Eng. R. Cas. (N. S.) 181; New York, etc., R. Co. *v.* Bridgeport Traction Co., 65 Conn. 410, 32 Atl. R. 953.

[3] Byrne *v.* Kansas City, etc., R. Co., 61 Fed. Rep. 605, s. c. 24 L. R. A. 693.

[4] Philadelphia, etc., R. Co. *v.* Boyer, 97 Pa. St. 91, 2 Am. & Eng. R. Cas. 172: Booth on Street Railroads, § 301.

In some cases, however, both companies may be guilty of negligence, and where such is the case a joint action may be maintained against both.[1] Additional authorities will be found in a subsequent section, where the subject is more fully treated.[2]

[1] Downey *v.* Philadelphia, etc., R. Co., 161 Pa. St. 588, 58 Am. & Eng. R. Cas. 594.

[2] *Post*, § 1178, and authorities there cited.

CHAPTER XLV.

PRIVATE CROSSINGS.

§ 1136. Definition.
1137. Who entitled to.
1138. Effect of conveyance of right of way by land-owner.
1139. Right to crossing where right of way has been condemned.
1140. Private crossings by prescription.
1141. Private crossings by agreement.
1142. Private crossings under statutory authority.
1143. Location and number of crossings.
1144. Construction of crossing—Sufficiency.
1145. Enforcing construction.
1146. Repair and maintenance.
1147. Passways and subways under the track.
1148. Damages for destruction or impairment of crossing by railway company.
1149. When right to private crossing runs with the land.
1150. Care required on part of railway company at private crossings.
1151. Accidents and injuries at private crossings.

§ 1136. **Definition.**—Private or farm crossings, as distinguished from public crossings, are those crossings which are constructed not for the use of the public, but for the benefit of a single individual or group of individuals, and are crossings in which the public have no interest. They are usually constructed between different parcels of land which have been severed by the construction of the railway, so as to afford the owner access from one parcel to the other. They are, however, to a limited degree constructed between parcels of land owned by different individuals, and between parcels of land and highways located on opposite sides of the right of way.[1]

§ 1137. **Who entitled to.**—The number of persons who are entitled to claim and secure private or farm crossings must de-

[1] For a definition and explanation of what amounts to and is included in a highway crossing, see § 1097, *ante*.

pend, in a measure, at least, on the manner in which it is sought to secure the crossing. Where the crossing is secured by agreement between the person seeking the crossing and the railroad company, any one who may be able to secure an agreement with the company may obtain a crossing, and if not prohibited by statute, a company may grant any number of private crossings it sees fit, so long as it does not impair its ability to perform its public functions.[1] The general rule is that only the person to be benefited by the crossing has a right to demand its construction.[2] Aside from the crossings secured by agreement between the person for whom the crossing is constructed and the railway company granting it, the subject is so largely a matter of statutory regulation in the different states, that it is almost impossible to lay down general rules applicable to the subject. The question as to who are entitled to private and farm crossings is so closely connected with the sections which are to follow, that the discussion there made completely covers the subject, and, therefore, we do not deem it necessary to further consider it at this place. It has been held that a statute requiring a railway company to put in and maintain private farm crossings for adjoining land-owners applies only to those cases where the farm was bisected by the construction of the road, and not to those cases where an owner acquired lands on both sides of the right of way, after the road was constructed.[3]

§ 1138. **Effect of conveyance of right of way by landowner.**— Where a landowner through whose land a railroad company

[1] In the case of Kansas City, etc., R. Co. *v.* Kregelo, 32 Kan. 608, s. c. 20 Am. & Eng. R. Cas. 241, this language was used: "As a general rule, the land-owner has a reasonable right to farm crossings at such places as the necessities of his farm demand, provided such crossings, and the use thereof will not interfere with the paramount rights of the railroad company."

[2] Henderson *v.* Chicago, etc., R. Co., 48 Iowa 216. It has been held that where a landlord would be entitled to a private crossing, his tenant is entitled to it. Hugo *v.* Great Western, etc., R. Co., 16 U. C. Q. B. 506.

[3] Stumpe *v.* Missouri, etc., R. Co., 1 Mo. App. Reporter 633. But see Miller *v.* Quincy, etc., R. Co., 56 Mo. App. 72.

seeks to secure a right of way, executes to the company a conveyance which is silent as to private crossings between the different parts of his land the question sometimes arises as to the effect of such a conveyance. After the conveyance has been made and the railway company has constructed its line the owner of the different parcels of land may desire a crossing over the railway tracks from one part of the land to another. Where such cases have arisen the contention of the railway company has been that the execution of an unconditional deed by an owner to a right of way through his land estops him to claim any further interest in such strip of land, such as a right to have a private way across the same. The rule, however, is that such a conveyance does not constitute a waiver of a right to a private crossing, and the owner whose land has been severed into parcels may claim and enforce the right to a crossing, notwithstanding, his unconditional instrument of conveyance.[1] One of the authorities which we have cited seems to rest on the ground that where there is a statute securing to owners whose lands are severed by a railroad right of way the right to private crossings from one part to another it is applicable to cases where the right of way is secured by conveyance from the owner as well as to cases in which the right of way is secured under the right of eminent domain,[2]

[1] New York, etc., R. Co. *v.* Railroad Commissioners, 162 Mass. 81, s. c. 38 N. E. R. 27; Smith *v.* New York, etc., R. Co,, 63 N. Y. 58; Gulf, etc., R. Co. *v.* Rowland, 70 Tex. 298.

[2] "The statute is general and applies to cases where the lands are acquired by purchase, as well as to those where they are acquired by the power of eminent domain. It may be assumed that the owner has power to waive or release this obligation in respect to his lands, but we do not think that a conveyance in fee of a right of way has this effect. Such a conveyance is not inconsistent with the duty imposed upon the corporation. It gives the company a title in fee to the land for their roadway, and nothing more. In the conveyance of this land there is not a word indicating a purpose to waive or release the right to enforce the duty to make a farm crossing, and the presumption is, that the parties intended to leave the duty unaffected. The obligation imposed is not connected with the acquisition of land by purchase or otherwise, but is enjoined independently, and upon the assumption of ownership, and without regard to the manner of acquisition." Smith *v.* New York, etc., R. Co., 63 N. Y. 58.

while another rests on the ground that where a strip of land is conveyed from the middle of a parcel leaving the remainder in two separate tracts a right of way from one to the other is implied independent of any statute securing such right.[1] It is possible that the latter case carries the doctrine a little too far, at least when applied to railroads.

§ 1139. **Right to crossing where right of way has been condemned.**—Where a railroad right of way has been condemned through the lands of a land-owner and damages have been assessed and paid to such land-owner, his right to a private crossing from one portion of his land to another seems to depend in a great measure upon what he was allowed compensation for in the condemnation proceedings. If, in estimating the damages, compensation has been allowed for the reduced value of the land because of the owner being deprived of access from one parcel to another and compensation has been made on the theory that no crossing would be put in, then the railroad company is entitled to exclusive possession of its right of way and the land-owner has no right to a private crossing.[2] Where it appears that compensation was not made on the theory that there should be no crossings and the owner was not compensated for the damages resulting from being deprived of access from one parcel of his land to the other, the

[1] "But it is familiar law that, if one conveys a part of his land in such a form as to deprive himself of access to the remainder of it unless he goes across the land sold, he has a way of necessity over the granted portion. This comes by implication from the situation of the parties, and from the terms of the grant, when applied to the subject-matter. The law presumes that one will not sell land to another without an understanding that the grantee shall have a legal right of access to it, if it is in the power of the grantor to give it, and it equally presumes an understanding of the parties that one selling a portion of his land shall have a legal right of access to the remainder over the part sold, if he can reach it in no other way. This presumption prevails over the ordinary covenants of a warranty deed." New York, etc., R. Co. *v.* Railroad Commissioners, 162 Mass. 81, s. c. 38 N. E. R. 27.

[2] Chicago, etc., R. Co. *v.* Casper, 42 Kan. 561; Baltimore, etc., R. Co. *v.* Lansing, 52 Ind. 229; Springfield, etc., R. Co. *v.* Rhea, 44 Ark. 258; Cedar Rapids, etc., R. Co. *v.* Raymond, 37 Minn. 204, 30 Am. & Eng. R. Cas. 345.

award of damages and the acceptance of compensation under the award does not estop the owner from claiming and securing a private crossing over the railroad right of way from one parcel of his land to the other.[1] And where an award of damages has been made, unless it appears that it was made on the theory that the land-owner should be limited to a certain kind of crossing, it has been held that he is not thereby estopped from compelling the railroad company to construct an underground crossing.[2]

§ 1140. **Private crossings by prescription.**—It seems to be well settled that a land-owner may acquire a right to a private crossing over a railroad right of way by adverse user.[3] The right to acquire a crossing in this way has been declared in a number of cases. Thus, where a crossing was used continuously for forty-nine years, and no effort was made by the railroad company to discontinue it, it was held that the railroad company was liable for its maintenance.[4] Twenty years user has been held sufficient to acquire the right to a private crossing.[5] And where a railway company in constructing its line left under a trestle an open subway which an adjoining owner used, openly and continuously, for a period of twenty-five years as a passway from one portion of his land to another, it was held that he had acquired such right to such passage-way as would entitle him to maintain an action for damages against the railway company for filling up and destroying it.[6]

[1] Lind *v.* Chicago, etc., R. Co., 42 Kan. 352; Kansas City, etc., R. Co. *v.* Kregelo, 32 Kan. 608; Beardsley *v.* Lehigh Valley, etc., R. Co., 142 N. Y. 173.

[2] Beardsley *v.* Lehigh Valley, etc., R. Co., 142 N. Y. 173; Van Wagner *v.* Central, etc., R. Co., 30 N. Y. Supp. 165.

[3] "Twenty years of appropriate user is sufficient to prove the establishment of a public way across a railroad, or the grant of a private way. Fisher *v.* New York, etc., R. Co., 135 Mass. 107." See Gay *v.* Boston, etc., R. Co., 141 Mass. 407, 6 N. E. R. 236.

[4] Prince *v.* New York, etc., R. Co., 14 N. Y. Supp. 817.

[5] Fisher *v.* New York, etc., R. Co., 135 Mass. 107, s. c. 17 Am. & Eng. R. Cas. 80; Gay *v* Boston, etc., R. Co., 141 Mass. 407, 6 N. E. R. 236. See note in 35 Am. & Eng. R. Cas. 320.

[6] Wells *v.* Northern R. Co., 14 Ont. R. 595, s. c. 35 Am. & Eng. R. Cas. 314.

§ 1141. **Private crossings by agreement.**—The terms and conditions upon which private crossings are secured may be, and often are, determined by contract between the railway company and the person seeking the crossing.[1] Such contracts are valid and will be enforced by the court. Resort may be had to equity to enforce such a contract, if there is no adequate remedy at law for the person aggrieved,[2] but where there is an adequate remedy at law equity will not interfere. Thus, where it was sought to enforce specific performance of a contract for a private crossing and it appeared that the crossing would be of slight or doubtful value to the land-owner after constructed the court refused to decree specific performance and left the party to his remedy for damages.[3] And where a company in consideration of the conveyance of a right of way by a land-owner agreed to construct farm crossings for him and refused to do so, and it appeared that there was in force a statute which provided that land-owners could secure private crossings it was held that equity would not enforce the contract but would leave the owner to his remedy at law for damages for a breach of the contract or his right to secure the crossings under the statute.[4] Damages will be allowed for the obstruc-

[1] In Gay *v.* Boston, etc., R. Co., 141 Mass. 407, 6 N. E. R. 236, the court said: "That a land-owner, in conveying land for a railway, may reserve a right of way, which must operate as a grant; that the railroad corporation, when settling with the land-owner for damages for land taken, may make a valid agreement to allow or maintain a crossing as one of the terms of settlement, and that a railroad corporation may, to the extent of its interest as owner of the land, or holder of the easement and franchise, grant a private right of way over its road—are propositions which we believe have never been questioned, and which are recognized by statutes and decisions."

[2] See Clouse *v.* Canada, etc., R. Co., 4 Ont. R. 28, s. c. 14 Am. & Eng. R. Cas. 456.

[3] Murdfeldt *v.* New York, etc., R. Co., 1 Sil. App. N. Y. 93, 25 Am. & Eng. R.Cas. 144.

[4] Illinois Central R. Co. *v.* Willenborg, 117 Ill. 203, 26 Am. & Eng. R. Cas. 358. In that case it was said: "Whether they (the land-owners) are entitled to have a crossing constructed by the company for their use, either under the convenant in the right of way deed, or under the statute, or both, their remedy is clearly in a court of law, and they will be remitted to that forum, where such matters are purposely cognizable. The remedy for the complaint made against the railroad company for the omission of duty, whether it arises out of a contract or under the statute, is full, complete and adequate at law, and no reason appears why a court of equity

tion of a crossing by gates when the agreement provides that the crossing shall be open,[1] and where the company refuses altogether to construct the crossing.[2] When once a valid contract has been made for a crossing the railway company will not be excused from performing the contract and constructing the crossing because the cost will be somewhat heavy.[3] It has been held that the sale of the land after suit is brought will not defeat the action for damages.[4] The measure of damages for failure to construct a private crossing is the cost of constructing the crossings together with such damages as may have resulted from the loss of the use of the crossing up to the time of the trial.[5]

§ 1142. **Private crossings under statutory authority.**—In a great many of the states statutes are in force which provide a method by which land-owners whose lands border on the right of way of a railroad company may secure private or farm crossings. There is some conflict in the authorities as to the constitutionality of such statutes. That such statutes are constitutional as to all railway companies which are chartered and constructed after the enactment of the statutes the authorities

should assume jurisdiction." See Canada, etc., R. Co. *v.* Erwin, 13 Can. S. C. R. 162, 35 Am. & Eng. R. Cas. 311. When there was an alleged agreement as to a crossing, and plaintiff sued to redress a breach of it and it appeared that he did not rely upon his contract, but upon the law to secure his crossing, it was held that he had no rights under the alleged contract. Canada, etc., R. Co. *v.* Clouse, 13 Can. S. C. R. 139, 35 Am. & Eng. R. Cas. 296.

[1] Williams *v.* Clark, 140 Mass. 238, 24 Am. & Eng. R. Cas. 460.

[2] Indiana, etc., R. Co. *v.* Koons, 105 Ind. 507. In this case the contract provided that the company should fence the track and build a private crossing. The owner sued and recovered damages for a failure to construct the crossing. Afterward he brought a second suit for the failure to fence. It was held that the first suit was an adjudication of the breach of contract and that the second suit would not lie.

[3] Cincinnati, etc., R. Co. *v.* Hudson, 88 Ky. 480, 39 Am. & Eng. R. Cas. 693. See Clouse *v.* Canada, etc., R. Co., 4 Ont. R. 28, s. c. 14 Am. & Eng. R. Cas. 456.

[4] Cincinnati, etc., R. Co. *v.* Hudson, 88 Ky. 480, 39 Am. & Eng. R. Cas. 693.

[5] Cincinnati, etc., R. Co. *v.* Hudson, 88 Ky. 480, 39 Am. & Eng. R. Cas. 693. See Port *v.* Huntingdon, etc., R. Co., 168 Pa. St. 19, 31 Atl. R. 950.

are agreed,[1] but where the statute requiring a railroad company to construct and maintain private crossings was enacted after the railway company was chartered and its line constructed it was held unconstitutional, as depriving the company of its property without due compensation.[2] Other well reasoned authorities, however, hold that the enactment of such a statute is a valid exercise of the police power of the state and applies to those companies chartered before as well as those chartered after its passage.[3] If the decisions which uphold the constitutionality of such statutes can be placed upon the ground that the statutes rest upon the police power of the state, they are undoubtedly correct, but some of the authorities hold, and, we think, with some reason, that such statutes do not rest upon and are not within the police power of the state.[4] The state usually exercises the police power for the benefit and safety of the public and it seems to us that the construction of private and farm crossings over railway tracks can hardly be said to be for the benefit of the public. The same reason can not exist

[1] Illinois, etc., R. Co. *v.* Willenborg, 117 Ill. 203, 26 Am. & Eng. R. Cas. 358. A railway company which is reorganized after purchase at foreclosure sale is estopped to question the constitutionality of an act requiring farm crossings which was in effect at the time of such reorganization. Alabama, etc., R. Co. *v.* Odeneal (Miss.) 19 So. R. 202.

[2] People *v.* Detroit, etc., R. Co., 79 Mich. 471, 42 Am. & Eng. R. Cas. 257, 7 L. R. A. 717; Gulf, etc., R. Co. *v.* Rowland, 70 Tex. 298, 35 Am. & Eng. R. Cas. 286. In the case of New York, etc., R. Co. *v.* Railroad Comrs., 162 Mass. 81, 38 N. E. R. 27, the statute was upheld, but the court placed its opinion upon the ground that the statute did not create a new right, but simply declared a right which existed independent of statute. The court intimated that if the statute attempted to create a new right or to impose a new burden it would be held unconstitutional. The court, among other things, said: "If the statute assumed to create a right of way where none before existed, and to put upon the railroad corporations the burden of establishing and maintaining crossings for private persons over land held by a railroad corporation under a perfect title, subject to no rights or privileges, it might well be held unconstitutional."

[3] New York, etc., R. Co. *v.* Railroad Comrs., 162 Mass. 81, 38 N. E. R. 27; Illinois, etc., R. Co. *v.* Willenborg, 117 Ill. 203, 26 Am. & Eng. R. Cas. 358.

[4] People *v.* Detroit, etc., R. Co., 79 Mich. 471, 42 Am. & Eng. R. Cas. 257, 7 L. R. A. 717. But they may also be valid where the power to amend or repeal has been reserved.

for placing a statute requiring a railway company to construct private crossings upon the police power that exists for resting a statute requiring a company to fence its tracks upon the police power, for in one case the safety of the public who use the railway is endangered while in the other it is secured.[1] The provisions of the various statutes are so different that it will be impossible to notice them all. The right to a crossing under such statutes is not confined to one for agricultural purposes.[2] Lessees may be compelled to furnish private crossings under the statute,[3] as well as the owners of the railway, and so may a receiver.[4] The procedure in securing a crossing under statutory authority depends on the particular statute under which the crossing is sought, and since the statutes are so different in their provisions it follows that the procedure must vary.[5] In some of the states the owner must put the crossing in at his own expense while in others the expense must be borne by the company.[6] Some of the statutes provide that if the company fail, after being notified, to put in the crossing, the land-owner may do so and recover the expense from the railroad company,[7] or, if the railroad company refuse, the owner may recover damages for such refusal.[8]

[1] "It is apparent that every open crossing into the public highway across a railroad track increases rather than diminishes, the danger of travel, by giving animals an opportunity to get upon the track in front of passing trains. These residence crossings can not, therefore, be justified on the ground of protection and safety to passengers and property." People *v.* Detroit, etc., R. Co., 79 Mich. 471, 42 Am. & Eng. R. Cas. 257, 7 L. R. A. 717.

[2] Buffalo, etc., Co. *v.* Delaware, etc., R. Co., 130 N. Y. 152. In the case cited it was said: "The statute does not limit the right of adjoining owners to crossings solely for agricultural purposes, but they may be ordered to enable owners to remove the natural products of the land, like stone and minerals."

[3] Buffalo, etc., R. Co. *v.* Delaware, etc., R. Co., 130 N. Y. 152.

[4] Peckham *v.* Dutchess County R. Co., 145 N. Y. 385, 40 N. E. R. 15.

[5] It has been held that where the obligation to put in farm crossings is purely statutory, the statutory method of enforcing that obligation is exclusive. Chicago, etc., R. Co. *v.* Eichman, 47 Ill. App. 156.

[6] Omaha, etc., Co. *v.* Severin, 30 Neb. 318, 45 Am. & Eng. R. Cas. 122.

[7] Sheridan *v.* Atchison, etc., R. Co., 56 Mo. App. 68.

[8] Port *v.* Huntingdon, etc., R. Co., 168 Pa. St. 19, s. c. 31 Atl. R. 950.

§ 1143. **Location and number of crossings.**—The manner in which the location of a crossing shall be determined depends in a great measure upon the terms of the statute. Where the statute confers upon the land-owner the right to select the place of crossing, he may do so, but his selection must be reasonable and such as not to interfere with the paramount rights of the railway company.[1] And, on the other hand, where the statute permits the railway company to select the place of crossing, it may do so, provided the location is a suitable one and such as not to subject the owner to great inconvenience.[2] Whether the land-owner or the railroad company has the right to select the place of crossing, the purposes of the crossing and the respective rights of each of the parties must be considered, and neither party will be allowed to arbitrarily select a place of crossing to the manifest injury or detriment of the other party.[3] The remedy where the company fails to construct the crossing at a place convenient for the land-owner, is by a suit

[1] Van Vrankin *v.* Wisconsin, etc., R. Co., 68 Iowa 576, s. c. 27 N. W. R. 761. "As a general rule, the land-owner has a reasonable right to farm crossings at such places as the necessities of his farm demand, provided such crossings and the use thereof will not interfere with the paramount rights of the railroad company. Kansas, etc., Railway Co. *v.* Allen, 22 Kan. 285; Atchison, etc., Railroad Co. *v.* Gough, 29 Kan. 94." Kansas City, etc., R. Co. *v.* Kregelo, 32 Kan. 608, s. c. 20 Am. & Eng. R. Cas. 241.

[2] Wademan *v.* Albany, etc., R. Co., 51 N. Y. 568; Boggs *v.* Chicago, etc., R. Co., 54 Iowa 435.

[3] In Jones *v.* Seligman, 81 N. Y. 190, s. c. 3 Am. & Eng. R. Cas. 236, the court said: "The location of a crossing is to be made somewhat with reference to the needs, necessities and convenience of the owner of the farm, and he is entitled to be reasonably and fairly accommodated. The circumstances are to be considered, and the crossings should be located in view of all the surroundings, and according to the situation of the adjacent land. The railroad corporation, in the exercise of its duty in providing farm crossings, is not vested with any absolute discretion or arbitrary power that its decision is final and conclusive and can not be reviewed or disturbed, while under the provisions of the general railroad act, requiring the corporation to erect farm crossings, etc., for the use of the proprietor of lands adjoining, the interest of neither party is alone controlling, the power must be exercised in a proper manner, having due regard to the convenience of the owner of the land, and without subjecting him to needless and unreasonable injury." See, also, Van Kleeck *v.* Dutchess County R. Co., 28 N. Y. Supp. 902; Clarke *v.* Ohio River R. Co., 39 W. Va. 732, 20 S. E. R. 696.

for damages,[1] or by an action to compel the construction of a crossing at a proper place,[2] And where the land-owner selects a place for a crossing at a point where the expense to the company will be enormous in proportion to the benefit to the land-owner, the company may properly refuse to construct the crossing at such place.[3] The number of crossings to which a land-owner is entitled is limited. The general rule is that when the railroad has granted a reasonable number of crossings, and afforded the owner a reasonable opportunity to pass from one part of his farm to another, its duty, at least so far as the number of crossings is concerned, is at an end.[4] When the statute under which the crossing is sought provides that the company must furnish adjoining owners "necessary" farm crossings, it has been held that it must furnish such crossings and as many as are reasonably necessary, and that what are "necessary" crossings is a question for the jury.[5]

[1] Wademan *v.* Albany, etc., R. Co., 51 N. Y. 568. In this case the plaintiff sued for damages and for the construction of a crossing at a suitable place. The court held that as the construction of a new crossing would entail such a heavy expense on the railroad in proportion to the benefit to the land-owner, he should be awarded damages and nothing more. See, also, Sheridan *v.* Atchison, etc., R. Co., 56 Mo. App. 68.

[2] See Jones *v.* Seligman, 81 N. Y. 190; Sheridan *v.* Atchison, etc., R. Co., 56 Mo. App. 68.

[3] The company, however, can not refuse to construct a crossing at a proper place. Gray *v.* Burlington, etc. R. Co., 37 Iowa 119.

[4] See, on the general subject, Van Kleeck *v.* Dutchess County R. Co., 28 N. Y. Supp. 902; Jones *v.* Seligman, 81 N. Y. 190; Canada S. R. Co. *v.* Clouse, 13 Can. S. C. 139, s. c. 35 Am. & Eng. Cas. 296. The law is very clearly expressed in the recent case of Clarke *v.* Ohio River R. Co., 39 W. Va. 732, 20 S. E. R. 696, as follows: "When once the company has put in suitable crossings, can it be required later to put in additional ones? No authority has been cited to the exact point, and I have found none. In Wademan *v.* Albany, etc., R.Co., 51 N. Y. 568, under such a statute, it was held that if the statute give no election in terms to the land-owner, it is the right of the company to say where the crossings shall be; but in the exercise of this right regard must be had to the convenience of both parties, and such a location must be made as will not subject the owner to needless and unreasonable injury. 1 Ror. R. R. 444. Must the company change the crossings in place, or add new ones, with the changing caprices, or even needs, of the owner? If the owner sell part of his land, must the company then make a crossing on the part sold, and must it keep on adding crossings as further sales of parts are made? I think not."

[5] Alabama, etc., R. Co. *v.* Odeneal,

§ 1144. **Construction of crossing—Sufficiency.**—Where the railway company is under an obligation to put in private crossings for the adjoining land-owners, such crossings must be adequate and sufficient for all the usual purposes for which such crossings are used. The company can not discharge its duty by constructing a crossing which would enable only persons on foot or animals to cross. The crossing must be adequate, and an adequate means of crossing has been held to be such a crossing as would enable the owner to cross the track and right of way, on foot or horseback, with wagon or carriage, or with domestic animals under his control.[1] It is difficult to lay down any general rule that can apply to all cases for the adequacy of any particular private crossing must necessarily depend largely on its position and the surrounding circumstances.[2]

§ 1145. **Enforcing construction.**—Different methods are provided for enforcing the construction of private or farm crossings. The methods must, of course, vary, because in some cases the right to the crossing rests on a contract while in others it rests on statutory enactments. Where the right to the crossing rests on a contract between the land-owner and the railway company there is some conflict as to whether or not such a contract can be enforced by a decree of specific performance. Unless the land-owner has a full, complete and adequate remedy at law for damages for a violation of the contract we are of the opinion that the contract may be enforced by a decree in equity, but where full and adequate compensation can be made[3] or where it appears that to decree specific

(Miss.) 19 So. R. 202. See Dubbs *v.* Phila., etc., Railroad Co., 148 Pa. St. 66, s. c. 23 Atl. R. 883.

[1] Omaha, etc., R. Co. *v.* Severin, 30 Neb. 318, 45 Am. & Eng. R. Cas. 122. See, also, Fremont, etc., R. Co. *v.* Lamb, 11 Neb. 592, 5 Am. & Eng. R. Cas. 267. An adequate crossing has been held not to mean an open crossing, so that animals may wander across the track from one part of a farm to another. Curtis *v.* Chicago, etc., 62 Iowa 418, 13 Am. & Eng. R. Cas. 593.

[2] Horne *v.* Atlantic, etc., R. Co., 36 N. H. 440; Gray *v.* Burlington, etc., R. Co., 37 Iowa 119.

[3] *Ante*, § 1141.

performance will result in little advantage to the land-owner and great expense to the railroad company specific performance will be denied.[1] Where the right to a crossing rests upon statute the statute usually provides a method for enforcing a construction of the crossing. The methods provided by the statutes are not at all uniform, varying, of course, in the different states. Some of the statutes provide that the construction of the crossing may be secured by mandamus against the railway company.[2] Others provide that the land-owner may give notice to the railway company to construct the crossing, and on its failure to do so within the time specified by the statute, he may do so and recover the expense from the railway company.[3] Some of the statutes provide that double the cost of the crossing may be recovered.[4]

§ 1146. **Repair and maintenance.**—The general rule is that the duty of repairing and maintaining private crossings rests upon the person whose duty it was to construct the crossing.[5]

[1] Murdfeldt *v.* New York, etc., R. Co., 102 N. Y. 703, 1 Sil. App. (N. Y.) 93, 25 Am. & Eng. R. Cas. 144; *ante*, § 1141.

[2] Boggs *v.* Chicago, etc., R. Co., 54 Iowa 435, 6 N. W. R. 744; State *v.* Mason City, etc., R. Co., 85 Iowa 516, 52 N. W. R. 490. See Buffalo, etc., Co. *v.* Delaware, etc., R. Co., 130 N. Y. 152, 29 N. E. R. 121. In State *v.* Chicago, etc., R. Co., 79 Wis. 259, s. c. 49 Am. & Eng. R. Cas. 304, it was said: "This provision (the one providing for a penalty for the failure to construct a farm crossing) enables the owner to sue the corporation and recover damages or penalties for its failure to perform its legal duty; but that will not secure the construction of the necessary farm crossing, nor will it afford an adequate remedy. The writ of mandamus would seem to be most efficient, if not the only adequate means for compelling the corporation to do its legal duty. * * * * * It seems to us clear that mandamus is the only legal remedy to which the relator can resort in this case to enforce his rights to compel the corporation to perform the duty which the law imposes." Mandamus, however, is not an exclusive remedy. State *v.* Mason City, etc., R. Co., 85 Iowa 516, 52 N. W. R. 490.

[3] Chicago, etc., R. Co. *v.* Eichman, 47 Ill. App. 156; Green *v.* Morris, etc., R. Co., 24 N. J. L. 486.

[4] Chicago, etc., R. Co. *v.* Eichman, 47 Ill. App. 156.

[5] Madison *v.* Missouri, etc., R. Co., 60 Mo. App. 599; Peckham *v* Dutchess County, etc., R. Co., 20 N Y. Supp. 39; Cotton *v.* New York, etc. R. Co., 20 N. Y. Supp. 347; Patterso *v.* South, etc., R. Co., 89 Ala. 318 Miller *v.* Chicago, etc., R. Co., 6 Iowa 546; Stewart *v.* Cincinnati, etc. R. Co., 89 Mich. 315, 17 L. R. A. 539

The statutes imposing upon railway companies the duty of constructing farm crossings usually provide that the company shall "construct and maintain" suitable farm crossings, and under such provisions the duty of keeping in repair falls upon the railway company.[1] The obligation to repair may also become binding upon the company from long continued custom to repair. Thus, where the company had kept a crossing in repair for a period of forty-nine years it was held that the duty to repair was one from which it could not escape.[2] The duty to repair is not owing to any one besides persons lawfully using the crossing. A person using a private crossing without right and for his own convenience can not complain because the crossing may not be in proper repair.[3]

§ 1147. **Passways and subways under the tracks.**—Communication from one part of a land-owner's property to another part which has been cut off by a railroad right of way is often provided for by passways and subways constructed under the tracks. As a rule, such passways and subways are more convenient for the land-owner, and are at the same time much safer for the railway company, for collisions and injuries at such crossings are practically reduced to a minimum. There are but few adjudicated cases as to whether or not a company can be compelled to furnish a crossing by means of a passway or subway under the track. Most of the cases on the subject involve the rights of railway companies and land-owners in reference to passways and subways after they have been constructed. It has, however, been held, and correctly, we think, that where a railroad company was required to construct farm crossings, and it appeared that the track was on a

[1] See Omaha, etc., R. Co. *v.* Severin, 30 Neb. 318, 45 Am. & Eng. R. Cas. 122; Clouse *v.* Canada Southern, R. Co., 4 Ont. R. 28, s. c. 14 Am. & Eng. R. Cas. 456; Fremont, etc., R. Co. *v.* Lamb, 11 Neb. 592, 5 Am. & Eng. R. Cas. 367; Illinois Central R. Co. *v.* Willenborg, 117 Ill. 203, s. c. 26 Am. & Eng. R. Cas. 358.

[2] Prince *v.* New York, etc., R. Co., 14 N. Y. Supp. 817. See Stewart *v.* Cincinnati, etc., R. Co., 89 Mich. 315, 17 L. R. A. 539.

[3] Cornell *v.* Skaneateles R. Co., 15 N. Y. Supp. 581. See Mann *v.* Chicago, etc., R. Co., 86 Mo. 347.

high embankment and there was a natural depression through which a subway could be more conveniently constructed than a grade crossing, such subway would be ordered constructed.[1] And where a railway company was under a statutory obligation to furnish a land-owner a crossing, it was held that it might be done either by a grade crossing, an overhead crossing or an undergrade crossing, depending on the lay of the land, and the relative cost of constructing the different crossings.[2] After a passway has been constructed and the railway company attempts to fill it up, there is some conflict as to whether an injunction will lie to restrain the company from taking such action. Where the company has entered into a valid agreement with the land-owner to construct and maintain passways under its tracks, and it afterwards undertakes to fill up and destroy such passways, injunction is the proper remedy.[3] But where a passway has been used by mere sufferance, and under no claim of right, although it has been used for a sufficient length of time to give an easement by prescription, no such right has been acquired as will entitle a land-owner to an injunction to prevent the filling up of the passway.[4] But if the land-owner has acquired an easement, although he may not be entitled to an injunction to prevent the company from filling up the subway, he can recover damages for the destruction of his easement.[5]

§ 1148. **Damages for destruction or impairment of crossing by railway company.**—Where a railway company has once constructed a private crossing under a statutory duty to build such crossing it is under an obligation to see that the crossing

[1] Beardsley *v.* Lehigh Valley Ry. Co., 20 N. Y. Supp. 458, s. c. 142 N. Y. 173; Van Wagner *v.* Central, etc., R. Co., 80 Hun 278, 30 N. Y. Supp. 165; Jones *v.* Seligman, 81 N. Y. 190.

[2] Post *v.* Huntington, etc., R. Co., 168 Pa. St. 19, 31 Atl. Rep. 950. See St, Paul, etc., R. Co. *v.* Murphy, 19 Minn. 500.

[3] Swan *v.* Burlington, etc., R. Co., 72 Iowa 650; Rock Island, etc., R. Co. *v.* Dimick, 144 Ill. 628, 32 N. E. R. 291.

[4] Davis *v.* Cleveland, etc., R. Co., 140 Ind. 468. See Canada Southern R. Co. *v.* Clouse, 13 Can. S. C. R. 139, s. c. 35 Am. & Eng. R. Cas. 296.

[5] Wells *v.* Northern, etc., R. Co., 14 Ont. Rep. 594, s. c. 35 Am. & Eng. R. Cas. 314.

is properly maintained. It has no right to take out or destroy the crossing and if it does so it will be liable in damages.[1] But where a company changed the grade of its track thus necessitating a change in a private crossing it was held that the company was not bound to construct new approaches to the crossing.[2]

§ 1149. **When right to private crossing runs with the land.**—Where there is a mere parol agreement to put in a private crossing or for its use the right to such crossing does not run with the land and does not pass to a subsequent grantee of the adjoining land.[3] But where a deed conveying a right of way to the railway company provided for the construction and maintenance of private crossings the right is one that runs with the land and the right to the crossing may be enforced in favor of a subsequent grantee of the land.[4] And where the railway company which has put in a crossing in compliance with an agreement between itself and an adjoining land-owner continues to maintain the crossing after the land-owner has conveyed to another it may estop itself to claim that the subsequent grantee is not entitled to the crossing.[5] Where a rail-

[1] Ohio, etc., R. Co. *v.* McGehee, 47 Ill. App. 348; Wells *v.* Northern, etc., R. Co., 14 Ont. R. 594, s. c. 35 Am. & Eng. R. Cas. 314.

[2] Williams *v.* Clark, 140 Mass. 238, 24 Am. & Eng. R. Cas. 460.

[3] Mills *v.* Hopkins, 6 U. C. C. P. 138. A purchaser of a railway at a foreclosure rule is not bound by a parol agreement made by the president of the railroad company to make a farm crossing or maintain a fence of a certain description. Hunter *v.* Burlington, etc., R. Co., 76 Iowa 490, s. c. 41 N. W. R. 305.

[4] Port *v.* West Shore, etc., R. Co., 50 Hun 301; Hall *v.* Clearfield, etc., R. Co., 168 Pa. St. 64, s. c. 31 Atl. R. 940.

[5] The question of whether the right to a private crossing runs with the land was before the supreme court of Michigan in the case of Stewart *v.* Cincinnati, etc., R. Co., 89 Mich. 315, 17 L. R. A. 539. The court held that it was not necessary to decide that point to dispose of the case, but said in the course of its opinion: "In this case it is contended by the defendant that the agreement was personal, and was binding only between the railroad and the owner, and did not contain any covenants which ran with the land; and, moreover, it was an agreement to construct, and not to maintain. Conceding, without deciding, that this contention is correct, it follows that when Kent conveyed to Green on March 15, 1884, the obligation of the railroad company with respect to the crossing it had erected for Kent terminated, and they were at liberty to remove the structure at

way company has constructed and maintained a private crossing and the company afterwards sells its line, the grantee taking with notice that the crossing exists, it has been held that the grantee is bound to maintain the crossing and can not destroy it.[1]

§ 1150. Care required on part of railway company at private crossings.—We have already referred to the duty of a railway company in reference to repairing and maintaining private crossings, and in another chapter is discussed the duty of railway companies in reference to fences, gates and bars at private crossings. Here we propose to discuss the duty in respect to the operation of trains at private crossings. At public crossings railway companies are required to exercise a care reasonably proportionate to the danger to protect persons who may be using the crossings, but at private crossings where only a limited number of persons cross the precautions required to be taken in order to constitute reasonable care under the circumstances may be few and slight when compared with those required at public crossings. While there is some slight conflict in the authorities as to whether signals are required at private crossings the decided weight of authority is that they are not required,[2] unless a statute so provides. Where, however, a private crossing is located so near a public

pleasure; but they did not remove it, but continued it as a crossing; and as long as they did so they were obligated to use ordinary care to see that it was not dangerous to those who should accept the invitation to use it for the purposes for which it was maintained."

[1] Swan *v.* Burlington, etc., R. Co., 72 Iowa 650; Rock, Island, etc., R. Co. *v.* Dimick, 144 Ill. 628, 55 Am. & Eng. R. Cas. 65.

[2] Holmes *v.* Central, etc., R. Co., 37 Ga. 593; Hucker *v.* Railroad Co., 7 Ky. L. R. 761; Annapolis, etc., R. Co. *v.* Pumphrey, 72 Md. 82; Northern Central R. Co. *v.* State, 54 Md. 113; Gurley *v.* Missouri, etc., R. Co., 104 Mo. 211; Sanborn *v.* Detroit, etc., R. Co., 91 Mich. 538, 16 L. R. A. 119; Johnson *v.* Louisville, etc., R. Co., (Ky.) 13 Am. & Eng. R. Cas. 623; Thomas *v.* Delaware, etc., R. Co., 8 Fed. R. 729; Philadelphia, etc., R. Co. *v.* Fronk, 67 Md. 339, s. c. 32 Am. & Eng. R. Cas. 31; Maxey *v.* Missouri Pac. R. Co., 113 Mo. 1; Locke *v.* First Division, etc., R. Co., 15 Minn. 350. *Contra*, Cahill *v.* Cincinnati, etc., R. Co., 92 Ky. 345, 13 Ky. L. R. 714, 6 Lewis' R. R. & Corp. Rep. 18. See Ransom *v.* Chicago, etc., R. Co., 62 Wis. 178, 51 Am. Rep. 718. In Johnson *v.* Louisville, etc., R. Co., (Ky.) 60 Am. & Eng. R. Cas. 648, it was said: "There not being any rea-

crossing that signals given thereat can be distinctly heard at the private crossing it has been held by some courts that the persons using the private crossing are entitled to the benefit of the signals required at the public crossing and that if the company fails to give such signals it will be guilty of negligence.[1] If the company has recognized a private crossing as a public crossing and the public use it as such then, it seems, signals must be given.[2] At private crossings the persons who have a right to use the crossing do not do so as trespassers and since they are not trespassers and the company knows that such use of the crossing is likely to be made it has been held that it is bound to use some degree of care to warn persons of the approach of trains.[3] Some authorities hold that the question of whether or not it was negligence to omit signals or some warning at a private crossing in any particular instance should be left to a jury.[4]

son for requiring the giving of signals and slackening the speed of railroad trains when approaching a private way as exists in respect to a public road, and as to require it to be done at every private crossing, or opposite every dwelling house near the road, would unnecessarily and seriously interfere with and impede the running of trains, we think it would be unreasonable to require it."

[1] Sanborn *v.* Detroit, etc., R. Co., 91 Mich. 538, 52 N. W. R. 153; Cahill *v.* Cincinnati, etc., R. Co., 92 Ky. 345, 6 Lewis' R. R. & Corp. Rep. 18. This, however, seems to us to be questionable.

[2] Missouri Pac. R. Co. *v.* Lee, 70 Tex. 496; Chicago, etc., R. Co. *v.* Dillon, 24 Ill. App. 203. See Sutton *v.* New York, etc., R. Co., 66 N. Y. 243. And where the company has been in the habit of giving signals at a private crossing it can not discontinue them without notice. If it does so and injury results therefrom it will be held guilty of negligence. Westaway *v.* Chicago, etc., R. Co., 56 Minn. 28, 60 Am. & Eng. R. Cas. 653.

[3] Swift *v.* Staten Island, etc., R. Co., 123 N. Y. 645; Thomas *v.* Delaware, etc., R. Co., 8 Fed. R. 729. In Owens *v.* Pennsylvania Co., 41 Fed. R. 187, the court speaking of the duty of the company to give warnings at private crossings said: "I think it was proper and reasonable to require that persons having charge of railroad trains, in coming to a place of that kind where, as I have said, a number of persons are engaged in business, and have occasion to pass backward and forward, should give some sign of warning."

[4] Thomas *v.* Delaware, etc., R. Co., 8 Fed. R. 729. There is conflict, however, on this question for in the case of Philadelphia, etc., R. Co. *v.* Fronk, 67 Md. 339, s. c. 32 Am. & Eng. R. Cas. 31, it is said: "Nor have we found or been referred to any case, either in this country or in England, in which it has been decided that the failure to whistle at a crossing like

§ 1151. **Accidents and injuries at private crossings.**—Where a railway company is under an obligation to maintain and repair a private crossing, it is liable for all proximate damages which may result to persons rightfully using the crossing by reason of such failure to repair,[1] unless the person who has suffered damages has been guilty of contributory negligence.[2] One who uses a private crossing with full knowledge that it is defective and dangerous, does so at his own risk, and if he is injured when so using the crossing, he can not recover,[3] but if he is ignorant of the condition of the crossing, the company may be liable.[4] Where the person who uses the crossing is a mere licensee, he takes it as he finds it, and the company is not liable to him for injuries sustained because the crossing is not properly constructed.[5]

this, is evidence to go to the jury of culpable negligence on the part of a railway company." See *post*, § 1154.

[1] Smith *v.* New York, etc., R. Co., 63 N. Y. 58; Steward *v.* Cincinnati, etc., R. Co., 89 Mich. 315, 17 L.R.A. 539; Cotton *v.* New York, etc., R. Co., 20 N. Y. Supp. 347. In the case last cited a horse's hoof became fastened in a defective private crossing, and a train struck him and killed him.

[2] Madison *v.* Missouri, etc., R. Co., 60 Mo. App. 599.

[3] Madison *v.* Missouri, etc., R. Co., 60 Mo. App. 599; Artman *v.* Kansas Cent. R. Co., 22 Kan. 296. That is, if a reasonably prudent man, in the exercise of ordinary care, would not use it, or, in other words, if he is guilty of contributory negligence.

[4] See Stewart *v.* Cincinnati, etc., R. Co., 89 Mich. 315, 17 L.R.A. 539; Madison *v.* Missouri, etc., R. Co., 60 Mo. App. 599.

[5] Truax *v.* Chicago, etc., R. Co., 83 Wis. 547, 53 N. W. R. 842.

CHAPTER XLVI.

INJURIES AT CROSSINGS.

§ 1152. Introductory.
1153. Mutual rights and duties of company and traveler at crossings—Generally.
1154. Duty of company at private crossings and at crossings by custom or license.
1155. Statutory duties of company at crossings—Violation as negligence.
1156. Common law duties of company at crossings—Degree of care.
1157. Sign boards, gates and flagmen at crossings.
1158. Signals on approach to crossings.
1159. Duty of company to keep a lookout—Lights.
1160. Rate of speed—When negligence.
1161. Duty of company where view is obstructed.
1162. Backing and "kicking" cars.
1163. Contributory negligence generally.
1164. Contributory negligence—Illustrative cases.
1165. Duty of traveler—Generally.
§ 1166. Duty of traveler to look and listen.
1167. Duty of traveler to stop, look and listen.
1168. Attempting to cross in front of an approaching engine or train.
1169. Passing under, over, or between cars.
1170. Smoke and like obstructions to view.
1171. Misleading traveler—Invitation to cross.
1172. Children and infirm persons.
1173. Sudden peril as affecting the duty of the traveler.
1174. Negligence of driver of vehicle not imputed to passenger therein.
1175. Injury after discovery of traveler's danger—Wilfulness.
1176. Injuries at defective crossings.
1177. Evidence of subsequent repairs and other accidents at the same place.
1178. Collisions with street cars.
1179. Directing a verdict in crossing cases.

§ 1152. **Introductory.**—It is the purpose in this chapter to treat of the duties respectively of railway companies and travelers at highway crossings and such other places as have by custom and use become recognized as crossings, so as to require a duty from the railroad company to those entitled to use them,

and also to treat of the liability of the railway company to travelers suffering injuries at such crossings. At other places the right of way and track of the railroad company are its exclusive property upon which no stranger has a right to be,[1] and to those who trespass upon its track and right of way it owes no duty, as a general rule, except to refrain from wilfully or wantonly injuring them.[2] But when a public crossing is once established, the traveler, in the proper use of the crossing, is no longer a trespasser and certain mutual rights and duties arise upon the part of both the company and the traveler.[3] Any attempt to specifically define these rights and duties is embarrassed by much conflict of authority, but there are certain well-defined general rules which are universally recognized as applying to the general class of cases, and these rules we shall attempt to lay down.

§ 1153. **Mutual rights and duties of company and traveler at crossings—Generally.**—The company possesses the right to the use of its track over highway crossings and the public retains the right to the use of the crossing as a highway. Neither

[1] Philadelphia, etc., R. Co. *v.* Hummell, 44 Pa. St. 375, 84 Am. Dec. 457; Jackson *v.* Rutland, etc., R. Co., 25 Vt. 150, 60 Am. Dec. 246; Donnelly *v.* Brooklyn, etc., R. Co., 109 N. Y. 16; Isabel *v.* Hannibal, etc., R. Co., 60 Mo. 475, s. c. 9 Am. Ry. R. 261; Kansas, etc., R. Co. *v.* Ward, 4 Col. 30; Finlayson *v.* Chicago, etc., R. Co., 1 Dill. 579; Pittsburgh, etc., R. Co. *v.* Collins, 87 Pa. St. 405; Patterson *v.* Philadelphia, etc., R. Co., 4 Houst. 103, s. c. 7 Am. Ry. R. 207; Sweeney *v.* Boston, etc., R. Co., 128 Mass. 5, s. c. 1 Am. & Eng. R. Cas. 138; Hazen *v.* Boston, etc., R. Co., 2 Gray 574; Cauley *v.* Pittsburgh, etc., R. Co., 95 Pa. St. 398, 2 Am. & Eng. R. Cas. 4.

[2] Gaynor *v.* Old Colony, etc., R. Co., 100 Mass. 208; Palmer *v.* Chicago, etc., R. Co., 112 Ind. 250; Finlayson *v.* Chicago, etc., R. Co., 1 Dill. 579; Jeffersonville, etc., R. Co. *v.* Goldsmith, 47 Ind. 43; Pittsburgh, etc., R. Co. *v.* Evans, 53 Pa. St. 250; 2 Wood on Railroads, 1459, and authorities cited; 2 Rorer on Railroads, 1122. See note to Houston, etc., R. Co. *v.* Sympkins, 54 Tex. 615, 6 Am. & Eng. R. Cas. 17 (11); Lewis *v.* Baltimore, etc., R. Co., 38 Md. 588, 13 Am. Law. Reg. N. S. 284; Cooley on Torts, 674.

[3] Kay *v.* Pennsylvania, etc., R. Co., 65 Pa. St. 269; Continental Improvement Co. *v.* Stead, 95 U. S. 161; Willoughby *v.* Chicago, etc., R. Co., 37 Iowa 432; Pennsylvania, etc., R. Co. *v.* Krick, 47 Ind. 368; Elliott on Roads and Streets, 604; Pierce on Railroads, 340, *et seq*; Wood on Railroads, 1510.

has a right to interfere with a proper use of it by the other.[1] Their rights have been said to be "mutual, co-extensive, and, in all respects, reciprocal,"[2] but this statement must be qualified in that, owing to the momentum of trains, confinement of their movement to a track, and the necessities and public nature of railway traffic, the railway company has the right of way and the traveler must wait until the train, the coming of which he knows, or ought to know, has passed.[3] The prior right of passage is in the railway company. The right of precedence of the company, however, does not impose upon the traveler the whole duty of avoiding collisions, but both parties must exercise care and diligence in regard to their re-

[1] Baltimore, etc., R. Co. *v.* Owings, 65 Md. 502, 28 Am. & Eng. R. Cas. 639; Louisville, etc., R. Co. *v.* Goetz, 79 Ky. 442, 14 Am. & Eng. R. Cas. 627; Indianapolis, etc., R. Co. *v.* McLin, 82 Ind. 435; Rockford, etc., R. Co. *v.* Hillmer, 72 Ill. 235; Baltimore, etc., R. Co. *v.* State, 29 Md. 252; Pennsylvania, etc., R. Co. *v.* Goodman, 62 Pa. St. 329; Beisiegel *v.* New York, etc., R. Co., 40 N. Y. 9; Kelly *v.* Michigan, etc., R. Co., 65 Mich. 186, 31 N. W. R. 186; North Pa. R. Co. *v.* Heileman, 49 Pa. St. 60; Morris *v.* Chicago, etc., R. Co., 26 Fed. R. 22; Lesan *v.* Maine Cent. R. Co., 77 Me. 85, 23 Am. & Eng. R. Cas. 245; Toledo, etc., R. Co. *v.* Goddard, 25 Ind. 185; Louisville, etc., R. Co. *v.* Phillips, 112 Ind. 59, 62. See 2 Wood on Railroads, § 1510.

[2] 1 Rorer on Railroads, 531. See Elliott on Roads and Streets, 604.

[3] Ohio, etc., R. Co. *v.* Walker, 113 Ind. 196, 32 Am. & Eng. R. Cas. 121, 15 N. E. R. 234; Continental Improvement Co. *v.* Stead, 95 U. S. 161; Chicago, etc., R. Co. *v.* Boggs, 101 Ind. 522, 51 Am. R. 761; Pennsylvania, etc., R. Co. *v.* Goodman, 62 Pa. St. 329; Black *v.* Burlington, etc., R. Co., 38 Iowa 515; Galena, etc., R. Co. *v.* Dill, 22 Ill. 265; Toledo, etc., R. Co. *v.* Goddard, 25 Ind. 185; Chicago, etc., R. Co. *v.* Cauffman, 38 Ill. 424; Lehigh, etc., R. Co. *v.* Brandtmaier, 113 Pa. St. 610, 6 Atl. R. 238; Lesan *v.* Maine Cent. R. Co., 77 Me. 85, 23 Am. & Eng. R. Cas. 245; Philadelphia, etc., R. Co. *v.* Hogeland, 66 Md. 149, 7 Atl. R. 105; Brown *v.* Texas, etc., R. Co., 42 La. Ann. 350, 7 So. R. 682; Louisville, etc., R. Co. *v.* Phillips, 112 Ind. 59, 13 N. E. R. 132; Morris *v.* Chicago, etc., R. Co., 26 Fed. R. 22; Newhard *v.* Pennsylvania, etc., R. Co., 153 Pa. St. 417, 26 Atl. R. 105, 2 Rorer on Railroads, 1049. As to "absolute right of way" see Chicago, etc., R. Co. *v.* Ingraham, 33 Ill. App. 351; Northern Pac. R. Co. *v.* Holmes, 3 Wash. Ter. 543, 18 Pac. R. 76. The assertion in Continental Improvement Co. *v.* Stead, *supra*, followed in Indianapolis, etc., R. Co. *v.* McLin, 82 Ind. 435, and many other cases, that the right of precedence of trains is conditioned upon due and timely warning of their approach, is subject to the qualification that the absence of warning does not absolve the traveler from reasonable diligence on his part and that the presence of the track is in itself sufficient to put him upon guard.

spective duties and are charged with the mutual duty of exercising reasonable care to prevent injury.[1] Each must make reasonable and proper efforts, in view of the circumstances, to foresee and avoid collisions,[2] and each may, to a limited extent, rely upon the other to exercise such ordinary care.[3] It is generally the duty of the railroad company to give due and timely warning of the approach of trains, and it is the duty of the traveler to seek to discover whether danger is imminent and to yield precedence. Failure to give such warning, whether statutory or required by ordinary care, will render the company liable for any injury of which it is the proximate cause, where the party injured

[1] Continental Improvement Co. *v.* Stead, 95 U. S. 161, per Bradley, J.; Chicago, etc., R. Co. *v.* Cauffman, 38 Ill. 424; Lehigh Valley R. Co. *v.* Brandtmaier, 113 Pa. St. 610, 6 Atl. R. 238; Heddles *v.* Chicago, etc., R. Co., 74 Wis. 239, 39 Am. & Eng. R. Cas. 645, 42 N. W. R. 237; Bullock *v.* Wilmington, etc., R. Co., 105 N. Car. 180, 42 Am. & Eng. R. Cas. 93, 10 S. E. R. 988; Kelly *v.* Duluth, etc., R. Co., 92 Mich. 19, 52 N. W. R. 81; Halferty *v.* Wabash, etc., R. Co., 82 Mo. 90; Purinton *v.* Maine, etc., R. Co., 78 Me. 569, 7 Atl. R. 707; Robinson *v.* Western, etc., R. Co., 48 Cal. 409; Cooper *v.* Lake Shore, etc., R. Co., 66 Mich. 261, 33 N. W. R. 306; North Pa. R. Co. *v.* Heileman, 49 Pa. St.60.

[2] Morris *v.* Chicago, etc., R. Co., 26 Fed. R. 22; Glass *v.* Memphis, etc., R. Co., 94 Ala. 581, 10 So. R. 215; Beyel *v.* Newport News, etc., R. Co., 34 W. Va. 538, 45 Am. & Eng. R. Cas. 188; North Pa. R. Co. *v.* Heileman, 49 Pa. St. 60; Lake Shore, etc., R. Co. *v.* Miller, 25 Mich. 274; Beers *v.* Housatonuc, etc., R. Co., 19 Conn. 566; Brand *v.* Schenectady, etc., R. Co., 8 Barb. 368; Runyon *v.* Central R. Co., 25 N. J. L. 556; Baltimore, etc., R. Co. *v.* State, 29 Md. 252; Kansas Pac. R. Co. *v.* Pointer, 9 Kan. 620.

[3] Thomas *v.* Delaware, etc., R. Co., 8 Fed. R. 729, and authorities cited; Beisiegel *v.* New York, etc., R. Co., 34 N. Y. 622, 90 Am. Dec. 741; Boyd *v.* Wabash, etc., R. Co., 105 Mo. 371, 16 S. W. R. 909; Indiana, etc., R. Co. *v.* Wheeler, 115 Ind. 253, 17 N. E. R. 563; Georgia, etc., R. Co. *v.* Evans, 87 Ga. 673, 13 S. E. R. 580; Valin *v.* Milwaukee, etc., R. Co., 82 Wis. 1, 55 Am. & Eng. R. Cas. 247; Duame *v.* Chicago, etc., Railway Co., 72 Wis. 523; Pennsylvania Railroad Co. *v.* Ogler, 35 Pa. St. 60; Lyman *v.* Boston, etc., R. Co., 66 N. H. 200, 45 Am. & Eng. R. Cas. 163; Robinson *v.* Western, etc., R. Co., 48 Cal. 409; Jennings *v.* St. Louis, etc., R. Co., 112 Mo. 268, 20 S. W. R. 490; Correll *v.* Burlington, etc., R. Co., 38 Iowa 120; Ramsey *v.* Louisville, etc., R. Co., 89 Ky. 99, 20 S. W. R. 162; Rodrian *v.* New York, etc., R. Co., 7 N. Y. Supp. 811; Hendrickson *v.* Great Northern R. Co., 49 Minn. 245, 51 N. W. R. 1044; Petty *v.* Hannibal, etc., R. Co., 88 Mo. 306, 28 Am. & Eng. R. Cas. 618; Blackwell *v.* Lynchburg, etc., R. Co., 111 N. Car. 151, 16 S. E. R. 12; Lesan *v.* Maine Cent. R. Co., 77 Me. 85, 23 Am. & Eng. R. Cas. 245.

is without fault, but the track itself is a warning of danger and the traveler must always exercise care proportionate to the known danger, and this care must be such as one who knows the danger and is aware of the prior right of passage would be expected to exercise.[1] The engineer may presume, until the situation would otherwise disclose itself to a man on guard, that an adult person on the track or approaching the track is in full possession of his senses, knows that he must yield precedence, and will exercise ordinary care and diligence to take care of himself.[2] The traveler may rely, to a limited extent, upon the railroad company to give the usual or required warning, and to otherwise observe the requirements of ordinary care, but to him the track is itself a warning of danger and he is in all cases under the duty to exercise proper precaution to inform himself as to the proximity of trains before attempting to cross.[3]

[1] Louisville, etc., R. Co. *v.* Phillips, 112 Ind. 59, 13 N. E. R. 132; Indianapolis, etc., R. Co. *v.* McLin, 82 Ind. 435, 8 Am. & Eng. R. Cas. 237; Clampit *v.* Chicago, etc., R. Co., 84 Iowa 71, 50 S. W. R. 673; Murray *v.* Missouri, etc., R. Co., 101 Mo. 236, 13 S. W. R. 817; Bitner *v.* Utah, etc., R. Co., 4 Utah 502, 11 Pac. R. 620; Baltimore, etc., R. Co. *v.* Walborn, 127 Ind. 142, 26 N. E. R. 207; Burns *v.* North Chicago, etc., Co., 65 Wis. 312; Eskridge *v.* Cincinnati, etc., R. Co., 89 Ky. 367, 12 S. W. R. 580; Gray *v.* North Eastern R. Co., 48 L. T. Rep. 904; Morris *v.* Chicago, etc., R. Co., 26 Fed. R. 22; State *v.* Union R. Co., 70 Md. 69, 18 Atl. R. 1032.

[2] Ohio, etc., R. Co. *v.* Walker, 113 Ind. 196, 15 N. E. R. 234; Palmer *v.* Chicago, etc., R. Co., 112 Ind. 250; Gaynor *v.* Old Colony, etc., R. Co., 100 Mass. 208; Mason *v.* Missouri, etc., R. Co., 27 Kan. 83, 41 Am. R. 405; Louisville, etc., R. Co. *v.* Phillips, 112 Ind. 59, 62; Lake Shore, etc., R. Co. *v.* Miller, 25 Mich. 274; Rothe *v.* Milwaukee, etc., R. Co., 21 Wis. 256; Harty *v.* Central R. Co., 42 N. Y. 468; Dyson *v.* New York, etc., R. Co., 57 Conn. 9, 17 Atl. 137; Lesan *v.* Maine, etc., R. Co., 77 Me. 85, 23 Am. & Eng. R. Cas. 245; Boyd *v.* Wabash, etc., R. Co., 105 Mo. 371, 16 S. W. R. 909; Heddles *v.* Chicago, etc., R. Co., 77 Wis. 228, 46 N. W. R. 115; Beach Contrib. Neg., 394; Johnson's Adm. *v.* Louisville, etc., R. Co. (Ky.), 13 Am. & Eng. R. Cas. 623, and authorities cited in note. But see Georgia, etc., R. Co. *v.* Evans, 87 Ga. 673, 13 S. E. R. 580; Card *v.* New York, etc., R. Co., 50 Barb. (N. Y.) 39.

[3] Miller *v.* T. H. & I. R. Co. (Ind.), 43 N. E. R. 257; Jennings *v.* St. Louis, etc., R. Co., 112 Mo. 268, 20 S. W. R. 490; Railroad Co. *v.* Houston, 95 U. S. 697; Loucks *v.* Chicago, etc., R. Co., 31 Minn. 526, 19 Am. & Eng. R. Cas. 305; Beisiegel *v.* New York, etc., R. Co., 34 N. Y. 622, 90 Am. Dec. 741; Ernst *v.* Hudson, etc., R. Co., 35 N. Y. 9, 90 Am. Dec. 761; Schofield *v.* Chicago, etc., R. Co., 114 U. S. 615, 5

§ 1154. Duty of company at private crossings and at crossings by custom or license.—The duties of the company and traveler respectively at a private crossing are somewhat different from those imposed upon each at a public crossing. As a rule the company is not required at such places to give the signals required by statute or otherwise at public crossings,[1] but it may, in peculiar instances, be a question for the jury, whether in the particular case it is negligence to omit the warning signals.[2] The fact that people repeatedly cross the tracks at a place where there is no public right of passage does not entail upon the company any duty to treat the place as a public crossing and the fact that there are numerous trespassers and that the act is committed often does not in itself relieve their presence upon the track of the character of a trespass,[3] but situations may arise from which the company ought reasonably to foresee danger, and in such cases it has been held

Sup. Ct. R. 1125; Brown *v.* Milwaukee, etc., R. Co., 22 Minn. 165; Bowers *v.* Chicago, etc., R. Co., 61 Wis. 457, 19 Am. & Eng. R. Cas. 301; Vandewater *v.* New York, etc., R. Co., 74 Hun 32, 26 N. Y. Supp. 397; Blackwell *v.* Lynchburg, etc., R. Co., 111 N. Car. 151, 16 S. E. R. 12; Hendrickson *v.* Great Northern R. Co., 49 Minn. 245, 51 N. W. R. 1044.

[1] Johnson's Admr. *v.* Louisville, etc., R. Co., (Ky.), 13 Am. & Eng. R. Cas. 623; Sanborn *v.* Detroit, etc., R. Co., 91 Mich. 538, 52 N. W. R. 153; Thomas *v.* Delaware, etc., R. Co., 8 Fed. R. 729; Bennett *v.* Grand Trunk, etc., R. Co., 3 Ont. 446, 13 Am. & Eng. R. Cas. 627; Philadelphia, etc., R. Co. *v.* Fronk, 67 Md. 339, 32 Am. & Eng. R Cas. 31; Maxey *v.* Missouri, etc., R. Co., 113 Mo. 1, 20 S. W. R. 654. But see Walton *v.* St. Louis, etc., R. Co., 67 Mo. 56.

[2] Thomas *v.* Delaware, etc., R. Co., 8 Fed. R. 729; Cordell *v.* New York, etc., R. Co., 70 N. Y. 119.

[3] Beach Contr. Neg., § 212; Finlayson *v.* Chicago, etc., R Co., 1 Dill. (U. S.) 579, per Miller, J.; Illinois, etc., R. Co. *v.* Hetherington, 83 Ill. 510; Gaynor *v.* Old Colony, etc., R. Co., 100 Mass. 208; Philadelphia, etc., R. Co. *v.* Hummell, 44 Pa. St. 375; Ivens *v.* Cincinnati, etc., R. Co., 103 Ind. 27; Blanchard *v.* Lake Shore, etc., R. Co., 126 Ill. 416, 18 N. E. R. 799; Brown *v.* Louisville, etc., R. Co. (Ky.), 30 S. W. R. 639; Atchison, etc., R. Co. *v.* Parsons, 42 Ill. App. 93; Illinois, etc., R. Co. *v.* Beard, 49 Ill. App. 232. "By endurance or toleration of a trespass we do not understand that any of a party's privileges are waived or yielded, or that it ceases to be entitled to the protection afforded by the law. * * * It is not believed that any length of forbearance to take legal proceedings against trespassers, or to warn them from the bed on which a railroad is constructed, will amount to a dedication of the same to the use of the public as a way for pedestrians." Central, etc., R. Co. *v.* Brinson, 70 Ga. 207, 241.

that the company is not absolved from ordinary care and precautions to prevent injuries.[1] Yet, although the place is used repeatedly and frequently as a crossing with the mere silent acquiescence of the company, or with the knowledge and simply passive permission of the company, the traveler who uses it is at most a bare licensee, who takes his license with all its concomitant risks and perils,[2] and as a general rule, the company owes him no duty greater than that which is due to a trespasser.[3] In order to impose upon the company the duty to treat a place as a public crossing, those who use the place as a crossing must either have a legal right to so use it, or must use it at the invitation of the company, and "neither sufferance nor permission, nor passive acquiescence" is equivalent

[1] Western, etc., R. Co. *v.* Meigs, 74 Ga. 857; South, etc., R. Co. *v.* Donovan, 84 Ala. 141, 4 So. R. 142; Peyton *v.* Texas, etc., R. Co., 41 La. Ann. 861, 6 So. R. 690; Cassida *v.* Oregon Ry., etc., Co., 14 Ore. 551, 13 Pac. R. 438; Sutton *v.* New York, etc., R. Co., 66 N. Y. 243; Owens, *v.* Pennsylvania R. Co., 41 Fed. R. 187; Keith *v.* Intercolonial, etc., R. Co., 18 Nova. Sc. 226; Johnson *v.* Lake Superior, etc., R. Co., 86 Wis. 64, 56 N. W. R. 161.

[2] Baltimore, etc., R. Co. *v.* State, 62 Md. 479, 50 Am. R. 233; McLaren *v.* Indianapolis, etc., R. Co., 83 Ind. 319, 8 Am. & Eng. R. Cas. 217; Memphis, etc., R. Co. *v.* Womack, 84 Ala. 149; Cleveland, etc., R. Co. *v.* Tartt, 64 Fed. R. 823; Gaynor *v.* Old Colony R. Co., 100 Mass. 208; Grethen *v* Chicago, etc., R. Co., 22 Fed. R. 609; Baltimore, etc., R. Co. *v.* Sherman, 30 Gratt. 602; Sweeny *v.* Old Colony, etc., R. Co., 10 Allen 368; Hickey *v.* Boston, etc., R. Co., 14 Allen 429; Philadelphia, etc., R. Co. *v.* Hummell, 44 Pa. St. 375; Gillis *v.* Pennsylvania R. Co., 59 Pa. St. 129; Hounsell *v.* Smyth, 7 C. B. (N. S.) 731; Redigan *v.* Boston, etc., R. Co., 155 Mass. 44, 28 N. E. R. 1133; Crane Elevator Co. *v.* Lippert, 63 Fed. R. 942; Faris *v.* Hoberg, 134 Ind. 269.

[3] Spicer *v.* Chesapeake, etc., R. Co., 34 W. Va. 514; Baltimore, etc., R. Co. *v.* State, 62 Md. 479; Illinois, etc., R. Co. *v.* Godfrey, 71 Ill. 500; Baltimore, etc., R. Co. *v.* Sherman, 30 Gratt. 602; Jeffersonville, etc., R. Co. *v.* Goldsmith, 47 Ind. 43; Cleveland, etc., R. Co. *v.* Stephenson, 139 Ind. 641, 37 N. E. R. 720; Evansville, etc., R. Co. *v.* Griffin, 100 Ind. 221, 50 Am. R. 783; Diebold *v.* Pennsylvania R. Co., 50 N. J. L. 478; Sutton *v.* New York, etc., R. Co., 66 N. Y. 243; Nicholson *v.* Erie, etc., R. Co., 41 N. Y. 525; Matze *v.* N. Y., etc., R. Co., 1 Hun 417; Cornell *v.* Skaneateles R. Co., 15 N. Y. Supp. 581; Collis *v.* New York Cent. R. Co., 71 Hun 504, 24 N. Y. Supp. 1090; Burk *v.* President, etc., Canal Co., 86 Hun 519, 33 N. Y. Supp. 986; Pennsylvania R. Co. *v.* Meyers, 136 Ind. 242; Hanks *v.* Boston, etc., R. Co., 147 Mass. 495, 18 N. E. R. 218; June *v.* Boston, etc., R. Co., 153 Mass. 79, 26 N. E. R. 238; Chenery *v.* Fitchburg R. Co., 160 Mass. 211, 35 N. E. R. 554.

to an invitation.[1] If, however, the traveler uses a place as a crossing by invitation of the company, it must use ordinary care to prevent injury to him, as, where the company constructs a grade crossing and holds it out to the public as a suitable place to cross.[2] Where by fencing off a foot way over its tracks it induces the public to so use it,[3] by building to the track plank bridges for foot passengers,[4] or by constructing gates in the railroad fence for the use of pedestrians who habitually cross the track,[5] it thereby holds out the place as proper for them to use. Such invitation as imposes on the company the duty of ordinary care is implied, where by some act or designation of the company persons are led to believe that a way was intended to be used by travelers or others having lawful occasion to go that way, and the company is under obligation to use ordinary care to keep it free from danger.[6] There is much conflict of authority as to what constitutes such a general use of a place as a crossing or such recognition of the right to use such a place as will impose upon the company the duty of observing the precaution required at public crossings, but we think the doctrine we have expressed is the true one supported by the best reasoned cases and by the recognized principles of law. The opposite view has been taken in a line of cases in which it is held that if the place has been used as a passageway, for a long period of time and this use is with the

[1] Wright *v.* Boston, etc., R. Co., 142 Mass. 296, s. c. 7 N. E. R. 866; Murphy *v.* Boston, etc., R. Co., 133 Mass. 121; Sweeny *v.* Old Colony, etc., R. Co., 10 Allen 368, 87 Am. Dec. 644; Jeffersonville, etc., R. Co. *v.* Goldsmith, 47 Ind. 43; Bennett *v.* Railroad Co., 102 U. S. 577; Cleveland, etc., R. Co. *v.* Adair, 12 Ind. App. 569; Indiana, etc., R. Co. *v.* Barnhart, 115 Ind. 399; Stewart *v.* Pennsylvania R. Co., (Marion County, Ind., Super. Ct.), 14 Am. & Eng. R. Cas. 679.

[2] Murphy *v.* Boston, etc., R. Co., 133 Mass. 121, 14 Am. & Eng. R. Cas. 675; Sweeny *v.* Old Colony, etc., R. Co., 10 Allen 368; Adams *v.* Iron Cliffs Co., 78 Mich. 271, 44 N. W. R. 270.

[3] Pennsylvania R. Co. *v.* Hammill, 56 N. J. L. 370, 29 Atl. R. 151.

[4] Norfolk, etc., R. Co. *v.* Carper, 88 Va. 556, 14 S. E. R. 328.

[5] Lynch *v.* St. Joseph, etc., R. Co., 111 Mo. 601, 19 S. W. R. 1114. Mere acquiesence may not even amount to a license, and in order to impliedly authorize travelers to use a railroad track there must usually be some allurement or enticement on the part of the company.

[6] Evansville, etc., R. Co. *v.* Griffin, 100 Ind. 221; Carleton *v.* Franconia Iron and Steel Co., 99 Mass. 216.

knowledge and permission of the railroad company, it is its duty to treat it as a highway,[1] and that where the railroad company licenses the public to make a general use of a crossing over its track, it can not treat a person who walks upon it as a trespasser,[2] but some of these decisions seem to impose upon the company a greater duty than is due to a bare licensee, and the traveler is no more than a bare licensee, unless he has a legal right to be on the track, or is there by invitation of the company. It has also been held that where the company has established a practice of giving signals or keeping a flagman at a place frequently used as a crossing and such practice is notorious, the traveler has a right to expect that the usual warning will be given, and the failure of the company to do so, is a proper fact for the jury to consider in determining the question of the defendant's negligence.[3]

§ 1155. **Statutory duties of company at crossing—Violation as negligence.**—The precautions to be observed by the railroad company at crossings are ordinarily prescribed by statutes which generally designate the signals required to be given by approaching trains and the maximum speed allowed at dangerous or populous places, and provide for the use of signboards, bells, lights, gates or flagmen at crossings of certain

[1] Barry *v.* New York, etc., R. Co., 92 N. Y. 289; Byrne *v.* New York, etc., R. Co., 104 N. Y. 362; Harriman *v.* Pittsburg, etc., R. Co., 45 Ohio St. 11, 9 Western R. 438; Chicago, etc., R. Co. *v.* Hedges, 105 Ind. 398; Bellefontaine, etc., R. Co. *v.* Snyder, 18 Ohio St. 399; Taylor *v.* Delaware, etc., R. Co., 113 Pa. St. 162, 57 Am. R. 446; Davis *v.* Chicago, etc., R. Co., 58 Wis. 646; Swift *v.* Staten Island, etc., R. Co., 123 N. Y. 645, 25 N. E. R. 378; Hansen *v.* Southern Pac. R. Co., 105 Cal. 379, 38 Pac. 957; Texas, etc., R. Co. *v.* Watkins, (Tex. Civ. App.), 26 S. W. R. 760.

[2] Davis *v.* Chicago, etc., R. Co., 58 Wis. 646; Murphy *v.* Chicago, etc., R. Co., 38 Iowa 539; Bennett *v.* Railroad Co., 102 U. S. 577; Kay *v.* Pennsylvania, etc., R. Co., 65 Pa. St. 269; Campbell *v.* Boyd, 88 N. Car. 129, 43 Am. R. 740; Well *v.* Portland, etc., R. Co., 57 Me. 117; Philadelphia, etc., R. Co. *v.* Troutman, (Pa.), 6 Am. & Eng. R. Cas. 117, 11 W. N. C. 453.

[3] Nash *v.* New York, etc., R. Co., 48 Hun 618, 1 N. Y. Supp. 269. And the company can not lawfully discontinue the signals without notice. Westaway *v.* Chicago, etc., R. Co., 56 Minn. 28, 57 N. W. R. 222; Pittsburgh, etc., R. Co. *v.* Yundt, 78 Ind. 373.

descriptions. These statutes may generally be regarded as defining the ordinary care due to travelers at such places, but circumstances may arise in which the observance of all the statutory requirements will not be sufficient to amount to the ordinary care required. It is said by some of the authorities that the statutes are merely cumulative, and do not release the company from the observance of such additional precautions as peculiar circumstances may demand, or, in other words, that they represent the minimum of care exacted,[1] but ordinarily when that which the statute prescribes is done, the company can not be held guilty of negligence. In some states the statutes provide that an omission of the statutory duty shall, *prima facie*, constitute actionable negligence,[2] although the company may show by way of defense that the negligence was not the proximate cause of the injury.[3] It has been held in many cases, in the absence of an express statutory provision to that

[1] Bradley *v.* Boston, etc., R. Co., 2 Cush. 539; Chicago, etc., R. Co. *v.* Boggs, 101 Ind. 522; Eaton *v.* Fitchburg R.Co.,129 Mass.364, 2 Am. & Eng. R. Cas. 183; Favor *v.* Boston, etc., R. Co., 114 Mass. 350; Richardson *v.* N. Y., etc., R. Co., 133 N. Y. 563, 15 N.Y. Supp. 868; Barry *v.* N. Y., etc., R. Co., 92 N. Y. 289, 13 Am. & Eng. R. Cas. 615; Alabama, etc., R. Co. *v.* Phillips, 70 Miss. 14, 11 So. R. 602; Chicago, etc., R. Co. *v.* Spilker, 134 Ind. 380, 33 N. E. R. 280; Atchison, etc., R. Co. *v.* Hague, 54 Kan. 284, 38 Pac. R. 257; Clark *v.* Canadian Pac. R. Co., 69 Fed. R. 543; Chicago, etc., R. Co. *v.* Netolicky, 67 Fed. R. 665. But see *contra* Chicago, etc., R. Co. *v.* Dougherty, 110 Ill. 521, 19 Am. & Eng. R. Cas. 292; Chicago, etc., R. Co. *v.* Robinson, 106 Ill. 142, 19 Am. & Eng. R. Cas. 396; Beisiegel *v.* N. Y., etc., R. Co., 40 N. Y. 9, 34 N. Y. 622, s. c. 90 Am. Dec. 741; Grippen *v.* N. Y., etc., R. Co., 40 N. Y. 34; Dyson *v.* N. Y., etc., R. Co., 57 Conn. 9, 17 Atl. R. 137.

[2] In Mississippi, Georgia, Missouri and Tennessee. In Tennessee such a statute has been construed to mean that when a violation of the statute is followed by an injury, it will be conclusively presumed that the violation was the proximate cause of the injury. Railroad *v.* Walker, 11 Heisk. (Tenn.) 383; Nashville, etc., R. Co. *v.* Thomas, 5 Heisk. (Tenn.) 262; Collins *v.* East Tenn., etc., R. Co., 9 Heisk. 841; Louisville, etc., R. Co. *v.* Connor, 9 Heisk. (Tenn.) 19. And that proof of the observance of the statute entirely relieves from liability for injuries inflicted at the time of its observance. Railroad *v.* Walker, 11 Heisk. (Tenn.) 383; Hill *v.* Louisville, etc., R. Co., 9 Heisk. (Tenn.) 823; Nashville, etc., R. Co. *v.* Thomas, 5 Heisk. (Tenn.) 262.

[3] Huckshold *v.* St Louis, etc., R. Co., 90 Mo. 548, 28 Am. & Eng. R. Cas. 659.

effect, that the omission of statutory duty is *prima facie* evidence of negligence,[1] and in other courts the rule has prevailed that the fact of failure to observe the statutory requirements is simply evidence of negligence, and is to be considered by the jury in connection with all the circumstances of the case.[2] The rule supported, we think, by the weight of authority is that one who violates the law is a wrong-doer,[3] that ordinarily the omission of the statutory duty is negligence *per se*,[4] and

[1] Terre Haute, etc., R. Co. *v.* Barr, 31 Ill. App. 57; St. Louis, etc., R. Co. *v.* Terhune, 50 Ill. 151; Orcutt *v.* Pacific Coast R. Co., 85 Cal. 291, 24 Pac. R. 661; Atchison, etc., R. Co. *v.* Feelan, 47 Ill. App. 66; Winstanley *v.* Chicago, etc., R. Co., 72 Wis. 375, 39 N. W. R. 856.

[2] Vandewater *v.* N. Y., etc., R. Co., 135 N. Y. 583, 32 N. E. R. 636; Meek *v.* Penn. R. Co., 38 Ohio St. 632, 13 Am. & Eng. R. Cas. 643; Phila., etc., R. Co. *v.* Ervin, 89 Pa. St. 71; Phila., etc., R. Co. *v.* Boyer, 97 Pa. St. 91; McGrath *v.* New York, etc., R. Co., 63 N. Y. 522; Omaha, etc., R. Co. *v.* O'Donnell, 22 Neb. 475, 35 Am. & Eng. R. Cas. 346; Garteiser *v.* Galveston, etc.,R. Co., 2 Tex. Civ. App. 230, 21 S. W. R., 631; Beck *v.* Portland, etc.,R. Co., 25 Ore. 32, 34 Pac. R. 753; Massoth *v.* Delaware, etc., R., 64 N. Y. 524; Grand Trunk R. Co. *v.* Ives, 144 U.S. 408, 12 Sup. Ct. R. 679; Union Pac. Railway Co. *v.* Rassmussen, 25 Neb. 810, 41 N. W. R. 778; Blanchard *v.* Lake Shore, etc., Railway Co., 126 Ill. 416, 18 N. E. R. 799; Riley *v.* Salt Lake, etc., R. Co., 10 Utah 428, 37 Pac. R. 681; Clark *v.* Boston, etc., R. Co., 64 N. H. 323, 10 Atl. R. 676. See *ante*, §§ 711, 1095.

[3] Chicago, etc., R. Co. *v.* Kennedy, 2 Kan. App. 693, 43 Pac. R. 802; Atchison, etc., R. Co. *v.* Morgan, 31 Kan. 77, 1 Pac. R. 298; Karle *v.* Kansas City, etc., R. Co., 55 Mo. 476; Baker *v.* Flint, etc., R. Co., 68 Mich. 90, 35 N. W. R. 836. It is an axiomatic truth that every person while violating an express statute is a wrong-doer, and as such is *ex necessitate* negligent in the eye of the law. Jetter *v.* N. Y., etc., R. Co., 2 Keyes (N. Y.) 154. See, also, Penn. R. Co. *v.* Stegemeier, 118 Ind. 305, citing Wanless *v.* N. E. R. Co., L. R., 6 Q. B. 481; Railway Co. *v.* Schneider, 45 Ohio St. 678; Baker *v.* Pendergast, 32 Ohio St. 494.

[4] Penn. R. Co. *v.* Horton, 132 Ind. 189; Penn. R. Co., *v.* Hensil, 70 Ind. 569; Indiana, etc., R. Co. *v.* Barnhart, 115 Ind. 399; Cincinnati, etc., R. Co. *v.* Butler, 103 Ind. 31; Dugan *v.* St. Paul, etc., R. Co., 40 Minn. 544, 42 N. W. R. 538; Dahlstrom *v.* St. Louis, etc., R. Co., 108 Mo. 525, 18 S. W. R. 919; Murray *v.* Missouri Pac. Ry. Co., 101 Mo. 236, 13 S. W. R. 817; Schlereth *v.* Missouri Pac. R. Co., 115 Mo. 87, 21 S. W. R. 1110; Keim *v.* Union Ry. Co., 90 Mo. 314, 2 S. W. R. 427; Piper *v.* Chicago, etc., R. Co., 77 Wis. 247, 46 N. W. R. 165; Phila., etc., R. Co. *v.* Stebbing, 62 Md. 504, 19 Am. & Eng. R. Cas. 36: Central, etc., R. Co. *v.* Smith, 78 Ga. 694, 34 Am. & Eng. R. Cas. 1; Atlanta, etc., R. Co. *v.* Wyly, 65 Ga. 120, 8 Am. & Eng. R. Cas. 262; Jetter *v.* N. Y., etc., R. Co., 2 Keyes (N.Y.) 154; Virginia, etc., Ry. Co. *v.* White, 84 Va. 498. A statute creates an absolute duty, and the duty of performance does not depend upon, and is

that where the omission is established, such negligence arises as a matter of law,[1] but such omission by no means conclusively establishes the company's liability, for the injured party must have been free from fault, and the negligence of the company must have been the proximate cause of his injury in order to enable him to recover.[2] And further, an omission of statutory duty is not conclusively negligence *per se*, for the company may explain the omission, and show that under peculiar cir-

not controlled by, surrounding circumstances. Terre Haute, etc., R. Co. *v.* Vœlker, 129 Ill. 540, 22 N. E. R., 20. "But the weight of authority is overwhelmingly to the effect that the failure to perform any duty imposed either by a statute or an ordinance, is negligence *per se*." Penn. R. Co. *v.* Hensil, 70 Ind. 569. "It is negligence *per se* to run a train of cars in violation of a city ordinance, and if any one is injured in consequence of such negligence, without being himself guilty of contributory negligence, he may recover damages for such injury." Penn. R. Co. *v.* Horton, 132 Ind. 189. See, also, Hays *v.* Gainesville St. R. Co., 70 Texas 602, 8 Am. St. R. 624; Fath *v.* Tower Grove, etc., R. Co., 105 Mo. 537, 13 L. R. A. 74.

[1] "But as was said in McCully *v.* Clarke, 40 Pa. St. 399, there are some cases in which a court can determine that omissions constitute negligence. They are those in which the precise measure of duty is determinate, the same under all circumstances. When the duty is defined, a failure to perform it is, of course, negligence, and may be so declared by the court." Schum *v.* Pennsylvania R. Co., 107 Pa. St. 8, 19 Rep. 184. The duty to give signals at a crossing in the manner prescribed by the statute is a determinate one, and the court has a right to instruct as a matter of law that an omission of such duty constitutes negligence. Chicago, etc., R. Co. *v.* Boggs, 101 Ind. 522, 51 Am. Rep. 761. The duty to give prescribed signals upon approaching a public highway was a duty defined by a positive law of the state, and a failure to observe it was in and of itself negligence, and an instruction to that effect as a matter of law was proper. Cincinnati, etc., R. Co. *v.* Butler, 103 Ind. 31. See, also, Terre Haute, etc., R. Co. *v.* Voelker, 129 Ill. 540, 22 N. E. R. 20; Central, etc., Co. *v.* Smith, 78 Ga. 694, 34 Am. & Eng. R. Cas. 1; Cordell *v.* N. Y., etc., R. Co., 64 N. Y. 535; Renwick *v.* N. Y., etc., R. Co., 36 N. Y. 132; Gorton *v.* Erie R. Co., 45 N. Y. 660; Western, etc., R. Co. *v.* Young, 81 Ga. 397, 7 S. E. R. 912. See Cooley on Torts, 670.

[2] Chicago, etc., R. Co. *v.* Crisman, 19 Col. 30, 34 Pac. R. 286; Cent. Tex., etc., R. Co. *v.* Nycum (Tex.), 34 S. W. R. 460; Chicago, etc., R. Co. *v.* Kennedy, 2 Kan. App. —, 43 Pac. R. 802; Atchison, etc., Railroad Co. *v.* Morgan, 31 Kan. 77, 1 Pac. R. 298; Penn. R. Co. *v.* Hensil, 70 Ind. 569; Quincy, etc., Railroad Co. *v.* Willhoener, 72 Ill. 60; Phila., etc., R. Co. *v.* Stebbing, 62 Md. 504; Stoneman *v.* Atlantic, etc., Railroad Co., 58 Mo. 503; Penn. R. Co. *v.* Rathgeb, 32 Ohio St. 66; Horn *v.* Baltimore, etc., R. Co., 54 Fed. 301.

cumstances, it may not have constituted negligence, as where the locomotive started at a less distance from the crossing than that at which the statute required signals to be given.[1] In no event is the omission to give the statutory signals sufficient of itself to make out a case, for there must be evidence showing that it was the proximate cause of the injury. Some courts and some authors, in discussing the elements which go to constitute negligence *per se* have produced confusion by a failure to distinguish the act or omission as separate from its consequences,[2] and have in their discussion erroneously assumed that absolute liability is an inseparable concomitant of negligence *per se*. The consequences of an act or omission do not of themselves show that an act is or is not negligent, and it is not necessary, in order to render an act or omission negligent, that it produce some disastrous result. Negligence *per se* may work no serious injury to any person, not because it is not wrongful in itself, but because no one is in position at a particular time to be injured. The liability of the wrong-doer to the person injured is, however, generally dependent upon the element of proximate cause.[3]

§ 1156. Common-law duty of company at crossings—Degree of care.—At common law the railway company is under obligation to exercise ordinary care to prevent collisions with travelers on the highway, and by ordinary care is meant such care as a reasonably prudent man would ordinarily exercise under the circumstances.[4] The company is not bound to exercise ex-

[1] 2 Jaggard on Torts, 927; Cent. Tex., etc., R. Co. *v.* Nycum (Tex.), 34 S. W. R. 460.

[2] See Beck *v.* Portland, etc., R. Co., 25 Ore. 32, 34 Pac. R. 753, 755; 4 Am. & Eng. Encyc. of Law 922; 923; 16 Am. & Eng. Encyc. of Law, 420 *et seq.*; 2 Wood on Railroads, 1514, 1515.

[3] "It should be remarked that a liability does not attach to every act of negligence *per se;* such liability only attaches when the injury results from the negligence." Houston, etc., R. Co. *v.* Wilson, 60 Tex. 142.

[4] Chicago, etc., R. Co. *v.* Fisher, 49 Kan. 460, 30 Pac. R. 462; Phila., etc., R. Co. *v.* Hogeland, 66 Md. 149, 7 Atl. R. 105; Continental Improvement Co. *v.* Stead, 95 U. S. 161; Weber *v.* N. Y., etc., R. Co., 58 N. Y. 451; Lapsley *v.* Union Pac. R. Co., 50 Fed. R. 172; Austin, etc., R. Co. *v.* McElmurray, (Tex. Civ. App.) 25 S. W. R. 324. An instruction is erroneous which requires "ordinary" care of a traveler and a "high degree of care" of the company. Atchison, etc., R. Co. *v.* McClurg, 59 Fed. R. 860.

traordinary care by using every possible means to prevent injury, but it is bound to use reasonable precautions.[1] It is said that the care and skill, to be reasonable, must be proportioned to the danger and multiplied chances of injury,[2] and where the surroundings are such as to render a crossing peculiarly dangerous it is the duty of the company to exercise care commensurate with the danger,[3] and especially if the company has created unusual danger at or near a crossing, it must meet such peril with additional precautions.[4] At the crossing of a street in a city or town the duties are greater than would be required in less populous districts where the chances of danger are less.[5]

[1] Weber *v.* New York, etc., R. Co., 58 N. Y. 451; Chicago, etc., R. Co. *v.* Stumps, 55 Ill. 367; Willoughby *v.* Chicago, etc., R. Co., 37 Iowa 432; Shaw *v.* Boston, etc., R. Co., 8 Gray (Mass.) 45; Gulf, etc., R. Co. *v.* Smith, 87 Tex., 348, 28 S. W. R. 520; Gulf, etc., R. Co. *v.* Younger, (Tex. Civ. App.) 29 S.W. R. 948. "In some cases, and under some circumstances, ordinary care may require a very high degree of vigilance and precaution, but this does not necessarily include all that is physically possible." Weber *v.* N. Y., etc., R. Co., 58 N. Y. 451, citing authorities. See, also, Gulf, etc., R. Co. *v.* Smith, 87 Tex. 348, 28 S. W. R. 520.

[2] Beers *v.* Housatonuc, etc., R. Co., 19 Conn. 566; Runyon *v.* Cent. R. Co., 25 N. J. L. 556; Kennedy *v.* North Mo. R. Co., 36 Mo. 351; Bellefontaine, etc., R. Co., *v.* Snyder, 24 Ohio St. 670; Lapsley *v.* Union Pac. R. Co., 50 Fed. R. 172; Norton *v.* Eastern R. Co., 113 Mass. 366; Dyer *v.* Erie, etc., R. Co., 71 N. Y. 228; Penn. R. Co. *v.* Barnett, 59 Pa. St. 259; Pittsburg, etc., R. Co. *v.* Yundt, 78 Ind. 373.

[3] Penn. R. Co. *v.* Matthews, 36 N. J. L. 531; Duffy *v.* Chicago, etc., R. Co., 32 Wis. 269; Central, etc., R. Co. *v.* Feller, 84 Pa. St, 226; Peoria, etc., R. Co. *v.* Siltman, 88 Ill. 529; Eilert *v.* Green Bay, etc., R. Co., 48 Wis. 606; Mackay *v.* N. Y., etc., R. Co., 35 N. Y. 75; Richardson *v.* N. Y., etc., R. Co., 45 N. Y. 846; Funston *v.* Chicago, etc., R. Co., 61 Iowa 452, 14 Am. & Eng. R. Cas. 640; Nehrbas *v.* Cent. Pac. R. Co., 62 Cal. 320, 14 Am. & Eng. R. Cas. 670; Continental Improvement Co. *v.* Stead, 95 U. S. 161; Louisville, etc., R. Co. *v.* Goetz, 79 Ky. 442, 14 Am. & Eng. R. Cas. 627; Weber *v.* N. Y., etc., R. Co., 58 N. Y. 451; Lake Shore, etc., R. Co. *v.* Orvis, 1 Ohio Dec. 492.

[4] Klein *v.* Jewett, 26 N. J. Eq. 474; New York, etc., R. Co. *v.* Randel, 47 N. J. L. 144, 23 Am. & Eng. R. Cas. 308; Funston *v.* Chicago, etc., R. Co., 61 Iowa 452, 14 Am. & Eng. R. Cas. 640; Nehrbas *v.* Cent. Pac. R. Co., 62 Cal. 320, 14 Am. & Eng. R. Cas., 670; Delaware, etc., R. Co. *v.* Shelton, 54 N. J. L. 342, 26 Atl. R. 937.

[5] Pittsburg, etc., R. Co. *v.* Yundt, 78 Ind. 373; Illinois, etc., R. Co. *v.* Dick, 91 Ky. 434, 15 S.W. R. 665; Baltimore, etc., R. Co. *v.* State, 29 Md. 252; Harlan *v.* St. Louis, etc., R. Co., 65 Mo. 22; Hilz *v.* Missouri, etc., R. Co., 101 Mo. 36, 13 S. W. R. 946; Andrews *v.* N. Y., etc., R. Co., 60 Conn. 293, 22 Atl. R. 566; Louisville, etc., R. Co. *v.*

The company must exercise reasonable care to provide sufficient men and proper appliances for the control of the train;[1] must, where necessary, provide suitable warnings of danger at highway crossings,[2] and on the approach of trains to crossings, warnings must be given which would apprise a traveler in the use of ordinary care of the danger of the situation.[3] The signals must be given at such a time and the speed of the train so regulated that the warning may be effectual to the traveler to whom the duty is due.[4] The traveler has a right to rely, to a limited extent, upon the company to exercise ordinary care, but never to such an extent as to dispense with ordinary care on his part. The traveler is not himself excused under any circumstances from the observance of like care in guarding himself from injury;[5] but what is ordinary care usually depends upon the circumstances of the particular case. If the company so operates its trains as to render the statutory warnings inef-

Schuster, (Ky.) 35 Am. & Eng. R. Cas. 407; Chicago, etc., R. Co. *v.* O'Sullivan, 143 Ill. 48; Penn. R. Co. *v.* Lewis, 79 Pa. St. 33; Fero *v.* Buffalo, etc., R. Co., 22 N. Y. 209, 78 Am. Dec. 178.

[1] O'Mara *v.* Hudson River R. Co., 38 N. Y. 445; St. Louis, etc., R. Co. *v.* Mathias, 50 Ind. 65; Frick *v.* St. Louis, etc., R. Co., 75 Mo. 595, 8 Am. & Eng. R. Cas. 280; Toledo, etc., R. Co. *v.* McGinnis, 71 Ill. 346; Kansas, etc., R. Co. *v.* Pointer, 14 Kan. 37; Kay *v.* Pennsylvania R. Co., 65 Pa. St. 269.

[2] Chicago, etc., R. Co. *v.* Still, 19 Ill. 499, 71 Am. Dec. 236; Field *v.* Chicago, etc., R. Co., 14 Fed. R. 332, 8 Am. & Eng. R. Cas. 425; Shaber *v.* St. Paul, etc., R. Co., 28 Minn. 103, 2 Am. & Eng. R. Cas. 185.

[3] Missouri Pac. R. Co. *v.* Moffatt (Kan.), 44 Pac. R. 607; Continental Improvement Co. *v.* Stead, 95 U. S. 161; Loucks *v.* Chicago, etc., R. Co., 31 Minn. 526, 19 Am. & Eng. R. Cas. 305; 4 Am. & Eng. Encyc. Law, 917.

[4] Continental Improvement Co. *v.* Stead, 95 U. S. 161; Reeves *v.* Delaware, etc., R. Co., 30 Pa. St. 454; Hinkle *v.* Richmond, etc., R. Co., 109 N. C. 472; Hermans *v.* N. Y. etc., R. Co., 17 N. Y. Supp. 319; South, etc., R. Co. *v.* Thompson, 62 Ala. 494; Ellis *v.* Lake Shore, etc., R. Co., 138 Pa. St. 506, 21 Atl. R. 140; Baltimore, etc., R. Co. *v.* Owings, 65 Md. 502, 5 Atl. R. 329; Childs *v.* Penn. R. Co., 150 Pa. St. 73, 24 Atl. R. 341.

[5] Robinson *v.* Western Pac. R. Co., 48 Cal. 409; Loucks *v.* Chicago, etc., R. Co., 31 Minn. 526, 19 Am. & Eng. R. Cas. 305; Ernst *v.* Hudson River R. Co., 35 N. Y. 9, 90 Am. Dec. 761; Railroad Co. *v.* Houston, 95 U. S. 697; Schofield *v.* Chicago, etc., R. Co., 114 U. S. 615; Bower *v.* Chicago, etc., R. Co., 61 Wis. 457, 19 Am. & Eng. R. Cas. 301. See, also, Penn. R. Co. *v.* Stegemeier, 118 Ind. 305, same as to statutory requirement.

fectual, its having given them may not in all cases relieve it from liability.[1] Ordinarily it is for the jury to determine what constitutes ordinary care under the circumstances of each case,[2] but where the facts are undisputed it may sometimes present a question of law for the court.[3] In cases where the statutory duties have been performed, it is, in some peculiar instances, for the jury to determine whether in the particular case the performance of such duties was sufficient to comply with the common law requirement.[4]

1157. **Sign-boards, gates and flagmen at crossings.**—Where signs or gates are not required by statute it is usually a question for the jury, as to whether, under the circumstances, it is

[1] Chicago, etc., R. Co. *v.* Boggs, 101 Ind. 522, 23 Am. & Eng. R. Cas. 282; South, etc., R. Co. *v.* Thompson, 62 Ala. 494; Ellis *v.* Lake Shore, etc., R. Co., 138 Pa. St. 506, 21 Atl. R. 140; Baltimore, etc., R. Co. *v.* Owings, 65 Md. 502, 5 Atl. R. 329; Childs *v.* Penn. R. Co., 150 Pa. St. 73, 24 Atl. R. 341.

[2] Lapsley *v.* Union Pac. R. Co., 50 Fed. R. 172; Omaha, etc., R. Co. *v.* Brady, 37 Neb. 27, 57 N. W. R. 767; Shaber *v.* St. Paul, etc., R. Co., 28 Minn. 103, 2 Am. & Eng. R. Cas. 185; Loucks *v.* Chicago, etc., R. Co., 31 Minn. 526, 19 Am. & Eng. R. Cas. 305, 309; Frick *v.* St. Louis, etc., R. Co., 75 Mo. 595, 8 Am. & Eng. R. Cas. 280; Louisville, etc., R. Co. *v.* Goetz, 79 Ky. 442, 14 Am. & Eng. R. Cas. 627; Macon, etc. R. Co. *v.* Davis, 18 Ga. 679. "The terms 'ordinary care,' 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men, have a relative significance, and can not be arbitrarily defined. What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court." Lamar, J., in Grand Trunk R. Co. *v.* Ives, 144 U. S. 408, 12 Sup. Ct. R. 679.

[3] Loucks *v.* Chicago, etc., R. Co., 31 Minn. 526, 19 Am. & Eng. R. Cas. 305; Delaware, etc., R. Co. *v.* Converse, 139 U. S. 469, 11 Sup. Ct. R. 569; Randall *v.* Baltimore, etc., Railroad Co., 109 U. S. 478, 3 Sup. Ct. R. 322; Schofield *v.* Chicago, etc., Railway Co., 114 U. S. 615, 5 Sup. Ct. R. 1125; Union Pac. R. Co. *v.* McDonald, 152 U. S. 262, 14 Sup. Ct. R. 619. The general rule is that it is only where the facts are such that reasonable men must draw the same conclusion from them that the question of negligence is considered as one of law for the court. Grand Trunk R. Co. *v.* Ives, 144 U. S. 408, 12 Sup. Ct. R. 679.

[4] Finklestein *v.* N. Y., etc., R. Co., 41 Hun 34; Byrne *v.* N. Y., etc., R. Co., 104 N. Y. 362, 10 N. E. R. 539; Piper *v.* Chicago, etc., R. Co., 77 Wis. 247, 46 N. W. R. 165; Weber *v.* N. Y., etc., R. Co., 58 N. Y. 451; Dyer *v.* Erie Ry. Co., 71 N. Y. 228; Grand Trunk R. Co. *v.* Ives, 144 U. S. 408, 12 Sup. Ct. R. 679.

negligence for the company to omit them.[1] The track in itself is a warning of danger, but its presence may not always be apparent to the traveler, and where it is obscured by the surroundings, reasonable care may require the company to erect such signs as will apprise him of its presence, or to take other proper precautions. The omission of a sign-board will not render the company liable to one who knows of the location of the track and is familiar with the surroundings, as the omission of the company can in no way be the cause of his injury,[2] but where sign-boards are required by statute their omission may constitute negligence, or, at least, evidence of negligence.[3] In order to render the company liable, however, the omission must have been the proximate cause of injury to the traveler who was himself in the exercise of ordinary care,[4] and it has been held that the erection of a sign-board, whether required by statute or not, can only be regarded as a duty to one who approaches a crossing for the purpose of using it.[5] Outside of statutory and municipal regulations there is no rule of law requiring the company to maintain gates at crossings, but the necessity for a gate at a particular crossing in order to comply with the requirement of ordinary care is in some cases to be determined by the jury.[6] Where maintained, whether required by statute or not, the fact that the gate is open is held to be an

[1] Eaton *v.* Fitchburg, etc., R. Co., 129 Mass. 364, 2 Am. & Eng. R. Cas. 183; Shaber *v.* St. Paul, etc., R. Co., 28 Minn. 103, 2 Am. & Eng. R. Cas. 185; Baltimore, etc., R. Co. *v.* Whitacre, 35 Ohio St. 627; Elkins *v.* Boston, etc., R. Co., 115 Mass. 190; Heddles *v.* Chicago, etc., R. Co., 77 Wis. 228, 46 N. W. R. 115.

[2] Field *v.* Chicago, etc., R. Co., 14 Fed. R. 332, 8 Am. & Eng. R. Cas. 425; Haas *v.* Grand Rapids, etc., R. Co., 47 Mich. 401, 11 N. W. R. 216; Gulf, etc., R. Co. *v.* Greenlee, 62 Tex. 344, 23 Am. & Eng. R. Cas. 322.

[3] Field *v.* Chicago, etc., R. Co., 14 Fed. R. 332, 8 Am. & Eng. R. Cas. 425; Haas *v.* Grand Rapids, etc., R. Co., 47 Mich. 401, 11 N. W. R. 216; Shaber *v.* St. Paul, etc., R. Co., 28 Minn. 103, 9 N. W. R. 575; Payne *v.* Chicago, etc., R. Co., 44 Ia. 236.

[4] Lang *v.* Holiday, etc., R. Co., 49 Iowa 469; Field *v.* Chicago, etc., R. Co., 14 Fed. R. 332, 8 Am. & Eng. R. Cas. 425.

[5] East Tenn., etc., R. Co. *v.* Feathers, 10 Lea (Tenn.) 103, 15 Am. & Eng. R. Cas. 446.

[6] Stubley *v.* London, etc., R. Co., L. R. 1 Ex. 13; Eaton *v.* Fitchburg, etc., R. Co., 129 Mass. 364, 2 Am. & Eng. R. Cas. 183.

invitation to cross and an assurance that the track can be crossed in safety,[1] but such an invitation will not excuse the traveler from himself exercising care to avoid a collision.[2] It is the duty of the company to close the gates on the approach of a train, but the traveler must not rely entirely upon its servant to do so.[3] In cases where the failure to close the gates is followed by a collision, the questions of negligence and contributory negligence are usually for the jury.[4] It is held that a traveler who attempts to cross while the gate is in motion is guilty of such contributory negligence as to defeat his action against the company.[5] In the absence of a statute, the company is not required to keep a flagman at every highway crossing,[6] but if the place be one of extraordinary peril, the fact

[1] Stubley *v.* London, etc., R. Co., L. R. 1 Ex. 13; Northeastern, etc., R. Co. *v.* Wanless, L. R. 7 E. & I. App. Cas. 12, 43 L. J. Q. B. 185; Sharp *v.* Glushing, 96 N. Y. 676, 19 Am. & Eng. R. Cas. 372; Penn. R. Co. *v.* Stegemeier, 118 Ind. 305; Cleveland, etc., Railway Co. *v.* Schneider, 45 Ohio St. 678, 17 N. E. R. 321; Central Trust Co. *v.* Wabash, etc., R. Co., 27 Fed. R. 159; Lindeman *v.* N. Y., etc., R. Co., 11 N. Y. St. R. 837, 46 Hun 679; Fitzgerald *v.* Long Island R. Co., 117 N. Y. 653; Oldenburg *v.* N. Y., etc., R. Co., 124 N. Y. 414, 26 N. E. R. 1021; State *v.* Boston, etc., R. Co., 80 Me. 430, 15 Atl. R. 36; Evans *v.* Lake Shore, etc., R. Co., 88 Mich. 442, 50 N. W. R. 386; Wilson *v.* N. Y., etc., R. Co., 18 R. I. 491, 29 Atl. R. 258; 2 Wood Ry. Law, 1328.

[2] Penn. R. Co. *v.* Stegemeier, 118 Ind. 305, and authorities cited; 31 Cent. L. J. 473. The facts of the absence of the flagman and the gates being open, are to be considered by the jury as affecting the traveler's conduct. Palmer *v.* N. Y., etc., R. Co., 112 N. Y. 234, 19 N. E. R. 678.

[3] Lunt *v.* London, etc., R. Co., L. R. 1 Q. B. 277; Phila., etc., R. Co. *v.* Boyer, 97 Pa. St. 91, 2 Am. & Eng. R. Cas. 172.

[4] Palmer *v.* N. Y., etc., R. Co., 112 N. Y. 234, 19 N. E. R. 678; Lunt *v.* London, etc., R. Co., L. R. 1 Q. B. 277; Bilbee *v.* London, etc., R. Co., 18 Com. B. (N. S.) 584; Sharp *v.* Glushing, 96 N. Y. 676, 19 Am. & Eng. R. Cas. 372.

[5] Peck *v.* N. Y., etc., R. Co., 50 Conn. 379, 14 Am. & Eng. R. Cas. 633.

[6] Weber *v.* N. Y., etc., R. Co., 58 N. Y. 451; Commonwealth *v.* Boston, etc., R. Co., 101 Mass. 201; Haas *v.* Grand Rapids, etc., R. Co., 47 Mich. 401, 8 Am. & Eng. R. Cas. 268; Penn. R. Co. *v.* Matthews, 36 N. J. L. 531; McGrath *v.* N. Y., etc., R. Co., 59 N. Y. 468, 17 Am. R. 359. In the case of Houghkirk *v.* President, etc., of Canal Co., 92 N. Y. 219, it was said: "A railroad company is not bound and owes no duty so to station a flagman, and negligence can not be predicated on the omission. The fact may be proven as one of the circumstances under which the train was moved, and by which the degree of care requisite in its handling and running may be affected; so that the question never is whether there should have been a

that there was no flagman, while not conclusive evidence of negligence on the part of the company, is usually for the jury to consider in determining whether in the particular case, the company exercised ordinary care.[1] When a flagman is required by statute or ordinance, the violation of the law does not conclusively establish liability on the part of the company, but the injured party must show that the omission was the proximate cause of the injury, and that he was himself free from fault.[2] It has been held, where the statute empowers railroad commissioners to designate the crossings at which flagmen shall be required and compels the company to maintain flagmen at such places, that in the absence of an order from the commissioners the company is under no duty to keep a flagman at a particular crossing and that the fact of its failure to do so could not be introduced as evidence,[3] but this is in conflict with what we think is the better rule—that the statutes only prescribe the minimum of care required.[4] Al-

flagman, or one ought to have been stationed at the crossing, but whether in view of his presence or absence, the train was moved with prudence or negligence." See article in 31 Cent. L. J. 473.

[1] Omaha, etc., R. Co. *v.* Brady, 39 Neb. 27, 57 N. W. R. 767; Schmitz *v.* St. Louis, etc., R. Co., 119 Mo. 256, 23 L. W. R. 250; Eaton *v.* Fitchburg R. Co., 129 Mass. 364, 2 Am. & Eng. R. Cas. 183; McGrath *v.* N. Y., etc., R. Co., 63 N. Y. 522; Bailey *v.* New Haven, etc., R. Co., 107 Mass. 496; Phila. R. Co. *v.* Killips, 88 Pa. St. 405; Penn. R. Co. *v.* Matthews, 36 N. J. L. 531; Cent. Pass. R. Co. *v.* Kuhn, 86 Ky. 578; Kansas Pac. R. Co. *v.* Richardson, 25 Kan. 391, 6 Am. & Eng. R. Cas. 96; Kinney *v.* Crocker, 18 Wis. 74; Pittsburgh, etc., R. Co. *v.* Yundt, 78 Ind. 373, 41 Am. R. 580; Welsch *v.* Hannibal, etc., R. Co. 72 Mo. 451, 6 Am. & Eng. R. Cas. 75; Hoye *v.* Chicago, etc., Railroad Co., 67 Wis. 1, 29 N. W. R. 646; Bolinger *v.* St. Paul, etc., R. Co., 36 Minn. 418, 31 N. W. R. 856. And failure to station a flagman at a particular crosssing may be introduced as evidence of negligence without being specifically alleged in the complaint. Lesan *v.* Maine, etc., R. Co., 77 Me. 85, 23 Am. & Eng. R. Cas. 245. See, also, Heddles *v.* Chicago, etc., R. Co., 74 Wis. 239, 42 N. W. R. 237.

[2] Pennsylvania Co. *v.* Hensil, 70 Ind. 569, 6 Am. & Eng. R. Cas. 79; Pakalinski *v.* N. Y., etc., R. Co., 82 N. Y. 424, 2 Am. & Eng. R. Cas. 251; Cordell *v.* N. Y., etc., R. Co., 70 N. Y. 119; Briggs *v.* N. Y. etc., R. Co., 72 N. Y. 26; Chicago, etc., R. Co. *v.* Notzki, 66 Ill. 455; Fletcher *v.* Atlantic, etc., R. Co., 64 Mo. 484; Johnson *v.* St. Paul, etc., R. Co., 31 Minn. 283, 15 Am. & Eng. R. Cas. 467.

[3] Battiskill *v.* Humphrey, 64 Mich. 494, 28 Am. & Eng. R. Cas. 597, 29 Am. & Eng. R. Cas. 411.

[4] See *Ante*, § 1155. Also, Grand Trunk R. Co. *v.* Ives, 144 U. S. 408, 12 Sup. Ct. R. 679.

though not originally under obligation to do so, if the company has maintained a flagman at a particular crossing for a long time and his presence is notorious, travelers have, within limits, a right to assume, when he is absent, that no train is approaching, and his absence or permanent removal without notice to the public is evidence of negligence;[1] but where, not knowing that a flagman had usually been stationed at the crossing, the traveler's conduct was in no way influenced by his absence, such absence creates no liability, nor does the absence of a flagman in any event absolve the traveler from the exercise of care.[2] The invitation or direction of the flagman to the traveler is held to be an assurance of safety upon which he has a right to rely,[3] but while relying upon such assurance he has no right to omit to use the senses of sight and hearing, as a prudent man would do under the circumstances,[4] although the same degree of vigilance is not required of him as if there were no such invitation.[5] If the traveler refuses to heed the signals of

[1] Pittsburgh, etc., R. Co. *v.* Yundt, 78 Ind. 373; St. Louis, etc., R. Co. *v.* Dunn, 78 Ill. 197; Ernst *v.* Hudson River R. Co., 39 N. Y. 61; Dolan *v.* Delaware, etc., R. Co., 71 N. Y. 285; Phila., etc., R. Co. *v.* Killips, 88 Pa. St. 405; Heddles *v.* Chicago, etc., R. Co., 74 Wis. 239, 42 N. W. R. 237; Burns *v.* North Chicago Rolling Mill Co., 65 Wis. 312, 27 N. W. R. 43; Richmond *v.* Chicago, etc., R. Co., 87 Mich. 374; Sweeny *v.* Old Colony R. Co., 10 Allen 368; Delaware, etc., R. Co. *v.* Toffey, 38 N. J. L. 525; 2 Shear. & Redf., § 466.

[2] Pakalinsky *v.* N. Y., etc., R. Co., 82 N. Y. 251, 2 Am. & Eng. R. Cas. 251; Lake Shore, etc., R. Co. *v.* Sunderland, 2 Bradw. (Ill.) 307.

[3] Sharp *v.* Glushing, 96 N. Y. 676, 19 Am. & Eng. R. Cas. 372; Sweeny *v.* Old Colony R. Co., 10 Allen (Mass.) 368, 87 Am. Dec. 644; Bayley *v.* Eastern R. Co., 125 Mass. 62; Whelan *v.* N. Y., etc., R. Co., 38 Fed. R. 15; Central Trust Co. *v.* Wabash, etc., R. Co., 27 Fed. R. 159; State *v.* Boston, etc., R. Co., 80 Me. 430, 35 Am. & Eng. R. Cas. 356; Philadelphia, etc., R. Co. *v.* Boyer, 97 Pa. St. 91, 2 Am. & Eng. R. Cas. 172. It seems to us that some of these cases go too far toward absolving the traveler from all care for himself. No reliance upon a servant of the company can excuse him for stepping recklessly into certain and apparent danger.

[4] Penn. R. Co. *v.* Stegemeier, 118 Ind. 305; Phila., etc., R. Co. *v.* Boyer, 97 Pa. St. 91, 2 Am. & Eng. R. Cas. 172; Berry *v.* Penn. R. Co., 48 N. J. L. 141, 26 Am. & Eng. R. Cas. 396; Casey *v.* N. Y., etc., R. Co., 78 N. Y. 518; Lake Shore, etc., R. Co. *v.* Frantz, 127 Pa. St. 297, 4 L. R. A. 389; Greenwood *v.* Phila., etc., R. Co., 124 Pa. St. 572, 17 Atl. R. 188.

[5] Lunt *v.* London, etc., R. Co., L. R. 1 Q. B. 277; Dolan *v.* Delaware, etc., Co., 71 N. Y. 285; Chicago, etc., R. Co.

the flagman and attempts to cross when warned not to do so, he can not recover for any injury sustained,[1] except it be wilful. The negligence of the flagman or gate-keeper is the negligence of the company and one customarily permitted to act as flagman, although not employed for the purpose, may render the company liable for his negligence.[2] Evidence of the intoxication of the flagman at the time of the accident is admissible.[3]

1158. **Signals on approach to crossings.**—The duty to give warning signals on the approach of trains to crossings has become so well established that in most, if not all of the states they are required by statutes, which are generally held to be cumulative only and to define the minimum of ordinary care, although there are a number of cases holding that compliance with the statute is always sufficient.[4] It has been held that whether required by statute or not suitable warnings must be given to apprise the traveler of the presence of the train.[5] How far the omission to give the warnings in compliance with the statute or to meet the requirement of ordinary care constitutes negligence on the part of the company has been discussed in previous sections. The company must exercise care to so operate

v. Hutchinson, 120 Ill. 587, 11 N. E. R. 855; Callaghan *v.* Delaware, etc., R. Co., 5 N. Y. Supp. 285, 52 Hun 276. See, also, Palmer *v.* N. Y., etc., R. Co., 112 N. Y. 234, 19 N. E. R. 678.

[1] Houston, etc., R. Co. *v.* Carson, 66 Tex. 345, 1 S. W. R. 107.

[2] Louisville, etc., R. Co. *v.* Webb, 90 Ala. 185, 8 So. R. 518; Dickson *v.* Missouri, Pac. R. Co., 104 Mo. 491, 16 S. W. R. 381; Peck *v.* Mich. Cent. R. Co., 57 Mich. 3, 19 Am. & Eng. R. Cas. 257; Dolan *v.* Delaware, etc., R. Co., 71 N. Y. 285; Ernst *v.* Hudson River R. Co., 35 N. Y. 9, 90 Am. Dec. 761; Kissenger *v.* N. Y., etc., R. Co., 56 N. Y. 538.

[3] Warner *v.* N. Y., etc., R. Co., 44 N. Y. 465.

[4] *Ante*, §§ 1155, 1156. Atchison, etc., R. Co. *v.* Hague, 54 Kan. 284, 60 Am. & Eng. R. Cas. 617, 38 Pac. 257; Missouri Pac. R. Co. *v.* Moffatt (Kan.), 44 Pac. R. 607. See New York, etc., R. Co. *v.* Hackett (N. J.), 32 Atl. R. 265.

[5] Chicago, etc., R. Co. *v.* Sharp, 63 Fed. R. 532, 60 Am. & Eng. R. Cas. 595; Gulf, etc., R. Co. *v.* Hamilton, (Tex.), 28 S. W. R. 906; Vandewater *v.* N. Y., etc., R. Co., 26 N. Y. Supp. 397, 74 Hun 32; Atlanta, etc., R. Co. *v.* Wyly, 65 Ga. 120, 8 Am. & Eng. R. Cas. 262; Faber *v.* St. Paul, etc., R. Co., 29 Minn. 465, 8 Am. & Eng. R. Cas. 277; Continental Improvement Co. *v.* Stead, 95 U. S. 161.

its trains that the warning signals may be heard and that the traveler may take advantage of them.[1] Otherwise it will be guilty of negligence. In order that one injured may recover he must be able to show that the omission of the signals was the proximate cause of his injury,[2] and in no case can one recover on account of such omission, who by any other means has timely notice of the approach of the train, for after he has seen the danger the purpose of the signals is subserved, whether they have been given or not;[3] but such statutes are mandatory, they define a positive duty, and it has been held that the court should not leave the question of their necessity to the jury,[4] although it is said that they are excused when the city ordinances forbid them in the limits of the municipality.[5] One who approaches the crossing has a right to assume that the company will give the usual signals of approach and when he can neither hear nor see any signs of a moving train, that the crossing may be made safely,[6] but he is not thereby relieved

[1] Chicago, etc., R. Co. *v.* Netolicky, 67 Fed. R. 665; Chicago, etc., R. Co. *v.* Boggs, 101 Ind. 522, 23 Am. & Eng. R. Cas. 282.

[2] Chicago, etc., R. Co. *v.* Crisman, 19 Colo. 30, 34 Pac. R. 286; Toledo, etc., R. Co. *v.* Jones, 76 Ill. 311; Chicago, etc., R. Co. *v.* Harwood, 90 Ill. 425; Parker *v.* Wilmington, etc., R. Co., 86 N. C. 221, 8 Am. & Eng. R. Cas. 420; East Tennessee, etc., R. Co. *v.* King, 81 Ala. 177, 2 So. Rep. 152; Central R. Co. *v.* Brinson, 70 Ga. 207, 19 Am. & Eng. R. Cas. 42; Horn *v.* Baltimore, etc. R. Co., 54 Fed. R. 301.

[3] State *v.* Baltimore, etc., R. Co., 69 Md. 339, 35 Am. & Eng. R. Cas. 412; Atchison, etc., R. Co. *v.* Walz, 40 Kan. 433, 19 Pac. R. 787; Chicago, etc., R. Co. *v.* Bell, 70 Ill. 102; Telfer *v.* Northern R. Co., 30 N. J. L. 188; Houston, etc., R. Co. *v.* Nixon, 52 Tex. 19; Saldana *v.* Galveston, etc., R. Co., 43 Fed. R. 862.

[4] Cincinnati, etc., R. Co. *v.* Butter, 103 Ind. 31, 23 Am. & Eng. R. Cas. 262; Pittsburgh, etc., R. Co. *v.* Martin, 82 Ind. 476; Atlanta, etc., R. Co. *v.* Wyly, 65 Ga. 120, 8 Am. & Eng. R. Cas. 262; Havens *v.* Erie R. Co., 53 Barb. (N. Y.) 328; Semel *v.* N. Y., etc., R. Co., 9 Daly (N. Y.) 321.

[5] Penn. R. Co. *v.* Hensil, 70 Ind. 569. But under such circumstances the company must exercise greater precaution in other respects. Baltimore, etc., R. Co. *v.* Golway, 23 Wash. L. Rep. 308. It has been held however, that the engineer must blow his whistle if prudence demands it, notwithstanding an order to the contrary from the railroad commissioners. Rowen *v.* N. Y., etc., R. Co., 59 Conn. 364, 21 Atl. R. 1073. See, also, Katzenberger *v.* Lawo, 90 Tenn. 235, 16 S. W. Rep. 611.

[6] Ernst *v.* Hudson, etc., R. Co., 35 N. Y. 9, 90 Am. Dec. 761, and note; Kennayde *v.* Pac. R. Co., 45 Mo. 255; Donohue *v.* St. Louis, etc., R. Co., 91

from the duty to use his senses vigilantly to avoid danger.[1] Where there is no statutory requirement it is generally for the jury to determine what notice is reasonable under the circumstances of the particular case.[2] There is conflict of authority as to who may claim the benefit of the statutory signals, and it may depend somewhat upon the language of the particular statute. Where the statute does not specifically designate the class to whom the duty is owing, the courts have usually construed it to be due only to those who are about to use, are using or have lately used the crossing, and have held that no others could recover for injuries resulting from a failure to give the signals,[3] but other courts have gone further and hold that the duty is for the protection of all persons lawfully at or near the crossing from any danger to be apprehended from the sudden approach of a train without warning.[4] There are other decisions which hold that the warning is intended only for travelers on the highway, whether intending to cross or not and that no

Mo. 357, 28 Am. & Eng. R. Cas. 673; Wabash, etc., R. Co. *v.* Central Trust Co., 23 Fed. R. 738.

[1] Gorton *v.* Erie, etc., R. Co., 45 N. Y. 460; Shaw *v.* Jewett, 86 N. Y. 616, 6 Am. & Eng. R. Cas. 111; Baltimore, etc., R. Co. *v.* State, 29 Md. 252; Meeks *v.* So. Pac. R. Co., 52 Cal. 602, 56 Cal. 513, s. c. 8 Am. & Eng. R. Cas. 314; Stoneman *v.* Atlantic, etc., R. Co., 58 Mo. 503; Miller *v.* Terre Haute, etc., R. Co. (Ind.), 43 N. E. R. 257.

[2] Tolman *v.* Syracuse, etc., R. Co., 98 N. Y. 198; Loucks *v.* Chicago, etc., R. Co., 31 Minn. 526, 19 Am. & Eng. R. Cas. 305; Guggenheim *v.* Lake Shore, etc., R. Co., 57 Mich. 488, 22 Am. & Eng. R. Cas. 546; Penn. R. Co. *v.* Ogier, 35 Pa. St. 60; Longenecker *v.* Pennsylvania R. Co., 105 Pa. St. 328.

[3] Reynolds *v.* Great Northern R. Co., 69 Fed. R. 808; Pike *v.* Chicago, etc., Railroad Co., 39 Fed. R. 754; Bell *v.* Hannibal, etc., Railroad Co., 72 Mo. 50; Evans *v.* Atlantic, etc., Railroad Co., 62 Mo. 49; Elwood *v.* New York, etc., Railway Co., 4 Hun 808; O'Donnell *v.* Providence, etc., Railway Co., 6 R.I. 211, 216; Clark *v.* Missouri Pac. Railway Co., 35 Kan. 350, 11 Pac. R. 134; Gorris *v.* Scott, L. R. 9 Exch. 125; East Tenn., etc, Railroad Co. *v.* Feathers, 10 Lea 103; Harty *v.* Central Railroad Co., 42 N. Y. 468; Central, etc., R. Co. *v.* Golden, 93 Ga. 510, 21 S. E. R. 68.

[4] Chicago, etc., R. Co. *v.* Metcalf, 44 Neb. 848, 63 N. W. R. 51; Lonergan *v.* Illinois Cent. R. Co., 87 Iowa 755, 49 N. W. R. 852, aff'd., 53 N. W. R. 236; Sanborn *v.* Railway Co., 91 Mich. 538, 52 N. W. R. 153; Central Railroad Co. *v.* Raiford, 82 Ga. 400, 9 S. E. R. 169. In People *v.* New York, etc., Railroad Co., 25 Barb. 199, it is held that the hazards to be provided against by such a statute are two-fold: First, the danger of collision at crossings; second, that of damage by frightening of teams traveling upon a public highway near the crossing.

duty is due to a farmer working in the field.[1] Positive evidence that signals were given overcomes evidence that they were not heard by other witnesses;[2] but if one who was intently listening for and expecting the signals, and could have heard them, testifies that he did not hear them, his evidence is of equal weight with the evidence that they were given, and it is for the jury to determine from the evidence.[3] The construction of the various statutes involves many difficult questions which the scope of this chapter will not allow us to discuss. Statutory signals are generally only required at legally established highways,[4] and it has been held that where the statute requires the ringing of the bell or the blowing of the whistle, both are not necessary.[5] Also the company is considered as having discharged its duty under some statutes where the signal is given at the required distance and continued until the crossing is passed,[6] but what constitutes a compliance must depend upon the phraseology of the particular statute, and its strict construction depends upon whether it is penal or remedial.[7] Statutes or ordinances requiring signals are police regulations, and the liability for their violation is sometimes in the nature of a

[1] Williams *v.* Chicago, etc., R. Co., 135 Ill. 491, 26 N. E. R. 661; Ranson *v.* Chicago, etc., Railroad Co., 62 Wis. 178, 22 N. W. R. 147.

[2] Ellis *v.* Great Western R. Co., L. R. 9 C. P. 551; Chicago, etc., R. Co. *v.* Still, 19 Ill. 499, 71 Am. Dec. 236, and note; Telfer *v.* Northern R. Co., 30 N. J. L. 188; Savannah, etc., R. Co. *v.* Shearer, 58 Ala. 672; McGrath *v.* New York, etc., R. Co., 63 N. Y. 522; Chapman *v.* N. Y., etc., R. Co., 14 Hun (N. Y.) 484; Bohan *v.* Milwaukee, etc., R. Co., 61 Wis. 391, 19 Am. & Eng. R. Cas. 276; Chicago, etc., R. Co. *v.* Robinson, 106 Ill. 142, 13 Am. & Eng. R. Cas. 620; Missouri, etc., R. Co. *v.* Pierce, 39 Kan. 391, 18 Pac. R. 305; Missouri Pac. R. Co. *v.* Moffatt (Kan.), 44 Pac. R. 607.

[3] Dublin, etc., R. Co. *v.* Slattery, L. R. 3 App. Cas. 1155; Voak *v.* Northern Cent. R. Co., 75 N. Y. 320; Renwick *v.* N. Y., etc., R. Co., 36 N. Y. 132; Chicago, etc., R. Co. *v.* Dickson, 88 Ill. 431; Bunting *v.* Cent. Pac. R. Co., 16 Nev. 277, 6 Am. & Eng. R. Cas. 282; Urbanek *v.* Chicago, etc., R. Co., 47 Wis. 59; Berg *v.* Chicago, etc., R. Co., 50 Wis. 419, 2 Am. & Eng. R. Cas. 70.

[4] *Ante*, § 1154; Cordell *v.* N. Y., etc., R. Co., 64 N. Y. 535.

[5] Terry *v.* St. Louis, etc., R. Co., 89 Mo. 586, 1 S. W. R. 746; Chicago, etc., R. Co. *v.* Damerell, 81 Ill. 450.

[6] Zimmerman *v.* Hannibal, etc., R. Co., 71 Mo. 476, 2 Am. & Eng. R. Cas. 191.

[7] *Ante*, § 715.

penalty, and generally the company or the engineer is liable to indictment for failure to give them.[1]

§ 1159. **Duty of company to keep a lookout —Lights.**—It is frequently provided by statute or ordinance that railroad companies shall keep a lookout as their trains approach crossings, and this may be required, in order to constitute reasonable care, even in the absence of any statute or ordinance upon the subject,[2] particularly where the crossing is unusually dangerous,[3] or the train is backed over the crossing or the like,[4] but under ordinary circumstances the engineer or other employe on the lookout may assume that an adult on the track or approaching the track, and who is apparently able to do so, will yield the right of way and exercise due care to avoid a collision.[5] So, there are cases in which it is the duty of the company at night to have a headlight on the locomotive or a light on the car nearest the crossing where the train is backed over it, unless reasonable care is exercised to provide some other efficient precaution to take its place.[6] But when a headlight

[1] *Ante*, § 721; Chicago, etc., R. Co. *v.* McDaniels, 63 Ill. 122; Commonwealth *v.* Boston, etc., R. Co., 133 Mass. 383, 8 Am. & Eng. R. Cas. 297, and note.

[2] Marcott *v.* Marquette, etc., R. Co., 47 Mich. 1, s. c. 4 Am. & Eng. R. Cas. 548; Hinkle *v.* Richmond, etc., R. Co., 109 N. Car. 472; St. Louis, etc., R. Co. *v.* Mathias, 50 Ind. 65; Leavitt *v.* Terre Haute, etc., R. Co., 5 Ind. App. 513; Johnson *v.* Chicago, etc., R. Co., 49 Wis. 529; Frick *v.* St. Louis, etc., R. Co., 75 Mo. 595, s. c. 8 Am. & Eng. R. Cas. 280; Chicago, etc., R. Co. *v.* Ryan, 70 Ill. 211. In some jurisdictions it is held that the engineer or fireman must keep a continuous lookout wherever persons may reasonably be expected upon the track even if they are not at a public crossing. *Post*, § 1257; Smith *v.* Norfolk, etc., R. Co., 114 N. Car. 728, s. c. 25 L. R. A. 287, and note.

[3] East Tenn., etc., R. Co. *v.* White, 5 Lea (Tenn.) 540, s. c. 8 Am. & Eng. R. Cas. 65; Marcott *v.* Marquette, etc., R. Co., 47 Mich. 1.

[4] Barley *v.* Chicago, etc., R. Co., 4 Biss. (U. S. C. C.) 430; Chicago, etc., R. Co. *v.* Triplett, 38 Ill. 482; Kansas Pac. R. Co. *v.* Pointer, 14 Kan. 37; Robinson *v.* Western Pac. R. Co., 48 Cal. 409; Chicago, etc., R. Co. *v.* Sharp, 63 Fed. R. 532; Schlimgen *v.* Chicago, etc., R. Co., 90 Wis. 186, s. c. 62 N. W. R. 1045; Wiley *v.* Long Island, etc., R. Co., 76 Hun (Y. Y.) 29. But compare Richmond, etc., R Co. *v.* Yeamans, 86 Va. 860.

[5] *Ante*, § 1153.

[6] Smedis *v.* Brooklyn, etc., R. Co., 88 N. Y. 13; Cheney *v.* New York Cent. R. Co., 16 Hun (N. Y.) 415;

is provided the company is not liable, where it exercises due care, merely because the light is temporarily obscured by causes beyond its control.[1] Nor is it liable merely because there was no headlight where the train was plainly visible and the absence of the headlight was not a proximate cause of the injury.[2]

§ 1160. **Rate of speed—When negligence.**—In the absence of any statute or ordinance upon the subject, no rate of speed is negligence *per se*.[3] But, when considered in connection with other circumstances, as it must be in some cases, the court may sometimes be justified in declaring that the company was guilty of negligence in running its train at an excessive and dangerous rate of speed under the circumstances of the particular case. Ordinarily, however, the question is one of fact for the jury.[4] In the absence of any statutory requirement there is no obligation upon the company to slacken the speed of its trains, under ordinary circumstances, at country cross-

Nashville, etc., R. Co. *v.* Smith, 6 Heisk. (Tenn.) 174; Chicago, etc., R. Co. *v.* Garvy, 58 Ill. 83; Chicago, etc., R. Co. *v.* Sharp, 63 Fed. 532; Missouri, etc., R. Co. *v.* Finch, (Tex. Civ. App.) 31 S. W. R. 84.

[1] Louisville, etc., R. Co. *v.* Melton, 2 Lea (Tenn.) 262. (Light obscured by mist).

[2] Daniels *v.* Staten Island, etc., Co., 125 N. Y. 407.

[3] Reading, etc., R. Co. *v.* Ritchie, 102 Pa. St. 425, s. c. 19 Am. & Eng. R. Cas. 267, and note; Young *v.* Hannibal, etc., R. Co., 79 Mo. 336; Powell *v.* Missouri Pac. R. Co., 76 Mo. 80, s. c. 8 Am. & Eng. R. Cas. 467; Cohen *v.* Eureka, etc., R. Co., 14 Nev. 376; Terre Haute, etc., R. Co. *v.* Clark, 73 Ind. 168; Warner *v.* New York, etc., R. Co., 44 N. Y. (5 Hand.) 465; Dyson *v.* New York, etc., R. Co., 57 Conn. 9, s. c. 17 Atl. R. 137; Shackleford *v.* Louisville, etc., R. Co., 84 Ky. 43, s. c. 4 Am. St. R. 189; Burlington, etc., R. Co. *v.* Wendt, 12 Neb. 76; Artz *v.* Chicago, etc., R. Co., 44 Iowa 284; Chicago, etc., R. Co. *v.* Harwood, 80 Ill. 88; Bemis *v.* Connecticut, etc., R. Co., 42 Vt. 375; Grows *v.* Maine, etc., R. Co., 67 Me. 100; Tobias *v.* Michigan Cent. R. Co., 103 Mich. 330, s. c. 61 N. W. R. 514.

[4] Marcott *v.* Marquette, etc., R. Co., 47 Mich. 1, s. c. 4 Am. & Eng. R. Cas. 548; Reeves *v.* Delaware, etc., R. Co., 30 Pa. St. 454, s. c. 72 Am. Dec. 713; Western, etc., R. Co. *v.* King, 70 Ga. 261, s. c. 19 Am. & Eng. R. Cas. 255; McGill *v.* Pittsburgh, etc., Ry. Co., 152 Pa. St. 331, s. c. 25 Atl. R. 540; Miller *v.* New York, etc., R. Co., 65 Hun 623, s. c. 20 N.Y. Supp. 163; Chicago, etc., R. Co. *v.* Spilker, 134 Ind. 380, s. c. 32 N. E. R. 280, 34 N. E. R. 218, and authorities cited in last preceding note, *supra*.

ings,[1] and a high rate of speed may be perfectly proper at country crossings, although it might be considered negligence at a crossing in a populous city.[2] Whether it is negligence or not usually depends upon the circumstances of the particular case, and the rate of speed, when alleged as one of the grounds for recovery, may generally be shown in connection with the other circumstances as evidence of negligence.[3] The rate of speed, however, should not be so great as to render the statutory signals unavailing,[4] and the company will be liable to one who is injured by reason of the violation of a valid statute or ordinance limiting the rate of speed, where such violation is the proximate cause of the injury and the person injured is rightfully using the crossing in the exercise of due care.[5] So,

[1] Chicago, etc., R. Co. *v.* Harwood, 80 Ill. 88; Toledo, etc., R. Co. *v.* Miller, 76 Ill. 278; Zeigler *v.* Northeastern R. Co., 5 S. Car. 221, 7 S. Car. 402; Chicago, etc., R. Co. *v.* Robinson, 9 Bradw. (Ill. App.) 89; DuBoise *v.* New York, etc., R. Co., 88 Hun 10, s. c. 34 N. Y. Supp. 279.

[2] Telfer *v.* Northern R. Co., 1 Vroom (N. J.) 188; Chicago, etc., R. Co. *v.* Spilker, 134 Ind. 380, s. c. 33 N. E. R. 280, 34 N. E. R. 218.

[3] Artz *v.* Chicago, etc., R. Co., 44 Iowa 284; Salter *v.* Utica, etc., R. Co., 88 N. Y. 42, s. c. 8 Am. & Eng. R. Cas. 437; Massoth *v.* Delaware, etc., Canal Co., 64 N. Y. 524; Rockford, etc., R. Co. *v.* Hillmer, 72 Ill. 235; Galveston, etc., R. Co. *v.* Duelm (Tex.), 23 S. W. R. 596; Louisville, etc., R. Co. *v.* Stommel, 126 Ind. 35; Terre Haute, etc., R. Co. *v.* Clark, 73 Ind. 168; Annacker *v.* Chicago, etc., R. Co., 81 Iowa 267, s. c. 47 N. W. R. 68.

[4] Continental Imp. Co. *v.* Stead, 95 U. S. 161, 164. See, also, Pennsylvania R. Co. *v.* Ackermann, 74 Pa. St. 265; Philadelphia, etc., R. Co. *v.* Hagan, 47 Pa. St. 244, s. c. 86 Am. Dec. 541; Quimby *v.* Vermont Cent. R. Co., 23 Vt. 387; Louisville, etc., R. Co. *v.* Commonwealth, 80 Ky., 143, 14 Am. & Eng. R. Cas. 613; Chicago, etc., R. Co. *v.* Boggs, 101 Ind. 522, s. c. 23 Am. & Eng. R. Cas. 282.

[5] Haas *v.* Chicago, etc., R. Co., 41 Wis. 44; Chicago, etc., R. Co. *v.* Becker, 84 Ill. 483; Corroll *v.* Burlington, etc., R. Co., 38 Iowa 120, s. c. 18 Am. R. 22; St. Louis, etc., R. Co. *v.* Mathias, 50 Ind. 65; Crosby *v.* New York, etc., R. Co., 88 Hun 196, s. c. 34 N. Y. Supp. 714; New Orleans, etc., R. Co. *v.* Toulme, 59 Miss. 284. That it must be the proximate cause to render the company liable, see Chicago, etc., R. Co. *v.* Kennedy, 3 Kan. App. 693, 43 Pac. R. 802; Georgia, etc., R. Co. *v.* Williams, 93 Ga. 253, s. c. 18 S. E. R. 825; Kelley *v.* Hannibal, etc., R. Co., 75 Mo. 138, s. c. 13 Am. & Eng. R. Cas. 638; Evans, etc., Co. *v.* St. Louis, etc., R. Co., 17 Mo. App. 624; Philadelphia, etc., R. Co. *v.* Stebbing, 62 Md. 504; Pennsylvania Co. *v.* Hensil, 70 Ind. 569, *ante*, § 1155. That it does not excuse the plaintiff from exercising due care and that contributory negligence is a good defense, see Illinois, etc., R. Co. *v.* Hetherington, 83 Ill. 510; Schofield *v.* Chicago, etc., R. Co., 114 U. S. 615; *post*, § 1163.

indeed, it will be liable in such a case where it runs its trains over a dangerous crossing at a rate of speed not so great as that limited by the statute or ordinance, if it is negligent for it to do so under the circumstances.[1]

§ 1161. **Duty of company where view is obstructed.**—Where a crossing is unusually dangerous because the track is curved or the view obstructed, or because of its peculiar construction or situation, it is the duty of the company to exercise such care and take such precautions as the dangerous nature of the crossing requires.[2] Its duty to travelers upon the highway is to exercise reasonable care under the circumstances, and reasonable care in such cases may require it to exercise precautions not demanded in ordinary cases. This rule is especially applicable when the company itself causes the obstruction, as, for instance, where it has allowed weeds and trees to grow up on its right of way, or has piled up wood or left cars in such a place that they obstruct the view.[3] It also requires the company, as a

[1] Louisville, etc., R. Co. *v.* Milam, 9 Lea (Tenn.) 223; Shaber *v.* St. Paul, etc., R. Co., 28 Minn. 103, s. c. 2 Am. & Eng. R. Cas. 185; Frick *v.* St. Louis, etc., R. Co., 75 Mo. 595, s. c. 8 Am. & Eng. R. Cas. 280; Louisville, etc., R. Co. *v.* French, 69 Miss. 121, s. c. 12 So. R. 338; Wabash, R. Co. *v.* Henks, 91 Ill. 406.

[2] Dimick *v.* Chicago, etc., R. Co., 80 Ill. 338; Funston *v.* Chicago, etc., R. Co., 61 Iowa 452; Central R. Co. *v.* Feller, 84 Pa. St. 226; Cordell *v.* New York, etc., R. Co., 75 N. Y. 330; Richardson *v.* New York, etc., R. Co., 45 N. Y. 846; Continental Imp. Co. *v.* Stead, 95 U. S. 161; Vandewater *v.* New York, etc., R. Co., 74 Hun 32, s. c. 26 N. Y. Supp. 397; Eilert *v.* Green Bay, etc., R. Co., 48 Wis. 606; Ritchie *v.* Caledonian R. Co., 7 Scotch Sess. Cas. (4th series) 148; Harlan *v.* St. Louis, etc., R. Co., 65 Mo. 22; Artz *v.* Chicago, etc., R. Co., 34 Iowa 153; Chicago, etc., R. Co. *v.* Dillon, 123 Ill. 570, s. c. 15 N. E. R. 181; Stapley *v.* London, etc., R. Co., L. R. 1 Ex. 21; James *v.* Great Western R. Co., L. R. 2 C. P. 634, note; Bilbee *v.* London, etc., R. Co., 18 C. B. N. S. 584.

[3] Nehrbas *v.* Central Pac. R. Co., 62 Cal. 320, s. c. 14 Am. & Eng. R. Cas. 670; Indianapolis, etc., R. Co. *v.* Smith, 78 Ill. 112; Chicago, etc., R. Co. *v.* Lee, 87 Ill. 454; Mackey *v.* New York, etc., R. Co., 35 N. Y. 75; Kissenger *v.* New York, etc., R. Co., 56 N. Y. 538; Brown *v.* Hannibal, etc., R. Co., 50 Mo. 461, s. c. 11 Am. R. 420; Houston, etc., R. Co. *v.* Poras (Tex. Civ. App.), 29 S.W. Rep. 945; Thomas *v.* Delaware, etc., R. Co., 8 Fed. R. 729; Delaware, etc., R. Co. *v.* Shelton, 55 N. J. Law, 342, 26 Atl. R. 937. See also, Klein *v.* Jewett, 26 N. J. Eq. 474; Pennsylvania Co. *v.* Stegemeier, 118 Ind. 305.

general thing, to take greater precautions at a dangerous crossing in a city than at an ordinary crossing in the open country.[1] And it may even require flagmen or gates to be placed at the crossing,[2] although these are unnecessary in ordinary cases, in the absence of a statute or an ordinance requiring them. It is usually a question of fact, or a mixed question of law and fact, for the jury to determine, under proper instructions, whether the company has exercised reasonable care in the particular case, and it should not be forgotten that the traveler must also exercise such reasonable care and take such precautions as the dangerous nature of the crossing may require.

§ 1162. **Backing and "kicking" cars.**—It is frequently said that it is negligence *per se* to make a "flying switch" or "kick" a car over a crossing, or to push a train backward over a crossing, without warning and in the absence of a lookout.[3] It is doubtless true that there are many cases in which but one reasonable inference can be drawn and the court can say as a matter of law that it is negligence to make a "flying switch" or "kick" a car over a crossing where people are likely to be, as for instance, in a populous city, without giving any notice or taking other precautions to protect them,[4] or to back a train,

[1] Fero *v.* Buffalo, etc., R. Co., 22 N. Y. 209, s. c. 78 Am. Dec. 178, and note; Longabaugh *v.* Virginia City, etc., R. Co., 9 Nev. 271; Gagg *v.* Vetter, 41 Ind. 228; Paducah, etc., R. Co. *v.* Hoehl, 12 Bush. (Ky.) 41; Telfer *v.* Northern R. Co., 1 Vroom (N. J.) 188. See, also, Andrews *v.* New York, etc., R. Co., 60 Conn. 293, s. c. 22 Atl. R. 566; Illinois Cent. R. Co. *v.* Dick, 91 Ky. 434, s. c. 15 S. W. R. 665.

[2] Messenger *v.* Pennsylvania R. Co., 37 N. J. L. 531; Hubbard *v.* Boston, etc., R. Co., 162 Mass. 132, s. c. 38 N. E. R. 366; Pollock *v.* Eastern R. Co., 124 Mass. 158; Bailey *v.* New Haven, etc., Co., 107 Mass. 496; Louisville, etc., R. Co. *v.* Hackman (Ky.), 30 S. W. R. 407; Railway Co. *v.* Schneider, 45 Ohio St. 678, s. c. 17 N. E. R. 321; Freeman *v.* Duluth, etc., R. Co., 74 Mich. 86, s. c. 3 L. R. A. 594, and note.

[3] 3 Lawson's Rights, Rem. & Pr., § 1187; Pierce on Railroads, 356; note to Kentucky Cent. R. Co. *v.* Smith, (Ky.) 18 L. R. A. 63; Shearm. & Redf. Neg. (3rd ed.), § 446.

[4] French *v.* Taunton Branch Railroad, 116 Mass. 537; Delaware, etc., R. Co. *v.* Converse, 139 U. S. 469, s. c. 11 Sup. Ct. R. 569; Robinson *v.* Western, etc., R. Co., 48 Cal. 409; Chicago, etc., R. Co. *v.* Garvy, 58 Ill. 83 (detached car sent over a much used crossing at night without brakeman or light); Brown *v.* New York Cent. Railroad, 32 N. Y. 597; East Tennessee, etc., R.

especially when composed of flat cars, over such a crossing without warning or other precautions.[1] But we think that much must depend upon the peculiar circumstances of each particular case, and that it is going too far to say that making a "flying switch" or "kicking" or backing cars, is negligence *per se* under any and all circumstances.[2] It is certainly not negligence, if proper precautions are taken, and whether the company has taken such precautions and used reasonable care under the circumstances is generally a question of fact for the jury.[3] So, as in other cases, it is not actionable negligence unless it was a proximate cause of the injury complained of, and the plaintiff can not recover if he was guilty of contributory negligence.[4]

Co. *v.* King, 81 Ala. 177; Kay *v.* Pennsylvania R. Co., 65 Pa. St. 269; Peltier *v.* Louisville,etc.,R. Co. (Ky.), 39 S. W. R. 30; Pennsylvania R. Co. *v.* State, 61 Md. 108; Illinois Cent. R. Co. *v.* Hammer, 72 Ill. 347. See, also, O'Connor *v.* Missouri, etc., R. Co. 94 Mo. 150, s. c. 4 Am. St. R. 364; Hinckley *v.* Cape Cod R. Co., 120 Mass. 257; Schindler *v.* Milwaukee, etc., R. Co., 87 Mich. 400; Louisville, etc., R. Co. *v.* Coleman, 86 Ky. 556.

[1] Chicago, etc., R. Co. *v.* Triplett, 38 Ill. 482; Chicago, etc., R. Co. *v.* Sharp, 63 Fed. R. 532; Cooper *v.* Lake Shore, etc., R. Co., 66 Mich. 261, s. c. 33 N. W. R. 306, 11 Am. St. R. 482; Eaton *v.* Erie R. Co., 51 N. Y. 544; Kansas Pac. R. Co. *v.* Ward, 4 Colo. 30; Bailey *v.* New Haven., etc., Co., 107 Mass. 496.

[2] See Sullivan *v.* Pennsylvania Co., (Pa. St.), 7 Atl. R. 177; Carroll *v.* Minnesota Valley R. Co., 13 Minn. 30, 36; Ohio, etc., R. Co. *v.* McDaneld, 5 Ind. App. 108; Pakalinsky *v.* New York, etc., R. Co., 82 N. Y. 424.

[3] Alabama, etc., R. Co. *v.* Summers, 68 Miss. 566; Bohan *v.* Milwaukee,etc., R. Co., 58 Wis. 30, s. c. 15 Am. & Eng. R. Cas. 374, 61 Wis. 391, 19 Am. & Eng. R. Cas., 276; Ferguson *v.* Wisconsin, etc., R. Co., 63 Wis. 145, s. c. 19 Am. & Eng. R. Cas. 285; Woodard *v.* New York, etc., R. Co., 106 N. Y. 369; Howard *v.* St. Paul, etc., R. Co., 32 Minn. 214, s. c. 19 Am. & Eng. R. Cas. 283; Barry *v.* New York, etc., R. Co., 92 N. Y. 289; Illinois Cent. R. Co. *v.* Larson, 152 Ill. 326, s. c. 38 N. E. R. 784; York *v.* Maine Cent. R. Co., 84 Me. 117, s. c. 18 L. R. A. 60.

[4] Pennsylvania R. Co. *v.* State, 61 Md. 108; Lehigh, etc., Coal Co. *v.* Lear, (Pa.), 9 Atl. R. 267, (question for the jury); Grippen *v.* New York, etc., R. Co., 40 N. Y. (1 Hand.) 34; Hinckley *v.* Cape Cod R. Co., 120 Mass. 257 (nonsuit because of contributory negligence); Woodard *v.* New York, etc., R. Co., 106 N. Y. 369 (same); Murphy *v.* Chicago, etc., R. Co., 45 Iowa 661; Drain *v.* St. Louis, etc., R. Co., 86 Mo. 574 (question for jury); Delaware, etc., R. Co. *v.* Converse, 139 U. S. 469 (same); Patton *v.* Railway Co., 89 Tenn. 370, s. c. 12 L. R. A. 184 (same); Chicago, etc., R. Co. *v.* Hedges, 105 Ind. 398 (same); Phillips *v.* Milwaukee, etc., R. Co., 77 Wis. 349, s. c. 9 L. R. A. 521; Howard *v.* St. Paul, etc., R. Co., 32 Minn. 214.

§ 1163. **Contributory negligence of travelers at railroad crossings—Generally.**—At many places we have treated of contributory negligence and at this place our purpose is to treat very generally of the doctrine as applied to accidents at railroad crossings. The general rules as to the presence or absence of contributory negligence in crossing cases are, in the main, much the same as in other cases of actions for personal injuries where there is no contract relation, such as carrier and passenger, or employer and employe, between the parties, but there is this important qualification, namely, that as the *quantum* of care to be exercised at railroad crossings is defined by the law, the question whether there was contributory negligence is more frequently a question of law than in other cases where damages are sought for personal injuries caused by negligence. The rule which seems to us to have the best foundation in principle, is, that in cases of collision between travelers and railroad trains the presumption is that the traveler was guilty of negligence, and hence, that *prima facie*, his fault was the proximate cause of the injury.[1] It is established law that the track itself is a warning of danger, and it is a fact of which, because of its being a matter of general knowledge, courts take judicial notice, that multitudes of persons pass over railroad tracks in safety. It is also a matter of common knowledge, and, therefore, a matter judicially known, that reasonable care on the part of the traveler will in all ordinary cases enable him to cross the track in safety. These considerations require the conclusion, as we believe, that *prima facie* there was either a pure accident, or, if there was negligence, that the negligence of the plaintiff was nevertheless the proximate cause of the injury. It seems to us that evidence that a plaintiff received an injury at a railroad crossing of itself neither proves negligence on the part of the company nor the absence of contributory fault on the part of

[1] Cincinnati, etc., R. Co. *v.* Butler, 103 Ind. 31; Rainey *v.* New York, etc., R. Co. 68 Hun 495; Miller *v.* Louisville, etc., R. Co., 128 Ind. 97; Cleaves *v.* Pigeon, etc., Co., 145 Mass. 541, s. c. 14 N. E. R. 646; Tucker *v.* Duncan, 9 Fed. R. 867; Bates *v.* New York, etc., R. Co., 84 Hun 287, s. c. 32 N. Y. Supp. 337.

the injured person. But on this question there is conflict of authority, for courts of high standing hold that the presumption is that there was no contributory negligence on the part of the plaintiff.[1] The rule supported by the weight of authority is, as we have already said, that the burden of proving contributory negligence is on the defendant,[2] but upon this question there is great conflict of authority.[3] Granting, however, that the rule is that in cases other than actions to recover for injuries at crossings the burden is on the defendant, there is, nevertheless, ample reason for holding that it should not apply in crossing cases. Where there is a controversy as to the facts or where the facts are such that men of fair intelligence may draw different conclusions, the question of con-

[1] Mynning *v.* Detroit, etc., R. Co., 64 Mich. 93, s. c. 31 N. W. R. 147, 28 Am. & Eng. R. Cas. 665; Glascock *v.* Central, etc., R. Co.,73 Cal. 137, s. c. 14 Pac. R. 518; Lyman *v.* Boston, etc., R. Co., 66 N. H. 200, 45 Am. & Eng. R. Cas. 163, 20 Atl. R. 976; McBride *v.* Northern, etc., R. Co., 19 Ore. 64, s. c. 23 Pac. R. 814; Smith *v.* Chicago, etc., R. Co., 4 S. Dak. 71, s. c. 55 N. W. R. 717, 56 Am. & Eng. R. Cas. 123; Crumpley *v.* Hannibal, etc., R. Co., 111 Mo. 152.

[2] Of the many cases affirming that the burden is on the defendant we cite: Railroad Co. *v.* Gladmon, 15 Wall. 401; Indianapolis, etc., R. Co. *v.* Horst, 93 U. S. 291; Montgomery, etc., Co. *v.* Montgomery, etc., R. Co., 86 Ala. 372; Louisville, etc., R. Co. *v.* Goetz, 79 Ky. 442, s. c. 42 Am. R. 227; Northern, etc., R. Co. *v.* State, 31 Md. 357; Hicks *v.* Pacific, etc., R. Co., 65 Mo. 34; Northern Pac. R. Co. *v.* O'Brien, 1 Wash. 599, s. c. 21 Pac. R. 32; Cleveland, etc., R. Co. *v.* Crawford. 24 Ohio St. 631; Cassidy *v.* Angell, 12 R. I. 447, s. c. 34 Am. R. 690; Danner *v.* South Carolina R. Co., 4 Rich. L. 329, s. c. 55 Am. Dec. 678; Milwaukee, etc., R. Co. *v.* Hunter, 11 Wis. 160; Sanderson *v.* Frazier, 8 Colo. 79.

[3] Of the many cases affirming that the burden is on the plaintiff we cite: Wheelright *v.* Boston, etc., R. Co., 135 Mass. 225, s. c. 16 Am. & Eng. R. Cas. 315; Willoughby *v.* Chicago, etc., R. Co., 37 Iowa 432; Kauffman *v.* Cleveland, etc., R. Co., (Ind.) 43 N. E. R. 446; Perkins *v.* Eastern, etc., R.Co., 29 Me. 307; Miss. Central, etc., R. Co. *v.* Mason, 51 Miss. 234; Moore *v.* Mayor of Shreveport, 3 La. Ann. 645; Prather *v.* Richmond, etc., R. Co., 80 Ga. 427, s. c. 9 S. E. R. 530; Owens *v.* Richmond, etc., R. Co., 88 N. C. 502; Lake Shore, etc., R. Co. *v.* Miller, 25 Mich. 274; Walsh *v.* Oregon, etc., R. Co., 10 Ore. 250; Galena, etc., R. Co. *v.* Fay, 16 Ill. 558, s. c. 63 Am. Dec. 323; Park *v.* O'Brien, 23 Conn. 339; Greenleaf *v.* Illinois, etc., R. Co., 29 Iowa 14, s. c. 4 Am. R. 181; Kansas, etc., R. Co. *v.* Pointer, 14 Kan. 37; Reynolds *v.* New York, etc., R. Co., 58 N. Y. 248; Boss *v.* Providence, etc., R. Co., 15 R. I. 149; Lesan *v.* Maine, etc., R. Co., 77 Me. 85, s. c. 23 Am. & Eng. R. Cas. 245.

tributory negligence on the part of a traveler is a question of fact for the jury,[1] but the jury as to the law must act upon the instructions of the court. A railway company[2] and a traveler are bound to exercise ordinary care,[3] but, as we have elsewhere shown, what is ordinary care generally depends upon the facts of the particular case, and, in most instances, is a question of fact for the jury under instructions from the court.[4] The care of a traveler must be such, in cases where he is not misled, without fault on his part, by the negligence of the company, as would be exercised by a man of ordinary prudence who knows that he is about to go into a place where there is constant danger,[5] who knows that the trains of the company have a prior right of passage,[6] and, who knows,

[1] Cincinnati, etc., R. Co., *v.* Grames, 136 Ind. 39, 49; McKeever *v.* Market St., etc., R. Co., 59 Cal. 294, 300; Longenecker *v.* Pennsylvania, etc., R. Co., 105 Pa. St. 328; Fernandes *v.* Sacramento, etc., R. Co., 52 Cal. 45, 50; Young *v.* Detroit, etc., R. Co., 56 Mich. 430, s. c. 23 N. W. R. 67, s. c. 19 Am. & Eng. R. Cas. 417; Palmer *v.* Detroit, etc., R. Co., 56 Mich. 1, s. c. 22 N. W. R. 88; Tyler *v.* New York, etc., R. Co., 137 Mass. 238, 19 Am. & Eng. R. Cas. 296; Schmidt *v.* Burlington, etc., R. Co., 75 Iowa 606, s. c. 39 N. W. R. 916; Conway *v.* Troy, etc., R. Co., 41 Hun 639; Friedman *v.* Dry Dock, etc., R. Co., 110 N. Y. 676; Geist *v.* Detroit, etc., R. Co., 91 Mich. 446, s. c. 51 N. W. R. 1112; Kane *v.* New York, etc., R. Co., 132 N. Y. 160, s. c. 30 N. E. R. 256; Philadelphia, etc., R. Co. *v.* Carr, 99 Pa. St. 505; Johnson *v.* Gulf, etc., R. Co., 2 Tex. Civ. App. 139, s. c. 21 S. W. R. 274; McGhee *v.* White, 66 Fed. R. 502; Chicago, etc., R. Co. *v.* Sharp, 63 Fed. R. 532; Heath *v.* Stewart, 90 Wis. 418, s. c. 63 N. W. R. 1051; St. Louis, etc., R. Co. *v.* Box, 52 Ark. 368, s. c. 12 S. W. R. 757. It is a mixed question of law and fact in such cases as those referred to in the text inasmuch as it is the duty of the court to declare the law, and of the jury to accept the law as declared by the court.

[2] Garraher *v.* San Francisco, etc., R. Co., 81 Cal. 98, s. c. 22 Pac. R. 480; Houston, etc., R. Co. *v.* Brin, 77 Tex. 174, s. c. 13 S. W. R. 886. See Becke *v.* Missouri, etc., R. Co., 102 Mo. 544, s. c. 13 S. W. R. 1053, 9 L. R. A. 157.

[3] Chicago, etc., R. Co. *v.* Fisher, 49 Kan. 460, s. c. 30 Pac. R. 462. See, generally, Olson *v.* Chicago, etc., R. Co., 81 Wis. 41, s. c. 50 N. W. R. 1096; Hicks *v.* Missouri, etc., R. Co., 46 Mo. App. 304.

[4] Winstanley *v.* Chicago, etc., R. Co., 72 Wis. 375, s. c. 39 N. W. R. 856; Duame *v.* Chicago, etc., R. Co., 72 Wis. 523, s. c. 40 N. W. R. 394, 7 Am. St. R. 879.

[5] Daniel *v.* Metropolitan, etc., R. Co., L. R. 5 H. L. 45, s. c. L. R. 3 C. P. 391; State *v.* Maine Central R. Co., 76 Me. 357, s. c. 49 Am. R. 622.

[6] Brown *v.* Texas, etc., R. Co., 42 La. Ann. 350, s. c. 7 So. R. 682; Continental Improvement Co. *v.* Stead, 95 U. S. 161; Davey *v.* London, etc., R. Co., L. R. 12 Q. B. D. 70; Indiana, etc., R. Co. *v.* Hammock, 113 Ind. 1, s. c. 14 N. E. R. 737.

also, that he can not omit precautions on his part upon the assumption that there will not be negligence on the part of the employes of the company.[1] Where the measure of duty is prescribed by law and there is no controversy as to the facts and but one reasonable inference to be fairly and justly drawn from such facts, the question whether due care was exercised, is one of law for the court.[2] Where the case goes to the jury, it is the duty of the court to instruct the jury as to the law, and, as we have said, the question of negligence is usually, but not always, one of mixed law and fact.[3]

§ 1164. Contributory negligence at crossings—Illustrative cases.—It is held to be contributory negligence, in a case where the view is obstructed, for a traveler to drive so rapidly in approaching a crossing as to drown the noise of moving trains,[4]

[1] Howard *v.* Kansas City, etc., R. Co., 41 Kan. 403, s. c. 21 Pac. R. 267; New York, etc., R. Co. *v.* Kellam, 83 Va. 851, s. c. 3 S. E. R. 703; Runyon *v.* Central R. Co., 25 N. J. L. 556; Murray *v.* Pontchartrain Railway Co., 31 La. Ann. 490; Childs *v.* New Orleans, etc., Railway Co., 33 La. Ann. 154; Houston *v.* Vicksburgh Railroad Co., 39 La. Ann. 796, s. c. 2 So. R. 562; Weeks *v.* New Orleans, etc., Railroad Co., 40 La. Ann. 800, s. c. 5 So. R. 72; *post*, § 1165.

[2] *Post*, § 1179; Faris *v.* Hoberg, 134 Ind. 269; Parks *v.* Ross, 11 How. 362; Hoye *v.* Chicago, etc., R. Co., 62 Wis. 666, s. c. 23 N. W. R. 14; West Chester, etc., R. Co. *v.* McElwee, 67 Pa. St. 311; Colorado, etc., R. Co. *v.* Holmes, 5 Colo. 197; Pike *v.* Grand Trunk, etc., R. Co., 39 Fed. R. 255. But in order to authorize the court to direct a verdict the case must be a clear one. Detroit, etc., R. Co. *v.* Van Steinburg, 17 Mich. 99, 120; Walsh *v.* Oregon, etc., R. Co., 10 Ore. 250. There must, according to what we regard as the better opinion, be more than a *scintilla* of evidence in order to carry the case to the jury. Hathaway *v.* East Tenn., etc., R. Co., 29 Fed. R. 489; Goodlett *v.* Louisville, etc., R. Co., 122 U. S. 391; Beaulien *v.* Portland, etc., R. Co., 48 Me. 291; Thompson on Negligence, 1237.

[3] Wallace *v.* Western, etc., R. Co., 98 N. Car. 494 s. c. 2 Am. St. R. 346; Rogers *v.* Leyden, 127 Ind. 50; Metropolitan, etc., R. Co. *v.* Jackson, 3 L. R. App. Cas. 193; Manzoni *v.* Douglas, 6 L. R. Q. B. D. 145; Central etc., R. Co. *v.* Henigh, 23 Kan. 347; Wabash, etc., R. Co. *v.* Shacklet, 105 Ill. 364, s. c. 44 Am. R. 791; Kansas, etc., R. Co. *v.* Ward, 4 Colo. 30; Knight *v.* Pontchartrain, etc., R. Co., 23 La. Ann. 462; Beach on Contributory Negligence, § 444.

[4] Pepper *v.* Southern, etc., R. Co., 105 Cal. 389, s. c. 38 Pac. R. 974. See Wilson *v.* New York, etc., R. Co., 18 R. I. 598, s. c. 29 Atl. R. 300; Crandall *v.* Lehigh, etc., R. Co., 72 Hun 431, s. c. 25 N. Y. Supp. 151; McKinney *v.*

and so it is held of one who occupies such a position in the vehicle as prevents him from seeing an approaching engine.[1] Where one approaches a railroad crossing with his eyes or ears so covered as to prevent him from seeing or hearing approaching trains he is guilty of contributory negligence.[2] One who suffers his attention to be attracted to the movements of another person and takes no precautions to avoid danger from moving trains can not recover damages for injuries caused by a collision.[3] A man who crosses behind a freight train which obscures his view is held to be guilty of negligence if he pro-

Chicago, etc., R. Co., 87 Wis. 282, s. c. 58 N. W. R. 386; Thomas *v.* Chicago, etc., R. Co., 86 Mich. 496, s. c. 49 N. W. R. 547; Nash *v.* New York, etc., R. Co., 125 N. Y. 715; Philadelphia, etc., R. Co. *v.* Peebles, 67 Fed. R. 591; Ward *v.* Richmond, etc., R. Co., 43 Fed. R. 422; Blackwell *v.* St. Louis, etc., R. Co., 47 La. Ann. 268, s. c. 16 So. R. 818; Reeves *v.* Dubuque, etc., R. Co. (Iowa), 60 N. W. R. 243; Brunette *v.* Chicago, etc., R. Co., 86 Wis. 197, s. c. 56 N. W. R. 478; Dullea *v.* Chicago, etc., R. Co., 86 Wis. 173, s. c. 56 N. W. R. 477; Littaur *v.* Narragansett, etc., R. Co., 61 Fed. R. 591. But see Alexander *v.* Richmond, etc., R. Co., 112 N. Car. 720, s. c. 16 S. E. R. 896.

[1] Atchison, etc., R. Co. *v.* Booth, 53 Ill. App. 303. See Grostick *v.* Detroit, etc., R. Co., 90 Mich. 594, s. c. 51 N. W. R. 667, 49 Am. & Eng. R. Cas. 332. But it has been held not to be negligence for the driver of a wagon to sit on it in the usual manner adopted by persons engaged in the same business, although in thus sitting he was so low that he could not readily obtain a view of the track nor readily control his team. Bates *v.* New York, etc., R. Co., 60 Conn. 259, s. c. 22 Atl. R. 538. The doctrine of the case cited is of doubtful soundness. Brady *v.* Toledo, etc., R. Co., 81 Mich. 616, s. c. 45 N. W. R. 1110.

[2] Texas, etc., R. Co. *v.* Fuller, 5 Tex. Civ. App. 660, s. c. 24 S. W. R. 1090. See, generally, Horn *v.* Baltimore, etc., R. Co., 54 Fed. R. 301. In Blight *v.* Camden, etc., R. Co., 143 Pa. St. 10, s. c. 21 Atl. R. 995, it was held that failure to see a train because of rain and an umbrella did not excuse the traveler, and in Rodrian *v.* New York, etc., R. Co., 125 N. Y. 526, 26 N. E. R. 741, it was held that a woman who attempted to cross with her head covered with a shawl was guilty of contributory negligence. But see Petrie *v.* Columbia, etc., R. Co., 29 S. Car. 303, s. c. 7 S. E. R. 515.

[3] Adams *v.* New York, etc., R. Co., 21 N. Y. Supp. 681. As we have elsewhere shown a person about to get upon a railroad track must not suffer his attention to be absorbed so that he can not exercise care proportionate to the danger before him, and upon this principle it is held that one who permits his attention to be absorbed by an effort to get on a train is guilty of contributory negligence. Weeks *v.* New Orleans, etc., R. Co., 40 La. Ann. 800, s. c. 5 So. R. 72, 8 Am. St. R. 560. So of one who is engaged in conversation with a companion. Jensen *v.* Michigan, etc., R. Co., 102 Mich. 176, s. c. 60 N. W. R. 57.

ceeds without waiting until the train has moved a sufficient distance to enable him to obtain a clear view of the track.[1] A person who goes upon a railroad track in a vehicle with others who are singing and shouting in such a manner as to prevent the approach of trains from being heard is guilty of negligence.[2] It is held to be negligence for a person to rush rapidly across the tracks without making a careful observation to ascertain whether trains are approaching[3] and so it is for a person who attempts to cross in front of a locomotive which is standing still, but is about to be set in motion as any one could see.[4] Where, however, there is no indication that the locomotive is to be put in motion it may not be *per se* negligence to cross in front of it.

§ 1165. **Duty of traveler—Generally.**—The duty of a traveler in attempting to cross or in crossing a railroad track is to exercise ordinary care. This duty rests upon him in all cases, but what is ordinary care may in some instances depend upon the particular facts. As we shall see further on, the rule as to the *quantum* of care required at railroad crossings is different from the rule which ordinarily prevails. The duty to exercise ordinary care exists in all cases but what is ordinary care in one

[1] Kraus *v.* Pennsylvania, etc., R. Co., 139 Pa. St. 272, 20 Atl. R. 993; Daniels *v.* Staten Island, etc., R. Co., 125 N. Y. 407. See Chicago, etc., R. Co. *v.* Florens, 32 Ill. App. 365; Baltimore, etc., R. Co. *v.* Walborn, 127 Ind. 142, s. c. 26 N. E. R. 207.

[2] Koehler *v.* Rochester, etc., R Co., 66 Hun 566, s. c. 21 N. Y. Supp. 844.

[3] Chicago, etc., R. Co. *v.* Fitzsimmons, 40 Ill. App. 360. See McNamara *v.* New York, etc., R. Co., 19 N.Y. Supp. 497; Whalen *v.* New York, etc., R. Co, 15 N. Y. Supp. 941; Smith *v.* New York, etc., R. Co., 17 N. Y. Supp. 400.

[4] Mehegan *v.* New York, etc., R. Co., 19 N. Y. Supp. 444; Guta *v.* Lake Shore, etc., R. Co., 81 Mich. 291, s. c. 45 N. W. R. 821. We suppose that it can not invariably be held negligence for a traveler to cross in front of a motionless locomotive, but if he knows, or ought to know by the exercise of care proportionate to the dangers incident to railroad crossings, that the locomotive is about to be put in motion or be started he is guilty of negligence if he assumes to risk crossing before it has passed. If the locomotive appears to be about ready to be started then it is negligence, as we think, for the traveler to take the chance of crossing before it moves. Union Pacific R. Co. *v.* Hutchinson, 39 Kan. 485, s. c. 18 Pac. R. 705.

case may not be ordinary care in another.[1] Care is never ordinary care unless it is proportionate to the known danger. The traveler is not relieved from the duty of exercising care by a breach of duty on the part of the railroad company. A violation of a municipal ordinance or of a statute is ordinarily negligence on the part of the railroad company, but the violation of an ordinance or a statute does not relieve the traveler from the duty which the law imposes upon him.[2] In all cases where the right of recovery is based upon negligence the rule supported by authority is that in order to recover the plaintiff must himself exercise care and is not absolved from this duty no matter how clear the negligence of the defendant. Where, however, the acts and conduct of the defendant are such as may be justly regarded as willful, the general rule does not apply, nor, we may say in passing, does it fully apply where the defendant is negligent and the negligence is such as to mislead the plaintiff. But the plaintiff can not be heard to say that he has been misled unless he has used such care under the circumstances to ascertain the nature of the danger and guard

[1] Continental Improvement Co. *v.* Stead, 95 U. S. 161; Baltimore, etc., R. Co. *v.* Grffith, 159 U. S. 603, s. c. 16 Sup. Ct. R. 105.

[2] Miller *v.* Terre Haute, etc., R. Co. (Ind.), 43 N. E. R. 257; Cleveland, etc., Railroad Co. *v.* Elliott, 28 Ohio St. 340; Pennsylvania Co. *v.* Rathgeb, 32 Ohio St. 66; Horn *v.* Baltimore, etc., R. Co., 54 Fed. R. 301; Collins *v.* New York, etc., R. Co., 36 N. Y. S. 942; Blackwell *v.* St. Louis, etc., R. Co., 47 La. Ann. 268, s. c. 16 So. R. 818; Delaware, etc., R. Co. *v.* Heferan (N. J. Law), 30 Atl. R. 578; Chicago, etc., R. Co. *v.* Hedges, 118 Ind. 5, 9; Schofield *v.* Chicago, etc., R. Co., 114 U. S. 615; Ernst *v.* Hudson River, etc., R. Co., 39 N. Y. 61; Chicago, etc., R. Co. *v.* Crisman, 19 Colo. 30, s. c. 34 Pac. R. 286; Moore *v.* Keokuk, etc., R. Co., 89 Iowa 223, s. c. 56 N. W. R. 430; Marty *v.* Chicago, etc., R. Co., 38 Minn. 108; Hinckley *v.* Cape Cod, etc., R. Co., 120 Mass. 257; Richardson *v.* New York, etc., R. Co., 45 N. Y. 846; Brown *v.* Milwaukee, etc., R. Co., 22 Minn. 165; Freeman *v.* Duluth, etc., R. Co., 74 Mich. 86, s. c. 41 N.W. R. 872. "Negligence of the company's employes, in their particular capacity, was no excuse for negligence on her (plaintiff's) part." Per Court in Railroad Co. *v.* Houston, 95 U. S. 697. See, generally, Allyn *v.* Boston, etc., R. Co., 105 Mass. 77; Beach on Contr. Neg., § 188. The fact that a train is moving at a rate of speed forbidden by statute or by ordinance will not excuse a traveler who attempts to cross in front of it. Korady *v.* Lake Shore, etc., R. Co., 131 Ind. 261, 265; Railroad Co. *v.* Houston, 95 U. S. 697; Cadwallader *v.* Louisville, etc., R. Co., 128 Ind. 518.

against it, as a man of ordinary prudence would have exercised under similar conditions.[1] It can not be inferred from the mere fact that a defendant was guilty of negligence that the plaintiff was misled. The fact that there was negligence on the part of the defendant must be supplemented by evidence that there were such acts as would mislead a man of ordinary prudence or the plaintiff can not successfully assert that he was misled by the defendant. As a railroad track is a warning of danger one who attempts to cross it must act with care proportionate to the danger and not suffer his attention to be diverted from the danger before him, and he must keep his faculties in active exercise. It is his duty to keep his faculties in condition for exercise and to exercise them.[2] Mental absorption or reverie will not excuse the traveler who omits to perform the duty of looking and listening.[3] If the traveler could have seen the train by looking, the presumption is that he did not look, or if he did look did not heed what he saw.[4] This pre-

[1] Korrady *v.* Lake Shore, etc., R. Co., 131 Ind. 261; Cadwallader *v.* Louisville, etc., R. Co., 128 Ind. 518.

[2] In Oleson *v.* Lake Shore, etc., R. Co., 143 Ind. 405, 42 N. E. R. 736, after reviewing the authorities the court said: "There is no exception to the rule stated as to the traveler's duty at a crossing, except where the traveler, by some act of the company has been misled or thrown off his guard, and thus prevented from taking proper precautions." See, generally, Lake Erie, etc., R. Co. *v.* Stick, 143 Ind. 449, 41 N. E. R. 365; Hinken *v.* Iowa Central R. Co., (Iowa) 66 N. W. R. 882; Cincinnati, etc., R. Co. *v.* Duncan, 143 Ind. 524, 42 N. E. R. 37; Louisville, etc., R. Co. *v.* Stommel, 126 Ind. 35, s. c. 25 N. E. R. 863. The decision in Indianapolis, etc., R. Co. *v.* Neubacher, (Ind. App.) 43 N. E. R. 576, seems to us to be opposed to the decisions of the supreme court of that state and to the general current of opinion.

[3] Havens *v.* Erie R. Co., 41 N. Y. 296; Mann *v.* Belt R. Co., 128 Ind. 138, 143; Lake Shore, etc., R. Co. *v.* Miller, 25 Mich. 274; Davis *v.* New York, etc., R. Co., 47 N. Y. 400; Butterfield *v.* Western R. Co., 10 Allen 532; Allyn *v.* Boston, etc., R. Co., 105 Mass. 77; Wheelock *v.* Boston, etc., R. Co., 105 Mass. 203; Lake Shore, etc., R. Co. *v.* Sunderland, 2 Bradw. (Ill.) 307; Oleson *v.* Lake Shore, etc., R. Co., 143 Ind. 405, s. c. 42 N. E. R. 736.

[4] Wilcox *v.* Rome, etc., R. Co., 39 N. Y. 358; Oleson *v.* Lake Shore, etc., R. Co., 143 Ind. 405, 42 N. E. R. 736; Haetsch *v.* Chicago, etc., R. Co., 87 Wis. 304, s. c. 58 N. W. R. 393; Smith *v.* Philadelphia, etc., R. Co., 160 Pa. St. 117, s. c. 28 Atl. R. 641; Brown *v.* Milwaukee, etc., Railway Co., 22 Minn. 165; Weyl *v.* Chicago, etc., Railway Co., 40 Minn. 350, s. c. 42 N. W. R. 24; Myers *v.* Baltimore, etc., Railway Co., 150 Pa. St. 386, s. c. 24 Atl. R. 747; Miller *v.* Truesdale, 56 Minn. 274, s. c. 57 N. W. R. 661.

sumption in conjunction with the fact that the courts judicially know that great throngs of persons daily cross railroad tracks without receiving injury renders necessary and logical the conclusion that *prima facie* an accident at a crossing is attributable to the negligence of the traveler. A traveler who knows that a train is due must take care to avoid it and this knowledge imposes upon him a somewhat higher exercise of care than if he was not in possession of such knowledge.[1] Principle requires that in such a case the person who attempts to cross the track should be held guilty of negligence as matter of law if there are obstructions to sight or hearing, since no one can be said to exercise ordinary care who voluntarily encounters a danger that he knows is imminent, unless the situation and conditions are such as to enable him to see that he can proceed with safety. Analogous cases emphatically affirm that one who assumes to proceed upon a calculation of chances is guilty of negligence, and the rule established by those cases applies to such cases as we have mentioned.

§ 1166. **Duty of the traveler to look and listen.**—The overwhelming weight of authority affirms the rule to be that a traveler approaching a railroad crossing must look and listen.[2]

[1] Palys *v.* Erie R. Co.,30 N.J.Eq.604; Brooks *v.* Buffalo, etc., R. Co., 1 Abb. App. Dec. 211; Reynolds *v.* New York, etc., R. Co., 58 N. Y. 248.

[2] Elliott *v.* Chicago, etc., R. Co., 150 U. S. 245, s. c. 14 Sup. Ct. R. 85; Louisville, etc., R. Co. *v.* Richards, 100 Ala. 365, s. c. 13 So. R. 944; Blount *v.* Grand Trunk, etc., R. Co., 61 Fed. R. 375; St. Louis, etc., R. Co. *v.* Martin, (Ark.), 33 S. W. R. 1070; Louisville, etc., R. Co. *v.* Stephens, 13 Ind. App. 145; Steinhofel *v.* Chicago, etc., R. Co. (Wis.), 65 N. W. R. 852; Denver, etc., R. Co. *v.* Gustafson (Colo.), 41 Pac. R. 505; Engrer *v.* Ohio, etc., R. Co., 142 Ind. 618, s. c. 42 N. E. R. 217; Romeo *v.* Boston, etc., R. Co., 87 Me. 540, s. c. 33 Atl. R. 24; Lake Erie, etc., R. Co. *v.* Stick, 143 Ind. 449, s. c. 41 N. E. R. 365; Hayden *v.* Missouri, etc., R. Co., 124 Mo. 566, s. c. 28 S. W. R. 74; Sprow *v.* Boston, etc., R. Co., 163 Mass. 330, s. c. 39 N. E. R. 1024; Schlimgen *v.* Chicago, etc., R. Co., 90 Wis. 186, s. c. 62 N. W. R. 1045; Johnson *v.* Chesapeake, etc., Co., 91 Va. 171, s. c. 21 S. E. R. 238; Connerton *v.* Delaware, etc., Co., 169 Pa. St. 339, s. c. 32 Atl. R. 416; Gardiner *v.* Detroit, etc., R. Co., 97 Mich. 240, s. c. 56 N. W. R. 603; Pennsylvania Co. *v.* Leary, 56 N. J. L. 705, s. c. 29 Atl. R. 678; Owmsbee *v.* Boston, etc., R. Co., 14 R. I. 102; Wabash, etc., R. Co. *v.* Wallace, 110 Ill. 114, s. c. 19 Am. & Eng. R. Cas. 359; Pierce on

If this duty is omitted the court is bound to instruct, as matter of law, that a verdict be returned in favor of the defendant company,[1] except in cases of a peculiar nature, where there are facts excusing the performance of the duty. The *quantum* of care in such cases is prescribed by law,[2] and it is a breach of duty precluding a recovery for the traveler to omit to look and listen. It is as much a breach of duty on the part of the traveler to omit to look and listen, as it is for a railroad company to omit the signals required by law, because a duty may be as effectively prescribed by the common law as by legislative enactment.[3] The fact that a flagman signals the traveler to cross, does not relieve the latter from the duty of looking and listening,[4] but that fact may be sufficient to carry the case to the jury.[5] The general rule is that it is not sufficient to look in

Railroads, 343; Beach on Contributory Negligence, §§ 181, 184; Wood on Railroads, 1518; Elliott on Roads and Streets, 613. See Cincinnati, etc., R. Co. *v.* Wright, (Ky.), s. c. 34 S. W. R. 526; Central, etc., R. Co. *v.* Bush (Tex. Civ. App.), 34 S. W. R. 133; Texas, etc., R. Co. *v.* Spradling, 72 Fed. R. 152. Also, Atchison, etc., R. Co. *v.* Shaw (Kan.), 43 Pac. R. 1129.

[1] Tolman *v.* Syracuse, etc., R. Co., 98 N. Y. 198, s. c. 50 Am. R. 649; Railroad Co. *v.* Houston, 95 U. S. 697; Durkee *v.* President, etc., Co., 88 Hun 471, 34 N. Y. S. 978. See, *post*, § 1179; Schofield *v.* Chicago, etc., R. Co., 114 U. S. 615.

[2] Smith *v.* Wabash R. Co., 141 Ind. 92; Mann *v.* Belt R. Co., 128 Ind. 138, 142, (citing Beach on Contributory Negl., § 63; Ohio, etc., R. Co. *v.* Hill, 117 Ind. 56); Pennsylvania Co. *v.* Beale, 73 Pa. St. 504, s. c. 13 Am. R. 753; State *v.* Maine, etc., R. Co., 76 Me. 357, s. c. 49 Am. R. 622.

[3] Some of the courts hold, correctly as we believe, that the rule that the plaintiff must look and listen is a rule of law and not merely a rule of evidence. Aiken *v.* Pennsylvania R. Co., 130 Pa. St. 380, s. c. 18 Atl. R. 619. See Union, etc., R. Co. *v.* State, 72 Md. 153, s. c. 19 Atl. R. 449, 42 Am. & Eng. R. Cas. 172; Allen *v.* Maine, etc., R. Co., 82 Me. 111, s. c. 19 Atl. R. 105; Kohler *v.* Pennsylvania, etc., R. Co., 135 Pa. St. 346, s. c. 19 Atl. R. 1049; Brown *v.* Texas, etc., R. Co., 42 La. Ann. 350, s. c. 7 So. R. 682; McBride *v.* Northern Pacific R. Co., 19 Ore. 64, s. c. 23 Pac. R. 814; Donnelly *v.* Boston, etc., R. Co., 151 Mass. 210, s. c. 24 N. E. R. 38, 42 Am. & Eng. R. Cas. 182. *Contra*, Terre Haute, etc., R. Co. *v.* Voelker, 129 Ill. 540, s. c. 22 N. E. R. 20, s. c. 39 Am. & Eng. R. Cas. 615; Chicago, etc., R. Co. *v.* Robinson, 127 Ill. 9, s. c. 18 N. E. R. 772, 4 L. R. A. 126.

[4] Denver, etc., R. Co. *v.* Gustafson (Colo.), 41 Pac. R. 505; Berry *v.* Pennsylvania R. Co., 48 N. J. Law 141 s. c. 4 Atl. R. 303. In the case last cited it was said, in speaking of the plaintiff: "He must not rely entirely on the flagman."

[5] Buchanan *v.* Chicago, etc., R. Co., 75 Iowa 393, s. c. 39 N. W. R. 663.

one direction but the traveler is under a duty to look in both directions.[1] The duty to look and listen requires the traveler to exercise care to select a position from which an effective observation can be made.[2] The mere fact of looking and listening is not always a performance of the duty incumbent upon the traveler, for he must also exercise care to make the act of looking and listening reasonably effective.[3] The fact that one train has passed is not such an assurance of safety as authorizes the traveler to make the attempt to cross without carefully looking and listening for other trains.[4] The traveler has no right to confine his precautions to trains scheduled to pass at a designated time, but he must take precautions against all trains, "extra trains" and "wild trains," as well as against regular trains.[5] Trains may pass the crossing at any time and the

[1] Nixon *v.* Chicago, etc., R. Co., 84 Iowa 331, s. c. 51 N. W. R. 157; Mann *v.* Belt, etc., R. Co., 128 Ind. 138; Thornton *v.* Cleveland, etc., R. Co., 131 Ind. 492; Dunning *v.* Bond, 38 Fed. R. 813. See, generally, Bloomfield *v.* Burlington, etc., R. Co., 74 Iowa 607, s. c. 38 N. W. R. 431; Thompson *v.* New York, etc., R. Co., 110 N. Y. 636, 17 N. E. R. 690; Marland *v.* Pittsburg, etc., R. Co., 123 Pa. St. 487, s. c. 16 Atl. R. 623; New York, etc., R. Co. *v.* Kellam, 83 Va. 851; Glascock *v.* Central, etc., R. Co., 73 Cal. 137, s. c. 14 Pac. R. 518.

[2] In Owens *v.* Pennsylvania Co., 41 Fed. R. 187, it was said, in speaking of the duty of the traveler: "It was the duty of the plaintiff to select such a point as would enable him to see along the track both ways. If he could not see it, it was his business to stop, or to select some other place at which he could make the observation." See, also, Fowler *v.* New York, etc., R. Co., 74 Hun 141, s. c. 26 N. Y. Supp. 218; Weyl *v.* Chicago, etc., R. Co. 40 Minn. 350.

[3] Lennon *v.* New York, etc., R. Co., 65 Hun 578, s. c. 20 N. Y. Supp. 557. See §§ 1164, 1167, 1170; Schmolze *v.* Chicago, etc., R. Co., 83 Wis. 659, s. c. 53 N. W. R. 743, 54 N. W. R. 106; Urias *v.* Pennsylvania R. Co., 152 Pa. St. 326, s. c. 25 Atl. R. 566.

[4] Baltimore, etc., R. Co. *v.* Talmage, (Ind. App.) 43 N. E. R. 1019. Some of the decisions of the Indiana appellate court are in conflict with the doctrine of the case cited, but they are in conflict with the great weight of authority. McKinney *v.* Chicago, etc., R. Co., 87 Wis. 282, s. c. 59 N. W. R. 499; Stopp *v.* Fitchburg Co., 80 Hun 178, s. c. 29 N. Y. Supp. 1008; Schlimgen *v.* Chicago, etc., R. Co., 90 Wis. 186, s. c. 62 N. W. R. 1045; Purdy *v.* New York, etc., R. Co., 87 Hun 97, s. c. 33 N. Y. Supp. 952; Guta *v.* Lake Shore, etc., R. Co., 81 Mich. 291, s. c. 45 N. W. R. 821; Indianapolis, etc., R. Co. *v.* Wilson, 134 Ind. 95, s. c. 33 N. E. R. 793; Martin *v.* Little Rock, etc., R. Co., (Ark.) 34 S. W. R. 545.

[5] Wilcox *v.* Rome, etc., R. Co., 39 N. Y. 358, 362; Salter *v.* Utica, etc., R.

traveler must act upon the assumption that trains may pass at any time and exercise care proportionate to the danger from the frequent movement of trains. He must look and listen for all trains and not merely for some trains, for he has no right to proceed upon the assumption that trains will cross only at specified times. He has, indeed, no right in any case to omit to take precautions for his own safety upon the supposition or assumption that he may safely cross the track, for, under all circumstances, he must himself exercise ordinary care, and must not rely entirely upon the acts of others,[1] but as we have said, what is or is not ordinary care depends very often upon the facts of the particular case. Under the rule, just stated, namely, that whether due care was exercised depends upon the facts of the particular case, the question whether the traveler stopped at a proper place is generally a question for the jury, but it is sometimes a question of law. If there is but one reasonable inference that men of average intelligence can justly draw from the facts the question is one of law to be disposed of by the court.

§ 1167. **Duty of the traveler to stop and look and listen.**— Ordinary care often requires that the traveler should stop, look and listen for moving trains, from a place where danger can be discerned and precaution taken to avert it. If, for instance, the noise is so great that an approaching train can not be heard, or the obstructions such that it can not be seen, then the traveler must come to a halt and look and listen. It

Co., 75 N. Y. 273; Toledo, etc., R. Co. *v.* Jones, 76 Ill. 311; Schofield *v.* Chicago, etc., R. Co., 114 U. S. 615; Cincinnati, etc., R. Co. *v.* Howard, 124 Ind. 280, s. c. 24 N. E. R. 892, 8 L. R. A. 593; Durbin *v.* Oregon, etc., R. Co., 17 Ore. 5, s. c. 17 Pac. R. 5, 11 Am. St. R. 778; Judson *v.* Great Northern R. Co., (Minn.) 65 N. W. R. 447.

[1] Drake *v.* Chicago, etc., R. Co., 51 Mo. App. 562; Chicago, etc., Board *v.* Chicago, etc., R. Co., 44 Ill. App. 253; Duncan *v.* Missouri, etc., R. Co., 46 Mo. App. 198; Beyel *v.* Newport News, etc., R. Co., 34 W. Va. 538, s. c. 12 S. E. R. 532, 45 Am. & Eng. R. Cas. 188; Greenwood *v.* Philadelphia, etc., R. Co., 124 Pa. St. 572, s. c. 17 Atl. R. 188, 3 L. R. A. 44; Lake Shore, etc., R. Co. *v.* Frantz, 127 Pa. St. 297, s. c. 18 Atl. R. 22, 4 L. R. A. 389. See Jennings *v.* St. Louis, etc., R. Co., 112 Mo. 268, s. c. 20 S. W. R. 490.

can not be said that one who simply looks and listens where such acts are fruitless and unavailing, exercises that degree of care which the law requires. While it can not be justly affirmed as we believe, as matter of law, that there is a duty to stop in all cases,[1] yet there are cases where the failure to stop must be deemed such a breach of duty as will defeat a recovery by the plaintiff. There are very many cases holding that the surroundings may be such as to impose upon the traveler the duty of stopping, looking and listening, and these cases, as we think, assert the true doctrine.[2] Some of the courts, in well reasoned cases, press the rule further and hold that the traveler, must in all cases, stop, look and listen.[3] As we have said, we do not think that it can justly be affirmed as

[1] Winstanley *v.* Chicago, etc., R. Co., 72 Wis. 375, s. c. 39 N. W. R. 856; Reed *v.* Chicago, etc., R. Co., 74 Iowa 188, s. c. 37 N. W. R. 149.

[2] Houghton *v.* Chicago,etc.,R.Co.,99 Mich. 308, s. c. 58 N. W. R. 314, (citing among other cases, Chase *v.* Maine, etc., R. Co., 78 Me. 346, s. c. 5 Atl. R. 771; Brady *v.* Toledo, etc., R. Co., 81 Mich. 616, s. c. 45 N. W. R. 1110; Greenwood *v.* Phila., etc., R. Co., 124 Pa. St. 572, s. c. 17 Atl. R. 188; Northern Pac. R. Co. *v.* Holmes, 3 Wash. Ter. 202, s. c. 14 Pac. R. 688); Chicago, etc., R. Co. *v.* Williams, (Kan.) 43 Pac. R. 246; Abbot *v.* Dwinnell, 74 Wis. 515, s. c. 43 N. W. R. 496; Olson *v.* Chicago, etc., R. Co., 81 Wis. 41, s. c. 50 N. W. R. 412; Tucker *v.* Duncan, 9 Fed. R. 867; Sullivan *v.* New York, etc., R. Co., 154 Mass. 524, s. c. 28 N. E. R. 911; Shufelt *v.* Flint, etc., R. Co., 96 Mich. 327, s. c. 55 N. W. R. 1013; Louisville, etc., R. Co. *v.* French, 69 Miss. 121, s. c. 12 So. R. 338; Pennsylvania Co. *v.* Morel, 40 Ohio St. 338; Clark *v.* Northern Pac. R. Co. 47 Minn. 380, s. c. 50 N. W. R. 365; Brady *v.* Toledo, etc., R. Co., 81 Mich. 616; Haas *v.* Grand Rapids, etc., R. Co., 47 Mich. 401; Kelly *v.* Chicago, etc., R. Co., 88 Mo. 534; see, also, Atchison, etc., R. Co. *v.* Townsend, 39 Kan. 115; Flemming *v.* Western, etc., R. Co., 49 Cal. 253; Seefeld *v.* Chicago, etc., R. Co., 70 Wis. 216; Mantel *v.* Chicago, etc., R. Co., 33 Minn. 62; Merkle *v.* New York, etc., R. Co., 49 N. J. L. 473, 9 Atl. R. 680; Ellis *v.* Lake Shore, etc., R. Co., 138 Pa. St. 506, s. c. 21 Atl. R. 140; Ash *v.* Wilmington, etc., R. Co., 148 Pa. St. 133, s. c. 23 Atl. R. 898; Fletcher *v.* Fitchburg, R. Co., 149 Mass. 127, s. c. 21 N. E. R. 302; Henze *v.* St. Louis, R. Co., 71 Mo. 636; Chicago, etc., R. Co. *v.* Fisher,49 Kan. 460, s. c. 30 Pac. R. 462.

[3] Ely *v.* Pittsburgh, etc., R. Co., 158 Pa. St. 233, s. c. 27 Atl. R. 970; North Pennsylvania R. Co. *v.* Heileman, 49 Pa. St. 60; Pennsylvania Co. *v.* Beale, 73 Pa. St. 504, s. c. 13 Am. R. 753; Cincinnati, etc., R. Co. *v.* Howard, 124 Ind. 280, s. c. 24 N. E. R. 892; Louisville, etc., R. Co. *v.* Stommel, 126 Ind. 35. In a note to the case of Illinois Central R. Co. *v.* Nowicki, 148 Ill. 29, s. c. 60 Am. & Eng. R. Cas. 690, 694, a great number of cases are collected and they are,

matter of law that there is a duty to stop in all cases, but we do think that the duty exists in cases where there is an obstruction to sight or hearing; and that where the surroundings are such that but one conclusion can be reasonably drawn and that conclusion is that it is negligence to proceed without halting, the court should without hesitation direct a verdict if no halt is made. In the majority of cases, however, the question is one of fact rather than of law.[1]

§ 1168. **Attempting to cross in front of an approaching engine or train.**—The general rule is that it is negligence for a traveler to attempt to cross in front of an engine or train which he sees or knows is approaching the crossing, for a person who knows of danger is under an obligation to refrain from incurring it and endeavoring to avoid it upon a calculation of chances.[2] Where a train is at such a distance as that an ordinarily prudent man would, without hesitation, attempt

impliedly, at least, asserted to support the position that the general rule is that the traveler must always stop, but many of the cases cited do not go so far. There is, however, substantial agreement upon the proposition that when a reasonably effective observation can not be made without stopping, then the traveler must stop and look and listen. We think it entirely safe to affirm that the presence of obstructions invariably requires increased care and vigilance on the part of the traveler. In Terre Haute, etc., R. Co. *v.* Clark, 73 Ind. 168, Woods, J., said: "The counsel for the appellees insist that the presence of the houses obstructing the view, and the fact that it was snowing, were circumstances that made it gross negligence on the part of the appellant to move the train at the rate of speed at which it was running at the time of the accident. It seems to us, on the contrary, that there were circumstances which enhanced the degree of caution with which the deceased ought to have approached the crossing."

[1] Gray *v.* Pennsylvania Co., (Pa. St.) 33 Atl. R. 697; Davidson *v.* Lake Shore, etc., R. Co., 171 Pa. St. 522, s. c. 33 Atl. R. 86.

[2] Wendell *v.* New York, etc., R. Co., 91 N. Y. 420; Grows *v.* Maine Central, etc., R. Co., 67 Me. 100; Korrady *v.* Lake Shore, etc., R. Co., 131 Ind. 261; Railroad Co. *v.* Houston, 95 U. S. 697; Schofield *v.* Chicago, etc., R. Co., 114 U. S. 615, s. c. 5 Sup. Ct. R. 1125; Horn *v.* Baltimore, etc., R. Co., 54 Fed. R. 301; Young *v.* Old Colony R. Co., 156 Mass. 178, s. c. 30 N. E. R. 560; Carney *v.* Chicago, etc., R. Co., 46 Minn. 220, s. c. 48 N. W. R. 912; Marks *v.* Petersburg R. Co., 88 Va. 1, s. c. 13 S. E. R. 299; McNeal *v.* Pittsburgh, etc., R. Co., 131 Pa. St. 184, s. c. 18 Atl. R. 1026; Watson *v.* Mound City, etc., R. Co., 34 S. W. R. 573. See, also, Belton *v.* Baxter, 54 N. Y. 245; Buzby *v.* Philadelphia, etc., R. Co., 126 Pa. St. 559; Daven-

to cross the track it may be that there is no negligence.[1] But where an attempt to cross in front of an approaching train is voluntarily made the person making the attempt will be regarded as negligent if he undertakes to proceed upon the assumption that he has correctly calculated the chances of crossing in safety.[2] The failure of the employes of the company to give warning through the appropriate signals is not the proximate cause of the injury where the plaintiff sees the train and assumes the risk of crossing in front of it,[3] so that in such a case there are really two grounds of defense, contributory negligence and the failure to show that the negligence of the defendant was the proximate cause of the injury.

§ 1169. **Passing under, over or between cars.**—Although a railroad company may be guilty of negligence in suddenly moving cars without warning which it has left at a crossing with a space between them inviting people to pass through,[4] yet there can be no recovery for mere negligence in this respect

port *v.* Brooklyn City Railroad Co., 100 N. Y. 632; Ohio, etc., R. Co. *v.* Maisch, 29 Ill. App. 640; Lewis *v.* Puget Sound R. Co., 4 Wash. 188, s. c. 29 Pac. R. 1061; Studley *v.* St. Paul, etc., R. Co., 48 Minn. 249, s. c. 51 N. W. R. 115; Collins *v.* Long Island, etc., R. Co., 10 N. Y. Supp. 701.

[1] Detroit, etc., R. Co. *v.* Van Steinburg, 17 Mich. 99; Langhoff *v.* Milwaukee, etc., R. Co., 19 Wis. 489; Baxter *v.* Second Ave. R. Co., 30 How. Pr. R. 219; Mentz *v.* Second Ave. R. Co., 3 Abb. App. 274; Bonnell *v.* Delaware, etc., R. Co., 39 N. J. Law 189; Thomas *v.* Delaware, etc., R. Co., 8 Fed. R. 729.

[2] Hansen *v.* Chicago, etc., R. Co., 83 Wis. 631, s. c. 53 N. W. R. 909; Wendell *v.* New York, etc., R. Co., 91 N. Y. 420; Purl *v.* St. Louis, etc., Railroad Co., 72 Mo. 168; Graf *v.* Chicago, etc., R. Co., 94 Mich. 579, s. c. 54 N. W. R. 388; Lake Shore, etc., R. Co. *v.* Geiger, 8 Ohio C. C. 41; Bishop on Non Contract Law., § 1045; Shearman & Redf. on Negligence, § 475. But see Olsen *v.* Oregon, etc., R. Co., 9 Utah 129, s. c. 33 Pac. R. 623; Alexander *v.* Richmond, etc., R. Co., 112 N. Car. 720, s. c. 16 S. E. R. 896.

[3] In Pakalinsky *v.* New York, etc., R. Co., 82 N. Y. 424, the court, in speaking of the question of proximate cause, said: "He thus had all the notice the ringing of a bell could have given him, and the omission had nothing whatever to do with the accident." See, generally, Belton *v.* Baxter, 54 N. Y. 245; Culhane *v.* New York, etc., R. Co., 60 N. Y. 133; Sheldon *v.* Hudson River, etc., R. Co., 14 N. Y. 218.

[4] Schmitz *v.* St. Louis, etc., R. Co., 119 Mo. 256, s. c. 24 S. W. R. 472; Cleveland, etc., R. Co. *v.* Keely, 138 Ind. 600, s. c. 37 N. E. R. 406; Ft. Worth, etc., R. Co. *v.* Dennis, (Tex.) 33 S. W. R. 884.

if the injured party is guilty of contributory negligence.[1] In such cases questions of negligence on the part of the company and that of contributory negligence on the part of the person injured are usually questions of fact for the jury to determine under all the circumstances.[2] But where no space is left between the cars and an engine is attached to them which is liable to move them at any moment, one who attempts to pass under or over them may be declared guilty of contributory negligence as matter of law.[3] The same is true where he attempts to climb over them without looking to see whether they are attached to an engine or not and is injured in consequence thereof,[4] or to pass between cars which had broken loose and which he knows, or ought to know by using his faculties, are

[1] See authorities cited in following notes. Thus, in a recent case, where cars had been left at a crossing with an open space between them, while the trainmen were switching, and the plaintiff's intestate was found caught between them after the space was closed up, but no one saw the accident or knew what care, if any, he exercised, it was held that there could be no recovery, as the burden was upon the plaintiff to show freedom from contributory negligence, and that the court properly directed a verdict for the defendant. Kauffman *v.* Cleveland, etc., R. Co., (Ind.) 43 N. E. R. 446.

[2] Weber *v.* Atchison, etc., R. Co., 54 Kan. 389, s. c. 38 Pac. R. 569. Fort Worth, etc., R. Co. *v.* Dennis, (Tex.) 33 S. W. R. 884; Schmitz *v.* St. Louis, etc., R. Co., 119 Mo. 256, s. c. 24 S. W. R. 472; Cleveland, etc., R. Co. *v.* Keely, 138 Ind. 600, s. c. 37 N. E. R. 406; Chicago, etc., R. Co. *v.* Prescott, 59 Fed. R. 237; Burger *v.* Missouri Pac. R. Co., 112 Mo. 238, s. c. 20 S. W. R. 439; Henderson *v.* St. Paul, etc., R. Co., 52 Minn. 497, s. c. 55 N. W. R. 53; Baltimore, etc., R. Co. *v.* Fitzpatrick, 35 Md. 32; Vicksburg, etc., R. Co. *v.* Alexander, 62 Miss. 496.

[3] Andrews *v.* Central R. Co., 86 Ga. 192, s. c. 45 Am. & Eng. R. Cas. 171; Hudson *v.* Wabash etc., R. Co., 123 Mo. 445, s. c. 27 S. W. R. 717; McMahon *v.* Northern, etc., R. Co., 39Md. 438; Lewis *v.* Baltimore, etc., R. Co., 38 Md. 588, s. c. 17 Am. R. 521; Chicago, etc., R. Co. *v.* Dewey, 26 Ill. 255; Central R. Co. *v.* Dixon, 42 Ga. 327; Rauch *v.* Lloyd, 31 Pa. St. 358; Memphis, etc., R. Co. *v.* Copeland, 61 Ala. 376; Haldan *v.* Great Western R. Co., 30 U. C. C. P. 89; Rumpel *v.* Oregon, etc., R. Co., (Idaho) 35 Pac. R. 700; Howard *v.* Kansas City, etc., R. Co., 41 Kan. 403, s. c. 21 Pac. R. 267 (held where he climbed over at the suggestion of the brakeman). *Contra* Spencer *v.* Baltimore, etc., R. Co., 4 Mackey 138, s. c. 54 Am. R. 269; Shearm. & Redf. Neg., § 490.

[4] Corcoran *v.* St. Louis, etc., R. Co., 105 Mo. 399, s. c. 24 Am. St. R. 394; Hudson *v.* Wabash R. Co., 101 Mo. 13, s. c. 14 S. W. R. 15; O'Mara *v.* Delaware, etc., Canal Co., 18 Hun (N. Y.) 192; Magoon *v.* Boston, etc., R. Co., 67 Vt. 177, s. c. 31 Atl. R. 156.

likely to move at any moment.[1] So, it has been held that a child, only thirteen years old, was guilty of negligence as matter of law in attempting to pass between two sections of a freight train eight feet apart, although they were at a standstill when she reached the crossing, but were started together just before she stepped on the track between them.[2]

§ 1170. **Smoke and like obstructions to the view.**—Where the smoke emitted from moving trains obscures the view it is the duty of the traveler to wait until the smoke has disappeared and the view becomes unobstructed.[3] Cases of the class to which we have referred illustrate and enforce the general principle that it is not enough that the traveler looks and listens, but he must also exercise care to choose a place where the act of looking and listening will enable him to discover and avoid danger from moving trains. The mere fact that the traveler looked and listened will not be a performance of the duty re-

[1] Lake Shore, etc., R. Co. *v.* Pinchin, 112 Ind. 592. Approved in Magoon *v.* Boston, etc., R. Co., 67 Vt. 177, s. c. 31 Atl. R. 156. See, also, Lake Shore, etc., R. Co. *v.* Clemens, 5 Ill. App. 77; Flynn *v.* Eastern R. Co., 83 Wis. 238, s. c. 53 N. W. R. 494; Pannell *v.* Nashville, etc. R. Co., 97 Ala. 298, s. c. 12 So. R. 236.

[2] Wallace *v.* New York, etc., R. Co., 165 Mass. 236, s. c. 42 N. E. R. 1125. See, also, Shirk *v.* Wabash R. Co., (Ind. App.) 42 N. E. R. 656; Central, etc., R. Co. *v.* Rylee, 87 Ga. 491, s. c. 13 L. R. A. 634; Pittsburgh, etc., R. Co. *v.* Redding, 140 Ind. 101. But compare Philadelphia, etc., R. Co. *v.* Layer, 112 Pa. St. 414.

[3] Beynon *v.* Pennsylvania R. Co., 168 Pa. St. 642, s. c. 32 Atl. R. 84; West Jersey, etc., R. Co. *v.* Ewan, 55 N. J. Law 574, s. c. 27 Atl. R. 1064; Oleson *v.* Lake Shore, etc., R. Co., 143 Ind. 405, s. c. 42 N. E. R. 736; Heaney *v.* Long Island, etc., R. Co., 112 N. Y. 122, s. c. 19 N. E. R. 422; McCrory *v.* Chicago, etc., R. Co., 31 Fed. R. 531. See Powell *v.* New York, etc., R. Co., 109 N. Y. 613; Gorton *v.* Erie R. Co., 45 N. Y. 660; Shaber *v.* St. Paul, etc., R. Co., 28 Minn. 103. In Chicago, etc., R. Co. *v.* Fisher, 49 Kan. 460, s. c. 55 Am. & Eng. R. Cas. 223, it was held that where the view was obstructed by clouds of dirt it was negligence on the part of the traveler to attempt to cross. The court cited among others, the following cases: Union Pac. Railway Co. *v.* Adams, 33 Kan. 427, 19 Am. & Eng. R. Cas. 376; Atchison, etc., Railroad Co. *v.* Townsend, 39 Kan. 115; Fletcher *v.* Fitchburg Railroad Co., 149 Mass. 127, s. c. 21 N. E. R. 302; Blight *v.* Camden Railroad Co., 143 Pa. St. 10, s. c. 21 Atl. R. 995; Flemming *v.* Western, etc., Railroad Co., 49 Cal. 253. See for an extreme application of the general doctrine, Pennsylvania R. Co. *v.* Beale, 73 Pa. St. 504, s. c. 13 Am. R. 753.

quired of him by law inasmuch as looking and listening from a position where such an act will be unavailing does not come up to the standard prescribed.[1]

§ 1171. **Misleading traveler—Invitation to cross.**—Where the employes of a railroad company by negligent or wrongful acts mislead a traveler and put him off his guard the company may be liable although the traveler may have done that which but for the wrongful or negligent acts of the company must have been considered negligence on his part.[2] The negligence of the company will not, however, excuse the traveler for a failure to himself exercise ordinary care. As we have elsewhere shown the better reasoned decisions adjudge that in all cases the traveler must himself exercise due care and not rely entirely upon flagmen or other employes of the company.[3] Where

[1] The general doctrine stated is illustrated in a great variety of cases. Jobe *v.* Memphis, etc., R. Co., 71 Miss. 734, s. c. 15 So. R. 129; Merkle *v.* N. Y., etc., Railroad Co., 49 N. J. Law 473, s. c. 9 Atl. R. 680; Syme *v.* Richmond, etc., R. Co., 113 N. Car. 558, s. c. 18 S. E. R. 114; Frost *v.* Milwaukee, etc., R. Co., 96 Mich. 470, s. c. 56 N. W. R. 19; Littaur *v.* Narragansett, etc., R. Co., 61 Fed. R. 591; Highland, etc., R. Co. *v.* Maddox, 100 Ala. 618, s. c. 13 So. R. 615; Hayden *v.* Missouri, etc., R. Co., 124 Mo. 566, s. c. 28 S. W. R. 74; Philadelphia, etc., R. Co. *v.* Peebles, 67 Fed. R. 591; Bates *v.* New York, etc., R. Co., 84 Hun 287, s.c. 32 N. Y. Supp. 337; Gangawer *v.* Philadelphia, etc., R. Co., 168 Pa. St. 265, s. c. 32 Atl. R. 21; McPeak *v.* New York, etc., R. Co., 85 Hun 107, s. c. 32 N. Y. Supp. 647; Dirk *v.* Northern, etc., R. Co., 164 Pa. St. 243, s. c. 30 Atl. R. 231; Nelson *v.* Duluth, etc., R. Co., 88 Wis. 392, s. c. 60 N. W. R. 703; Jensen *v.* Michigan, etc., R. Co., 102 Mich. 176, s. c. 60 N. W. R. 57; Atchison, etc., R. Co. *v.* Booth, 53 Ill. App. 303; Plummer *v.* New York, etc., R. Co., 168 Pa. St. 62, s. c. 31 Atl. R. 887; Reeves *v.* Dubuque, etc., R. Co., (Iowa) 60 N. W. R. 243.

[2] Eddy *v.* Powell, 49 Fed. R. 814; Scaggs *v.* Delaware, etc., R. Co., 74 Hun 198, s. c. 26 N. Y. Supp. 323; Kleiber *v.* People's, etc., R. Co., 107 Mo. 240, s. c. 17 S. W. R. 946, 14 L.R. A. 613; Whelan *v.* New York, etc., R. Co., 38 Fed. R. 15; Pennsylvania R. Co. *v.* Stegemeier, 118 Ind. 305; Chicago, etc., R. Co. *v.* Clough, 134 Ill. 586; Central, etc., Co. *v.* Wabash R. Co., 27 Fed. R. 159. See Feeney *v.* Long Island, etc., R. Co., 116 N. Y. 375, s. c. 22 N. E. R. 402, 39 Am. & Eng. R. Cas. 639, 5 L. R. A. 544. The rule where the flagman does not see the traveler, Louisville, etc., R. Co. *v.* Webb, 90 Ala. 185, s. c. 8 So. R. 518, 11 L. R. A. 674; Little Rock, etc., R. Co. *v.* Densemann, (Ark.) 16 S. W. R. 169; Railway Co. *v.* Cullen, 54 Ark. 431. The absence of a flagman where one is occasionally kept is not an invitation to cross. Whalen *v.* New York, etc., R. Co., 58 Hun 431, s. c. 12 N. Y. Supp. 527.

[3] Berry *v.* Pennsylvania, etc., R. Co.,

the employes of the company direct or invite a traveler to cross the track the traveler may rely upon such invitation provided it is not plainly and clearly imprudent or hazardous to attempt to do so.[1] If, however, the danger is such that a man of ordinary prudence would not undertake to cross, then it may be contributory negligence to undertake to cross.[2] In no event, however, has an adult traveler a right to act entirely upon directions or invitations of employes and to omit the exercise of his own faculties, for under all circumstance he is bound to exercise care proportionate to the dangers of the place of which dangers he is bound to take notice. Some of the decisions hold that the fact that statutory signals are not given or municipal ordinances obeyed is sufficient evidence of an invitation to cross and excuses want of care on the part of the traveler,[3] but this is certainly a mistake. If the failure to obey statutory requirements or provisions of municipal ordinances excused the traveler from himself exercising the care which the law requires of him there would seldom be any question of contributory negligence and a multitude of decisions would be rendered nugatory. The omission of signals or the like can not or-

48 N. J. Law 141, s. c. 4 Atl. R. 303; Denver, etc., R. Co. *v.* Gustafson, (Colo.) 41 Pac. R. 505. In the case cited it was said: "It was error for the court to charge the jury as a matter of law that the plaintiff was excused from doing anything for his own safety except to obey the signals of the flagman."

[1] Chicago, etc., R. Co. *v.* Prescott, 59 Fed. R. 237, (citing Grand Trunk Railroad Co. *v.* Ives, 144 U. S. 408, s. c. 55 Am. & Eng. R. Cas. 159; Hoye *v.* Chicago, etc., Railway Co., 62 Wis. 672, s. c. 19 Am. & Eng. R. Cas. 347; Phila., etc., Railroad Co. *v.* Killips, 88 Pa. St. 405; Chicago, etc., Railway Co. *v.* Hutchinson, 120 Ill. 587; Directors, etc., *v.* Wanless, L. R. 7 H. of L. 12; Wheelock *v.* Boston, etc., Railway Co., 105 Mass. 203; Eddy *v.* Powell, 49 Fed. R. 814); Bond *v.* New York, etc., R. Co., 69 Hun 476, s. c. 23 N. Y. Supp. 450; Henning *v.* Caldwell, 18 N. Y. Supp. 339; Lunt *v.* London, etc., R. Co., L. R. 1 Q. B. 277; Cleveland, etc., R. Co. *v.* Keely, 138 Ind. 600, s. c. 37 N. E. R. 406; Chaffee *v.* Boston, etc., R. Co., 104 Mass. 108; Wheelock *v.* Boston, etc., R. Co., 105 Mass. 203; Spencer *v.* Illinois, etc., R. Co., 29 Iowa 55; Sweeny *v.* Old Colony, etc., R. Co., 10 Allen 368; Robbins *v.* Fitchburg, etc., R. Co., 161 Mass. 145.

[2] But in almost all such cases the question is one of fact for the jury.

[3] Pittsburg, etc., R. Co. *v.* Martin, 82 Ind. 476. The decision in the case cited is contrary to the later decisions of the same court. Miller *v.* Terre Haute, etc., R. Co., (Ind.) 43 N. E. R. 257; Cincinnati, etc., R. Co. *v.* Howard, 124 Ind. 280, s. c. 24 N. E. R. 892.

dinarily be regarded as a direction or invitation to cross, or as an assurance that there is no danger.[1] It is the duty of a railway company to exercise ordinary care in the management of gates at crossings and it is responsible to a traveler, who is himself without fault, injured by a negligent management of such gates.[2] A traveler who fails to keep a vigilant lookout for signals of gatemen or flagmen, or who gives them no heed is guilty of negligence.[3]

[1] *Ante*, § 1158; Connerton *v.* Delaware, etc., R. Co., 169 Pa. St. 339, s. c. 32 Atl. R. 416; Smith *v.* Wabash, etc., R. Co., 141 Ind. 92, s. c. 40 N. E. R. 270; Cadwallader *v.* Louisville, etc., R. Co., 128 Ind. 518; Blackwell *v.* St. Louis, etc., R. Co., 47 La. Ann. 268, s. c. 16 So. R. 818; Delaware, etc., R. Co. *v.* Hefferan, (N. J. Law) 30 Atl. R. 578; Chicago, etc., R. Co. *v.* Nuney, 19 Colo. 36, s. c. 34 Pac. R. 288; Pittsburgh, etc., R. Co. *v.* Bennett, 9 Ind. App. 92, s. c. 35 N. E. R. 1033; Blount *v.* Grand Trunk, etc., R. Co., 61 Fed. R. 375; Gardner *v.* Detroit, etc., R. Co., 97 Mich. 240, s. c. 56 N. W. R. 603; Krauss *v.* Wallkill, etc., R. Co., 69 Hun 482, s. c. 23 N. Y. Supp. 432; Hogan *v.* Tyler, 90 Va. 19, s. c. 17 S. E. R. 723; Drake *v.* Chicago, etc., R. Co., 51 Mo. App. 562; Studley *v.* St. Paul, etc., R. Co., 48 Minn. 249, s. c. 51 N. W. R. 115; Louisville, etc., R. Co. *v.* Webb, 90 Ala. 185, s. c. 8 So. R. 518, 11 L. R. A. 674. But, see, Sullivan *v.* Missouri, etc., R. Co., 117 Mo. 214, s. c. 23 S. W. R. 149; Cincinnati, etc., R. Co. *v.* Farra, 66 Fed. R. 496; Jennings *v.* St. Louis, etc., R. Co., 112 Mo. 268, s. c. 20 S. W. R. 490.

[2] Feeney *v.* Long Island, etc., R. Co., 116 N. Y. 375, s. c. 22 N. E. R. 402, 5 L. R. A. 544, 39 Am. & Eng. R. Cas. 639, (citing, as to the degree of care required of the traveler, Weber *v.* New York, etc., R. Co., 58 N. Y. 451, 456; Barker *v.* Savage, 45 N. Y. 191; Newson *v.* New York, etc., R. Co., 29 N. Y. 383; McGovern *v.* New York, etc., R. Co., 67 N. Y. 417; Beisiegel *v.* New York, etc., R. Co., 34 N. Y. 622; Bernhard *v.* Rensselaer, etc., R. Co., 1 Abb. App. Dec. 131); Callaghan *v.* Delaware, etc., R. Co., 52 Hun 276, 5 N. Y. Supp. 285; Whelan *v.* New York, etc., R. Co., 38 Fed. R. 15; Pennsylvania, etc., R. Co. *v.* Stegemeier, 118 Ind. 305, s. c. 20 N. E. R. 843. See, upon general subject of negligence of gateman, Fletcher *v.* Fitchburg R. Co., 149 Mass. 127, s. c. 3 L. R. A. 743; Parsons *v.* New York, etc., R. Co. 113 N. Y. 355, s. c. 3 L. R. A. 683. As to the duty of the traveler to exercise due care, see Greenwood *v.* Philadelphia, etc., R. Co., 124 Pa. St. 572, s. c. 3 L. R. A. 42, 17 Atl. R. 188; Lake Shore, etc., R. Co. *v.* Frantz, 127 Pa. St. 297, s. c. 18 Atl. R. 22, 4 L. R. A. 389.

[3] Deikman *v.* Morgan, etc., R. Co., 40 La. Ann. 787, s. c. 5 So. R. 76; Baltimore, etc., R. Co. *v.* Colvin, 118 Pa. St. 230, s. c. 12 Atl. R. 337. But see Kelly *v.* Southern, etc., R. Co., 28 Minn. 98. See, generally, Union, etc., R. Co. *v.* State, 72 Md. 153, s. c. 19 Atl. R. 449; Allerton *v.* Boston, etc., R. Co., 146 Mass. 241, s. c. 15 N. E. R. 621; Salmon *v.* New York, etc., R. Co., 5 N. Y. Supp. 225.

§ 1172. **Children and infirm persons.**—There is much confusion and conflict upon the question as to whether persons of non-age may be guilty of contributory negligence, not, indeed, as to whether persons although not of full legal age may be guilty of contributory negligence, but upon the question as to what age shall be deemed the age of discretion so as to make it the duty of a person of non-age to exercise that degree of care required of adult persons at railroad crossings. We think that, as a rule, children of "a tender age," that is, very young children, can not as a matter of law be deemed guilty of contributory negligence for failing to look and listen at railroad crossings,[1] but that where the age and intelligence of the child are such that it can understand the dangers of the place it may be deemed guilty of contributory negligence in attempting to cross without exercising care.[2] In many instances the question as to whether the person is so young as to excuse the failure to exercise care is a question of fact for the jury,[3] but

[1] Baker *v.* Flint, etc., R. Co.. 68 Mich. 90, s. c. 35 N. W. R. 836. The case cited carries the doctrine very far. Central, etc., R. Co. *v.* Golden, 93 Ga. 510, s. c. 21 S. E. R. 68; Cleveland, etc., R. Co. *v.* Tartt, 64 Fed. R. 830. See, Lake Shore, etc., R. Co. *v.* Orvis, 1 Ohio Dec. (C. C.) 492.

[2] In Shirk *v.* Wabash, etc., R. Co., (Ind. App.) 42 N. E. R. 656, a girl of twelve years of age was held guilty of contributory negligence, but in Citizens' Street R. Co. *v.* Stoddard, 10 Ind. App. 278, the same court held that a child five years of age could not be guilty of contributory negligence, citing Terre Haute, etc., R. Co. *v.* Tappenbock, 9 Ind. App. 422, in which it was held that a child nine years of age could not be presumed to be incapable of exercising ordinary care. In Wendell *v.* New York, etc., R. Co., 91 N. Y. 131, a boy seven years of age was held to be guilty of contributory negligence. Atchison, etc., R. Co. *v.* Todd, 54 Kan. 551, s. c. 38 Pac. R. 804; Chicago, etc., R. Co. *v.* White, 46 Ill. App. 446; Lennon *v.* New York, etc., R. Co., 65 Hun 578, s. c. 20 N. Y. Supp. 557; Marden *v.* Boston, etc., R. Co., 159 Mass. 393, s. c. 34 N. E. R. 404; Friess *v.* New York, etc., R. Co., 67 Hun 205, s. c. 22 N. Y. Supp. 104. But see Omaha, etc., R. Co. *v.* Morgan, 40 Neb. 604, s. c. 59 N. W. R. 81; Spillane *v.* Missouri, etc., R. Co., 111 Mo. 555, s. c. 20 S. W. R. 293.

[3] Central, etc., Co. *v.* Wabash R. Co., 31 Fed. R. 246; O'Flaherty *v.* Union R. Co., 45 Mo. 70; Mangam *v.* Brooklyn, etc., R. Co., 38 N. Y. 455; Pittsburgh, etc., R. Co. *v.* Caldwell, 74 Pa. St. 421; North Pennsylvania R. Co. *v.* Mahoney, 57 Pa. St. 187; Bay Shore R. Co. *v.* Harris, 67 Ala. 6; Houston, etc., R. Co. *v.* Simpson, 60 Tex. 103; Manly *v.* Wilmington, etc., R. Co., 74 N. Car. 655; Byrne *v.* New York, etc., 83 N. Y. 620; Barry *v.* New York, etc.,

there are unquestionably cases in which the court may adjudge as matter of law that the age of the person, although majority had not been attained, is such as to require the same measure of care as that required of adult persons.[1] The age of the injured child is always proper matter for consideration in determining whether there was contributory negligence but age is by no means the only matter to be considered, unless the child is so young that as matter of law it can be adjudged incapable of exercising care for its own safety.[2] Where the employes of a railroad company see a young child on the track they can not rightfully act upon the presumption which prevails in cases of adults that it will leave the track in time to avoid injury.[3] A person who in appearance is of mature age may, where there is nothing to indicate the contrary, be reasonably expected to leave the track before the train is upon him, but in many instances the question whether the employes were justified in acting upon the presumption referred to must be a question of fact and not of law. A blind or deaf person is not absolved from the duty to exercise due care at railroad crossings, and the general rule is that where there is a destruction or impairment of the faculties a higher degree of care is required than in the case of persons in the full possession of their faculties.[4] We suppose, it is quite clear, however, that if

R. Co., 92 N. Y. 289, s. c. 44 Am. R. 377. See, generally, Weber *v.* Atchison, etc., R. Co., 54 Kan. 389, s. c. 38 Pac. R. 569; Payne *v.* Chicago, etc., R. Co., 129 Mo. 405, s. c. 31 S. W. R. 885; East Tennessee, etc., R. Co. *v.* Harshaw, (Ky.), 29 S. W. R. 289; Mulligan *v.* Curtis, 100 Mass. 512; Wright *v.* Detroit, etc., R. Co., 77 Mich. 123, s. c. 43 N. W. R. 765; Hemmingway *v.* Chicago, etc., R. Co., 72 Wis. 42, s. c. 37 N. W. R. 804; Twist *v.* Winona, etc., Railroad Co., 39 Minn. 164, s. c. 39 N. W. R. 402.

[1] Lofdahl *v.* Minneapolis, etc., R. Co., 88 Wis. 421, s. c. 60 N. W. R. 795.

[2] Schmitz *v.* St. Louis, etc., R. Co., 119 Mo. 256, s. c. 24 S. W. R. 472; Texas, etc., R. Co. *v.* Fletcher, 6 Tex. Civ. App. 736, s. c. 26 S. W. R. 446.

[3] Indianapolis, etc., R. Co. *v.* Pitzer, 109 Ind. 179, s. c. 58 Am. R. 387.

[4] Marks *v.* Petersburg, etc., R. Co., 88 Va. 1, s. c. 13 N. E. R. 299; Maloy *v.* Wabash, etc., R. Co., 84 Mo. 270; Zimmerman *v.* Hannibal, etc., R. Co., 71 Mo. 476; Purl *v.* St. Louis, etc., R. Co., 72 Mo. 168; Central, etc., R. Co. *v.* Fellar, 84 Pa. St. 226; Morris, etc., R. Co. *v.* Haslan, 33 N. J. Law 147; Johnson *v.* Louisville, etc., R. Co., 91 Ky. 651, s. c. 25 S. W. R. 754; International, etc., R. Co. *v.* Garcia, 75 Tex. 583, s. c. 13 S. W. R. 223; Cleveland, etc., R. Co. *v.* Terry, 8 Ohio St.

the employes of the company had knowledge of the infirmities of the person upon or near the track they would have no right to act upon the presumption, which obtains in cases of adult persons really or apparently in possession of their faculties, that they will leave the track in time to avoid injury.[1] The fact that a person crossing a track is intoxicated does not absolve him from the duty to exercise that degree of care which the law requires of adult persons who undertake to cross railway tracks,[2] but the fact that a traveler is intoxicated is often a strong circumstance tending to prove contributory negligence.[3] A drunken man is not, however, an outcast and if he is so drunk as to be helpless or irresponsible and that fact is known to the employes of the company it is their duty to exercise reasonable care to avoid injuring him.[4] But if the employes do not know of the condition of the intoxicated person they may, as a rule, act upon the presumption that he will exercise care and leave the track in time to avoid injury, for they are under no obligation to take unusual precautions to

570; Illinois Cent. R. Co. *v.* Buckner, 28 Ill. 299; West *v.* New Jersey, etc., R. Co., 32 N. J. Law 91; Elkins *v.* Boston, etc., R. Co., 115 Mass. 190; Tyler *v.* Sites, 88 Va. 470, s. c. 13 S. E. R. 978; Galveston, etc., R. Co. *v.* Ryon, 80 Tex. 59, s. c. 15 S. W. R. 588.

[1] The rule is well settled that the presumption is that an adult person will leave the track in time to avert a collision with the train. Ohio, etc., R. Co. *v.* Walker, 113 Ind. 196; Lake Shore, etc., R. Co. *v.* Miller, 25 Mich. 274; Terre Haute, etc., R. Co. *v.* Graham, 95 Ind. 286; Beach on Contributory Negligence, (12 ed.), §§ 191, 394; 2 Wood on Railroads, 1330. There may, of course, be circumstances which would make the general rule stated inapplicable. Louisville, etc., R. Co. *v.* Phillips, 112 Ind. 59.

[2] Norfolk, etc., R. Co. *v.* Harman, 83 Va. 553, s. c. 8 S. E. R. 251; Houston, etc., R. Co. *v.* Sympkins, 54 Tex. 615, s. c. 38 Am. R. 632; Illinois Cent. R. Co. *v.* Hutchinson, 47 Ill. 408; Kean *v.* Baltimore, etc., R. Co., 61 Md. 154; Toledo, etc., R. Co. *v.* Riley, 47 Ill. 514; Yarnall *v.* St. Louis, etc., R. Co., 75 Mo. 575.

[3] Herring *v.* Wilmington, etc., R. Co., 10 Iredell L. 402, s. c. 51 Am. Dec. 395; Little Rock, etc., R. Co. *v.* Pankhurst, 36 Ark. 371; Carlin *v.* Chicago, etc., R., 37 Iowa 316; Richardson *v.* Wilmington, etc., R. Co., 8 Rich. (Law) 120.

[4] Cincinnati, etc., R. Co. *v.* Cooper, 120 Ind. 469; Atchison, etc., R. Co. *v.* Weber, 33 Kan. 543, s. c. 52 Am. R. 543; Railway Co. *v.* Valleley, 32 Ohio St. 345, s. c. 30 Am. R. 601.

protect a man from the consequences of his own folly or wrong.[1]

§ 1173. **Sudden peril as affecting the duty of a traveler.**— Where the traveler is placed in a position of sudden peril by the negligence of the railroad company, the omission on his part to exercise such care as one not influenced by sudden danger would exercise, can not be regarded as a breach of duty constituting negligence. A person placed in a position of sudden peril by the negligence of a railroad company is not necessarily guilty of contributory negligence unless he acts recklessly and heedlessly. Where one is deprived of the power to act deliberately and calmly, the person whose wrongful act took from him that power can not justly be permitted to aver that such precautions as under ordinary circumstances would be necessary were not taken. The cases generally recognize and enforce the doctrine we have stated, and as to the general doctrine itself there is no substantial conflict,[2] but there is some diversity of opinion as to the manner and extent of its application. The peril which will exonerate the traveler from the exercise of that care which the law requires of travelers at railroad crossings must be in its nature an extraordinary one, in the sense that it is not such as ordinarily pertains to railroad crossings, for, as matter of fact and of law, such crossings are places of great danger, exacting from the traveler care and caution. Where a traveler, not being in fault

[1] Cincinnati, etc., R. Co. *v.* Cooper, 120 Ind. 469; Welty *v.* Indianapolis, etc., R. Co., 105 Ind. 55; McClelland *v.* Louisville, etc., R. Co., 94 Ind. 276; Louisville, etc., R. Co. *v.* Sullivan, 81 Ky. 624.

[2] Central Trust Co. *v.* Wabash, etc., R. Co., 27 Fed. R. 159; Pennsylvania Co. *v.* Stegemeier, 118 Ind. 305; Cody *v.* New York, etc., R. Co., 151 Mass. 462, s. c. 24 N. E. R. 402; Pennsylvania, etc., Co. *v.* Varnau, (Pa. St.), 15 Atl. R. 624; Barton *v.* Springfield, 110 Mass. 131; Weare *v.* Fitchburg, 110 Mass. 334; Voak *v.* Northern, etc., R. Co., 75 N. Y. 320; Southwestern, etc., Co. *v.* Paulk, 24 Ga. 356; Gumz *v.* Chicago, etc., Co., 52 Wis. 672. See, generally, Schall *v.* Cole, 107 Pa. St. 1; Woolery *v.* Louisville, etc., R. Co., 107 Ind. 381, s. c. 57 Am. R. 114; Reary *v.* Louisville, etc., R. Co., 40 La. Ann. 32, s. c. 3 So. R. 390; Wright *v.* Great Northern, etc., R. Co., 8 Irish L. R. 257; Northeastern, etc., R. Co. *v.* Wanless, L. R. 7 H. L. Cas. 12, (L. R. 6 Q. B. 481).

himself, in endeavoring to escape from a sudden and threatening peril, places himself in a position of danger, his act is generally held not to proximately contribute to the injury and the sole proximate cause of the injury is the negligence of the railroad company. The rule, however, can not obtain where the danger is one incident to the place, its use or surroundings, for such danger is not a sudden peril within the meaning of the law, but a danger to be anticipated and guarded against by proper care and precaution. The rule goes further than to exonerate the traveler where the peril is caused by the act of the railroad company, for, if without fault himself, the traveler is placed in a position of sudden peril by a third person or by some accident, as, for instance, by horses running away, he may be absolved from exercising that degree of care required of one under ordinary circumstances.[1] Some of the courts carry the rule very far, for it is held that where the attention of the traveler is distracted by a commotion in the street or highway he will be excused,[2] but while there may be cases in which this doctrine should prevail, it is one to be cautiously applied and carefully limited. If there is time for deliberation it will generally be negligence on the part of the traveler to omit reasonable precautions, and so it will be if his attention is diverted where there is no element of danger and there is nothing more than curiosity to know what the commotion means. Where the sudden peril is attributable to the negligence of the plaintiff he can not successfully assert that he is absolved from the duty to exercise due

[1] Moore *v.* Central, etc., R. Co., 47 Iowa 688. See, generally, Coulter *v.* American Express Co., 56 N. Y. 585; Dublin, etc., Co. *v.* Slattery, L. R. 3 App. Cas. 1155; Collins *v.* Davidson, 19 Fed. R. 83; Knapp *v.* Sioux City, etc., Co., 65 Iowa 91; Wesley Coal Co. *v.* Healer, 84 Ill. 126; Iron, etc., R. Co. *v.* Mowery, 36 Ohio St. 418; Stickney *v.* Maidstone, 30 Vt. 738.

[2] Alabama, etc., R. Co. *v.* Lowe, (Miss.) 19 So. R. 96. In Cassida *v.* Oregon, etc., R. Co., 14 Ore. 551, s. c. 13 Pac. R. 438, it was held that a child, who, in endeavoring to escape from cattle, ran on a trestle, was not guilty of contributory negligence, but great stress was placed upon the fact that the child had not reached the years of discretion. The court cited Hurst *v.* Burnside, 12 Ore. 520, s. c. 8 Pac. R. 888; McGovern *v.* New York, etc., R. Co., 67 N. Y. 417; Eckert *v.* Long Island, etc., R. Co., 43 N. Y. 502.

care. If the plaintiff voluntarily goes into a place of danger without exercising the care required by law, he is guilty of negligence although after so getting into the place of danger he exercises his judgment to the best of his ability,[1] to escape from the danger. Care is required to keep out of danger as well as to avoid it after getting into it, and the rule that sudden peril excuses does not govern where the plaintiff without exercising due care goes into a place of danger, such as a railroad crossing is, and of which danger the track itself is a warning. Where there is evidence that there was a sudden peril, that is, a peril not incident to railroad crossings, the question whether the plaintiff was guilty of contributory negligence is generally one of fact, but where there is no evidence of sudden peril, then the question is often one of law.

§ 1174. Negligence of driver of vehicle not imputed to passenger therein.—The general rule is that the negligence of the driver of a vehicle with whom the injured person is riding will not be imputed to such injured person.[2] But where persons

[1] Leiman *v.* Chicago, etc., R. Co., 82 Wis. 286, s. c. 52 N. W. R. 91.

[2] The doctrine of Thorogood *v.* Bryan, 8 C. B. 115, is generally denied, but there are cases approving it. Prideaux *v.* City of Mineral Point, 43 Wis. 513, 28 Am. R. 558; Houfe *v.* Fulton, 29 Wis. 296, s. c. 9 Am. R. 568; Artz *v.* Chicago, etc., R. Co., 34 Iowa 153; Slater *v.* Burlington, etc., R. Co., 71 Iowa 209; Lake Shore, etc., R. Co. *v.* Miller, 25 Mich. 274. Denying the doctrine are the cases of Carlisle *v.* Sheldon, 38 Vt. 440; Little *v.* Hackett, 116 U. S. 366; The Berninia, L. R. 12 Prob. Div. 58, 57 Am. R. 494 note; Chartered, etc., Bank *v.* Netherlands, etc., Co., L. R. 9 Q. B. Div. 118; Street Railway, Co. *v.* Eadie, 43 Ohio 91; Robinson *v.* New York, etc., Co., 66 N. Y. 11; Pittsburgh, etc., R. Co. *v.* Spencer, 98 Ind. 186; City of Michigan City *v.* Boeckling, 122 Ind. 39; Robinson *v.* New York, etc., R. Co., 66 N. Y. 11, s. c. 23 Am. R. 1; Masterson *v.* New York, etc., R. Co., 84 N. Y. 247, s. c. 38 Am. R. 510; Bennett *v.* New Jersey, etc., R. Co., 36 N. J. 225, s. c. 13 Am. R. 435; New York, etc., R. Co. *v.* Steinbrenner, 47 N. J. Law 161, s. c. 54 Am. R. 126; State *v.* Boston, etc. R. Co., 80 Me. 430, s. c, 38 Alb. L. J. 269; Wabash, etc., R. Co. *v.* Shacklet, 105 Ill. 364, s. c. 44 Am. R. 791; Danville, etc., Co. *v.* Stewart, 2 Metc. (Ky.) 119; Tompkins *v.* Clay St., etc., R. Co., 66 Calf. 163; Noyes *v.* Town of Boscawen, 64 N. H. 361, s. c. 10 Am. St. R. 410; Follman *v.* City of Mankato, 35 Minn. 522, s. c. 59 Am. R 340, 57 Am. R. 488; Philadelphia, etc., R. Co. *v.* Hogeland, 66 Md. 149, s. c. 59 Am. R. 159, 57 Am. R. 402; Town of Albion *v.* Hetrick, 90 Ind. 545, s. c. 46 Am. R. 230; Randolph *v.* O'Riordon, 155 Mass.

riding in a vehicle all take part in managing it and the team drawing it, there is reason for holding that all are bound to exercise ordinary care to avoid collisions with railroad trains.[1] Where the driver is the agent or servant of the injured person it is held that the negligence of the former is attributable to the latter.[2] It is obvious that where the negligence of the person who receives the injury contributes to the injury he can not escape the consequences of his own carelessness.[3] Thus where one person riding with another saw the headlight of an approaching locomotive it was held that he was guilty of contributory negligence in failing to warn the driver of the vehicle in which he was riding.[4] If the person riding in the vehicle knows that the driver is negligent and he takes no precautions to guard against injury he can not recover, for in such case the negligence is his own and not simply that of the driver.[5] The plaintiff can not rightfully omit to use care in blind dependence upon another, but must use care proportionate to the danger of which the facts convey knowledge. It has been held that where a child of tender years is entrusted to the

331, s. c. 29 N. E. R. 583; Larkin *v.* Burlington, etc., R. Co., 85 Iowa 492, s. c. 52 N. W. R. 480; Becke *v.* Missouri, etc., R. Co., 102 Mo. 544; East Tennessee, etc., R. Co. *v.* Markens, 88 Ga. 60; Lapsley *v.* Union, etc., R. Co., 50 Fed. R. 172; Cahill *v.* Cincinnati, etc., R. Co., 92 Ky. 345, s. c. 18 S. W. R. 2; Transfer Co. *v.* Kelly, 36 Ohio St. 86, s. c. 33 Am. R. 558; Whelan *v.* New York, etc., R. Co., 38 Fed. R. 15. In Nesbit *v.* Town of Gainer, 75 Iowa 314, s. c. 9 Am. St. R. 486, the earlier cases are explained, and in Dean *v.* Pennsylvania R. Co., 129 Pa. St. 514, it said that the doctrine of Thorogood *v.* Bryan, 8 C. B. 115, was partially adopted in Pennsylvania.

[1] Nesbit *v.* Town of Gainer, 75 Iowa 314, s. c. 9 Am. St. R. 486; Brannen *v.* Kokomo, etc., Co., 115 Ind. 115, s. c. 17 N. E. R. 202.

[2] Brickell *v.* New York, etc., R. Co., 120 N. Y. 290. See, generally, Georgia, etc., R. Co. *v.* Underwood, 90 Ala. 49.

[3] Miller *v.* Louisville, etc., R. Co., 128 Ind. 97; Hoag *v.* New York, etc., R. Co., 111 N. Y. 199; Brickell *v.* New York, etc., R. Co., 120 N. Y. 290; Dean *v.* Pennsylvania R. Co., 129 Pa. St. 514, s. c. 15 Am. St. R. 733; Cincinnati, etc., R. Co. *v.* Howard, 124 Ind. 280; Durkee *v.* President, etc., 88 Hun 471, 34 N. Y. S. 978.

[4] Smith *v.* Maine Central R. Co., 87 Me. 339, s. c. 32 Atl. R. 967. See Howe *v.* Minneapolis, etc., R. Co., (Minn.) 64 N. W. R. 102.

[5] Township of Crescent *v.* Anderson, 114 Pa. St. 643, s. c. 8 Atl. R. 379; O'Toole *v.* Pittsburgh, etc., R. Co., 158 Pa. St. 99, s. c. 27 Atl. R. 737.

care of the driver of the vehicle the contributory negligence of the driver will defeat a recovery by the child,[1] but if the doctrine of the cases referred to can be regarded as sound in any event, it can not, as we think, be so regarded where the child is riding as a passenger in a public conveyance.

§ 1175. Negligence after discovery of traveler's danger—Wilfulness.—Although, as we have already shown, the general rule is that contributory negligence will defeat a recovery, yet there is an exception to the rule, or perhaps it would be better to say that the rule does not apply, where the injury is wilfully inflicted[2] or the failure of the company to exercise reasonable care after discovering the traveler's peril is the proximate cause of the injury.[3] In this connection, however, it is neces-

[1] Prideaux *v.* City of Mineral Point, 43 Wis. 513, s. c. 28 Am. R. 560; Lake Shore, etc., R. Co. *v.* Miller, 25 Mich. 274; Payne *v.* Chicago, etc., R. Co., 39 Iowa 523; Elkins *v.* Boston, etc., R. Co., 115 Mass. 190. See, generally, upon the subject of imputed negligence, Alabama, etc., R. Co. *v.* Davis, 69 Miss. 444, s. c. 60 Am. & Eng. R. Cas. 719; Pennsylvania Co. *v.* Goodenough, (N. J.), 28 Atl. R. 3; Honey *v.* Chicago, etc., R. Co., 59 Fed. R. 423; Lake Shore, etc., R. Co. *v.* McIntosh, 140 Ind. 261, s. c. 38 N. E. R. 476; Chicago, etc., R. Co. *v.* Spilker, 134 Ind. 380, s. c. 55 Am. & Eng. R. Cas. 200. It is to be said of the last named case that in some respects the doctrine it asserts is erroneous.

[2] Palmer *v.* Chicago, etc., R. Co., 112 Ind. 250, s. c. 14 N. E. R. 70; Chicago, etc., R. Co. *v.* Hedges, 105 Ind. 398, 404; Belt R. Co. *v.* Mann, 107 Ind. 89; Wabash R. Co. *v.* Speer, 156 Ill. 244, s. c. 40 N. E. R. 835; Georgia Pac. R. Co. *v.* Lee, 92 Ala. 262, s. c. 9 So. R. 230; Louisville, etc., R. Co. *v.* Webb, 97 Ala. 308, s. c. 12 So. R. 374; Brownell *v.* Flagler, 5 Hill (N. Y.) 282; Sandford *v.* Eighth Ave. R. Co., 23 N. Y. 343; Louisville, etc., R. Co. *v.* Collins, 2 Duv. (Ky.) 114; Beach on Contrib. Neg., § 64.

[3] Grand Trunk R. Co. *v.* Ives, 144 U. S. 408, s. c. 12 Sup. Ct. R. 676; Island, etc., Coasting Co. *v.* Tolson, 139 U. S. 551, s. c. 11 Sup. Ct. R. 653; Kean *v.* Baltimore, etc., R. Co., 61 Md. 154, s. c. 19 Am. & Eng. R. Cas. 321; Baltimore, etc., R. Co. *v.* Kean, 65 Md. 394, s. c. 28 Am. & Eng. R. Cas. 580; Donohue *v.* St. Louis, etc., R Co., 91 Mo. 357, s. c. 2 S. W. R. 424, 3 S. W. R. 848; Cleveland, etc., R. Co. *v.* Crawford, 24 Ohio St. 631; Texas, etc., R. Co. *v.* Spradling, 72 Fed. R. 152; Atchison, etc., R. Co. *v.* Walz, 40 Kans. 433, s. c. 19 Pac. R. 787; Valin *v.* Milwaukee, etc., R. Co., 82 Wis. 1, s. c. 51 N. W. R. 1084; Keefe *v.* Chicago, etc., R. Co., (Iowa) 60 N. W. R. 503; Carrico *v.* West Virginia, etc., R. Co., 35 W. Va. 389, s. c. 14 S. E. R. 12; Evansville, etc., R. Co. *v.* Hiatt, 17 Ind. 102; Cincinnati, etc., R. Co. *v.* Kassen, 49 Ohio St. 230, s. c. 31 N. E. R. 282; Denver, etc., Co. *v.* Dwyer, 20 Colo. 132, 36 Pac. R. 1106; Beach on Contrib. Neg., § 54, *et seq*; Busw. Law of Pers. Inj., § 101.

sary to bear in mind the rule that the company, or its employes, have a right to presume, under ordinary circumstances, that an adult who is upon or near the track and apparently able to take care of himself will do so and stay off or get off in due time. Some of the courts, misapplying, as we think, the doctrine of an old English case,[1] have held that the company is liable not only where it discovers the danger of the traveler in time to avoid the effect of his negligence, and fails to exercise reasonable care to avoid it, but also where it fails to exercise reasonable care to look out for the traveler and thus fails to discover his danger in the first instance or if it might, in any event, have avoided the consequences of the plaintiff's negligence by the exercise of reasonable care.[2] It seems to us that this doctrine is much like the exploded doctrine of comparative negligence and that, unless it is limited in its application, it loses sight of the element of proximate cause and virtually nullifies the doctrine of contributory negligence. We think the better rule is that, except where the injury is wilfully inflicted, or is inflicted under such circumstances as to amount to wilfulness, the rule that contributory negligence is a good defense applies without qualification unless the company is guilty of negligence subsequent to that of the plaintiff and not merely contemporaneous and concurrent with that of the plaintiff. In other words, while the company may be liable where it fails to exercise reasonable care by which it could have avoided the consequences of the plaintiff's negligence after discovering it and his danger, or if reasonable care requires that it should have made such discovery after the plaintiff had negligently incurred the danger and it fails to do so and to use reasonable care by which injury could have been avoided, yet it is stating the rule too broadly to say that the

[1] Davies *v.* Mann, 10 Mees. & W. 546.

[2] See Lloyd *v.* St. Louis, etc., R. Co., 128 Mo. 595, 29 S. W. R. 153, 31 S. W. R. 110; Bergman *v.* St. Louis, etc., R. Co., 88 Mo. 678, s. c. 28 Am. & Eng. R. Cas. 588; Louisville, etc., R. Co. *v.* Krey, (Ky.) 29 S. W. R. 869; Gass *v.* Missouri Pac. R. R. Co., 57 Mo. App. 574; Battishill *v.* Humphreys, 64 Mich. 514, s. c. 38 N. W. R. 581; Tuff *v.* Warman, 5 C. B. N. S. 573; McGuire *v.* Vicksburg, etc., R. Co., 46 La. Ann. 1543, s. c. 16 So. R. 457; Patterson's Ry. Acc. Law, 51.

company is liable if it might have avoided the injury or the consequences of the plaintiff's negligence by the exercise of reasonable care.[1]

§ 1176. **Injuries at defective crossings.**—Where a railroad company, whose duty it is to restore and keep in repair a highway crossing, negligently fails to perform that duty it will be liable to a traveler upon the highway who, in the exercise of due care, is injured thereby.[2] It has also been held that if it constructs a crossing at a point where all the travel is, although not the true line of the highway as established, it is liable for a defect in such crossing the same as if it were on the true line of the highway.[3] A hole in the crossing may

[1] International, etc., R. Co. *v.* Eason, (Tex.) 35 S. W. R. 208; Indiana, etc., Co. *v.* Stewart, 7 Ind. App. 563, s. c. 34 N. E. R. 1019; Maryland Cent. R. Co. *v.* Neubeur, 62 Md. 391; Kean *v.* Baltimore etc., R. Co., 61 Md. 154, s. c. 19 Am. & Eng. R. Cas. 321; Texas, etc., R. Co. *v.* Nolan, 62 Fed. R. 552, 556; Schmolze *v.* Chicago, etc., R. Co., 83 Wis. 659, s. c. 54 N. W. R. 106; St. Louis, etc., R. Co. *v.* Ross, (Ark.) 33 S. W. R. 1054; Murphy *v.* Deane, 101 Mass. 455, s. c. 3 Am. R. 390; Kirtley *v.* Chicago, etc., R. Co., 65 Fed. R. 386; Beach on Contrib. Neg., § 56. Such a rule would do away with the doctrine of contributory negligence almost entirely and make the company liable if the injury could have been avoided by it by due care in the first instance regardless of the contributory negligence of the plaintiff thereafter.

[2] Oakland, etc., R. Co. *v.* Fielding, 48 Pa. St. 320; Pittsburg, etc., R. Co. *v.* Dunn, 56 Pa. St. 280; International, etc., R. Co. *v.* Douglas, 7 Tex. Civ. App. 554, s. c. 27 S. W. R. 793; Tobias *v.* Michigan Cent. R. Co., (Mich.) 61 N. W. R. 514; Jeffrey *v.* Detroit, etc., R. Co., (Mich.) 65 N. W. R. 755; Hanson *v.* Chicago, etc., R. Co., (Iowa) 62 N. W. R. 788; O'Connor *v.* Boston, etc., R. Co., 135 Mass. 352; Omaha, etc., R. Co. *v.* Ryburn, 40 Neb. 87, s. c. 58 N. W. R. 541; Omaha, etc., R. Co. *v.* Brady, 39 Neb. 27, s. c. 57 N. W. R. 767; Johnson *v.* St. Paul, etc., R. Co., 31 Minn. 283; Snow *v.* Housatonic R. Co., 8 Allen (Mass.) 441; Inhabitants of Veazie *v.* Penobscot, etc., R. Co., 49 Me. 119; Paine *v.* Grand Trunk R. Co., 58 N. H. 611; Mann *v.* Central Vermont R. Co., 55 Vt. 484, s. c. 14 Am. & Eng. R. Cas. 620; Lake Shore, etc., R. Co. *v.* McIntosh, 140 Ind. 261, s. c. 38 N. E. R. 476; Grand Trunk R. Co. *v.* Sibbald, 20 Can. S. C. R. 259; Oliver *v.* Northeastern R. Co., L. R. 9 Q. B. 409. The defect in the crossing must, however, be a proximate cause of the injury. Murphy *v.* Michigan Cent. R. Co., (Mich.) 65 N. W. R. 753.

[3] Taylor, etc., R. Co. *v.* Warner, (Tex. Civ. App.) 31 S. W. R. 66. See, also, Texas, etc., R. Co. *v.* Neill, (Tex. Civ. App.) 30 S. W. R. 369; Missouri Pac. R. Co. *v.* Bridges, 74 Tex. 520, s. c. 15 Am. St. R. 856.

constitute such a defect as will render the company liable to one injured thereby,[1] and so may a defect in the planking between the tracks.[2] Thus, where a greater space is left between the planking and the rail than is required for the running of trains and the operation of the road the company is liable to one who, while exercising due care, gets his foot, or that of his horse, fastened therein and is run over or otherwise injured by the negligence of the company in that regard.[3] So, where the company left its rails projecting four or five inches above the surface of the street, without any planking or filling between them, it was held that it was for the jury to determine whether it was negligent, and therefore liable to a traveler who was injured at the crossing.[4] In another case the company had left its track nine inches above the surface of the highway, and it was held liable for the death of the plaintiff's horse from the extraordinary exertion in pulling a loaded wagon over the obstruction.[5] In still another case, decided by the same court, the railroad company was held liable where it had so constructed the crossing as to leave an obstruction, or embankment in the highway which was the plaintiff's only means of

[1] Washburn *v.* Chicago, etc., R. Co., 68 Wis. 474, s. c. 32 N. W. R. 234; Georgia, etc., R. Co. *v.* Parks, 93 Ga. 228, s. c. 18 S. E. R. 652; Louisville, etc., R. Co. *v.* Pritchard, 131 Ind. 564, s. c. 31 Am. St. R. 451. See, also, Potter *v.* Bunnell, 20 Ohio St. 150.

[2] Tetherow *v.* St. Joseph, etc., R. Co., 98 Mo. 74, s. c. 11 S. W. R. 310, 22 Am. St. R. 617, and note; Pennsylvania R. Co. *v.* Boylan, 104 Ill. 595; Lillstrom *v.* Northern Pac. R. Co., 53 Minn. 464, s. c. 55 N. W. R. 624; Retan *v.* Lake Shore, etc., R. Co., 94 Mich. 146, s. c. 53 N. W. R. 1094; Dillingham *v.* Fields, (Tex.) 29 S. W. R. 214.

[3] Spooner *v.* Delaware, etc., R. Co., 115 N. Y. 22; Payne *v.* Troy, etc., R. Co., 83 N. Y. 572, s. c. 6 Am. & Eng. R. Cas. 54; Elgin, etc., R. Co. *v.* Raymond, 148 Ill. 241, s. c. 35 N. E. R. 729; Toledo, etc., R. Co. *v.* Clark, 49 Ill. App. 17; Louisville, etc., R. Co. *v.* Phillips, 112 Ind. 59, s. c. 2 Am. St. R. 155; Burlington, etc., R. Co. *v.* Koonce, 34 Neb. 479, s. c. 51 N. W. R. 1033.

[4] Wasmer *v.* Delaware, etc., R. Co., 80 N. Y. 212. See, also, Evansville, etc., R. Co. *v.* Pritchard, 131 Ind. 564, s. c. 31 Am. St. R. 451; Milwaukee, etc., R. Co. *v.* Hunter, 11 Wis. 160.

[5] Evansville, etc., R. Co. *v.* Carvener, 113 Ind. 51. It is not, perhaps, altogether certain that the plaintiff was free from contributory negligence in this case, but the court, while admitting that contributory negligence would bar a recovery, held that he had a right to use the crossing and could not have anticipated any such result.

access to his home, and the plaintiff, without fault on his part, while riding homeward, was severely injured by reason of such obstruction combined with the fright of his horse at a hand-car negligently managed by the company's employes.[1] It should not be forgotten, however, that contributory negligence will prevent a recovery here as in other cases.[2] Nor does the law require the exercise of extraordinary care and vigilance on the part of a railroad company to keep its crossings safe for travelers upon the highway,[3] and it has been held that the company is not liable for an injury received by such a traveler because of its crossing being out of repair unless it had notice thereof or unless the defect had existed for such a length of time that it ought to have taken, or may be presumed to have had, notice of such defect.[4]

§ 1177. Evidence of subsequent repairs and other accidents at the same place.—Evidence of repairs made, or precautions taken, after the injury was received is not competent to prove antecedent negligence;[5] nor is evidence that other persons have

[1] Evansville, etc., R. Co. *v.* Crist, 116 Ind. 446, s. c. 9 Am. St. R. 865.

[2] International, etc., R. Co. *v.* Robertson, (Tex. Civ. App.) 27 S. W. R. 564; Ford *v.* Chicago, etc., R. Co., (Iowa) 59 N. W. R. 5.

[3] Terre Haute, etc., R. Co. *v.* Clem, 123 Ind. 15, s. c. 23 N. E. R. 965, 7 L. R. A. 588, 42 Am. & Eng. R. Cas. 229.

[4] Mann *v.* Chicago, etc., R. Co., 86 Mo. 347. See, also, Hill *v.* Port Royal, etc., R. Co., 31 So. Car. 393, s. c. 10 S. E. R. 91, 39 Am. & Eng. R. Cas. 607, 5 L. R. A. 349.

[5] Morse *v.* Minneapolis, etc., Co., 30 Minn., 465, disapproving earlier Minnesota cases. Terre Haute, etc., R. Co. *v.* Clem, 123 Ind. 15, s. c. 23 N. E. R. 965; Ely *v.* St. Louis, etc., Co., 77 Mo. 34; Nalley *v.* Hartford, etc., Co., 51 Conn. 524; Hodges *v.* Percival, 132 Ill. 53, s. c. 23 N. E. R. 423; Isaacs *v.* Southern Pac. R. Co., 49 Fed. R. 797; Dale *v.* Delaware, etc., R. Co., 73 N. Y. 468; Hudson *v.* Chicago R. Co., 59 Iowa 581, s. c. 8 Am. & Eng. R. Cas. 464; Dougan *v.* Champlain Co., 56 N. Y. 1; Board of Comrs. *v.* Pearson, 129 Ind., 456, s. c. 28 N. E. R. 1120; Menard *v.* Boston, etc., R. Co., 150 Mass. 386, s. c. 23 N. E. R. 214; Heucke *v.* Milwaukee, etc., R. Co., 69 Wis. 401; s. c. 34 N. W. R. 243; Sappenfield *v.* Main St., etc., R. Co., 91 Cal. 48, 27 Pac. R. 590, citing Elliott on Roads and Streets, 646-649. *Contra*, Pennsylvania Co. *v.* Henderson, 51 Pa. St. 315; West Chester, etc., R. Co. *v.* McElwee, 67 Pa. St. 311; Martin *v.* Towle, 59 N. H. 31; Galveston, etc., R. Co. *v.* Evansich, 63 Tex. 54. See, also, St. Joseph, etc., R. Co. *v.* Chase, 11 Kans. 47; Kansas Pac. R. Co. *v.* Miller, 2 Colo. 442; Augusta, etc., R. Co. *v.* Renz, 55 Ga. 126.

been injured at the same place.[1] But evidence of both of these things may sometimes be competent for other purposes. Thus, for the purpose of showing notice of the defect on the part of the company, evidence that others have been injured from the same defect is admissible in a proper case.[2] So, evidence of other accidents at the same place is sometimes admissible for the same purpose or to show its condition or the like.[3] But the court, upon proper request, should, by instructions, restrict the evidence to the point upon which it is competent and not permit it to be considered as proof of antecedent negligence.[4]

[1] Richards *v.* City of Oshkosh, 81 Wis. 226, s. c. 51 N. W. 256, 257, 42 Am. & Eng. Corp. Cas. 109, 111, citing Elliott on Roads and Streets 646, 647; Dubois *v.* Kingston, 102 N. Y. 219; O'Hagan *v.* Dillon, 76 N. Y. 170; Cleveland., etc., R. Co. *v.* Wynant, 114 Ind. 525, s. c. 5 Am. St. R. 644; Hudson *v.* Chicago, etc., R. Co., 59 Iowa 581, s. c. 8 Am. & Eng. R. Cas. 464; Davis *v.* Oregon, etc., R. Co., 8 Ore. 172; Chicago, etc., R. Co. *v.* Lee, 60 Ill. 501. But see Gordon *v.* Boston, etc., R. Co., 58 N. H. 396; Mobile etc., R. Co. *v.* Ashcraft, 48 Ala. 15. In Birmingham, etc., R. Co. *v.* Alexander, 93 Ala. 133, s. c. 9 So. R. 525, it was held proper to show that others crossed safely about the same time. See, also, Nivette *v.* New Orleans, etc., R. C., 42 La. Ann. 1153, s. c. 8 So. R. 581.

[2] District of Columbia *v.* Armes, 107 U. S. 519; City of Delphi *v.* Lowery, 74 Ind. 520, s. c. 39 Am. R. 98; City of Augusta *v.* Hafers, 61 Ga. 48, s. c. 34 Am. R. 95; City of Chicago *v.* Powers, 42 Ill. 169; Darling *v.* Westmoreland, 52 N. H. 401, s. c. 13 Am. R. 55; Pomfrey *v.* Saratoga Springs, 104 N. Y. 459; Hill *v.* Portland R. Co., 55 Me. 438, s. c. 92 Am. Dec. 601; Elliott on Roads and Streets, 463, 646. But see Collins *v.* Dorchester, 6 Cush. (Mass.) 396; Blair *v.* Pelham, 118 Mass. 420.

[3] Phelps *v.* Winona, etc., R. Co. 37 Minn. 485, s. c. 5 Am. St. R. 867; Kolsti *v.* Minneapolis, etc., R. Co., 32 Minn. 133; Mackie *v.* Central R. Co., 54 Iowa 405, s. c. 6 N. W. R. 723; Hirsch *v.* City of Buffalo, 107 N. Y. 671; City of Chicago *v.* Dalle, 115 Ill. 386, s. c. 5 N. E. R. 578; Chicago, etc., R. Co. *v.* Netolicky, 67 Fed. R. 665; City of Lafayette *v.* Weaver, 92 Ind. 477. So, evidence of the condition of the track near by has been held admissible to show the surroundings as part of the *res gestæ*. Letheraw *v.* St. Joseph, etc., R. Co., 98 Mo. 74, s. c. 14 Am. St. R. 617; Sparbracker *v.* Larrabee, 64 Wis. 573; Armstrong *v.* Ackley, 71 Iowa 76, s. c. 32 N. W. R. 180; City of Aurora *v.* Hillman, 90 Ill. 61. But see Dundas *v.* Lansing, 75 Mich. 499, s. c. 42 N. W. R. 1011; Hiner *v.* Fond du Lac, 71 Wis. 74; Pittsburgh, etc., R. Co. *v.* Williams, 74 Ind. 462; Reed *v.* New York, etc., R. Co., 45 N. Y. 574.

[4] Richards *v.* City of Oshkosh, 81 Wis. 226, s. c. 51 N. W. R. 256, 42 Am. & Eng. Corp. Cas. 109, citing Elliott on Roads and Streets, 650; Sewell *v.* City of Cohoes, 11 Hun (N. Y.) 626; City of Lafayette *v.* Weaver, 92 Ind, 477.

§ 1178. **Collisions with street cars.**—The rules which we have heretofore stated in regard to the respective rights of railroad companies and travelers upon a highway apply as between the railroad company and a street railway company. Their rights and duties are, in a sense, mutual and reciprocal, but the cars of the commercial or steam railroad company have the superior right of way or passage.[1] As to the railroad company the driver or other proper employe of the street car company should exercise the same care as the driver of a private vehicle.[2] But as between the street car company and its passengers, he is required, as in other cases, to exercise the higher care which is due to its passengers by such a carrier.[3] It has been held, however, that the fact that a street car driver has been instructed to obey the signal of a flagman employed by the commercial railroad company does not make such flagman an agent of the street car company so as to render it responsible for his negligence.[4] The contributory negligence of the employes of the street railway company is not to be imputed to a passenger in its car in an action by him against the commercial railroad company for negligently injuring him in a collision.[5] He may maintain an action against either com-

[1] DuBois, etc., R. Co. *v.* Buffalo, etc., R. Co., 10 Pa. Co. Ct. R. 401, affirmed in 149 Pa. St. 1.

[2] Philadelphia, etc., R. Co. *v.* Boyer, 97 Pa. St. 91, s. c. 2 Am. Eng. R. Cas. 172. See, also, Minneapolis St. R. Co. *v.* Chicago, etc., R. Co., 33 Minn. 62, s. c. 19 Am. & Eng. R. Cas. 362.

[3] Philadelphia, etc., R. Co. *v.* Boyer, 97 Pa. St. 91, s. c. 2 Am. & Eng. R. Cas. 172; West Chicago St. R. Co. *v.* Martin, 47 Ill. App. 610. See, also, Central Passenger R. Co. *v.* Kuhn, 86 Ky. 578; Watkins *v.* Atlantic Ave. R. Co., 20 Hun (N. Y.) 237; Smith *v.* St. Paul, etc., R. Co., 32 Minn. 1; Booth on Street Railways, §§ 324, 327, 328; Douglass *v.* Sioux City St. R. Co., 91 Ia. 94, s. c. 58 N. W. R. 1070; Graham *v.* Great Western R. Co., 41 U. C. Q. B. 324.

[4] Chicago R. Co. *v.* Volk, 45 Ill. 175. Compare Philadelphia etc., R. Co. *v.* Boyer, 97 Pa. St. 91.

[5] Gulf, etc., R. Co. *v.* Pendery, 87 Tex. 553, s. c. 29 S. W. R. 1038; Baltimore, etc., R. Co. *v.* State, 79 Md. 335, 47 Am. St. R. 415, and note; Holzab *v.* New Orleans, etc., R. Co., 38 La. Ann. 185; Bennett *v.* New Jersey R. Co., 36 N. J. L. 225, s. c. 13 Am. R. 435; New York, etc., R. Co. *v.* Steinbrenner, 47 N. J. L. 161, s. c. 54 Am. R. 126, and note; Little Rock, etc., R. Co. *v.* Harrell, 58 Ark. 454, s. c. 25 S. W. R. 117; Pittsburgh, etc., R. Co. *v.* Spencer, 98 Ind. 186, s. c. 21 Am. & Eng. R. Cas. 478; Little *v.*

pany by whose negligence he is injured,[1] and if his injury is caused by the concurrent negligence of both of them he is not obliged to sue them severally, but may sue them jointly.[2]

Hackett, 116 U. S. 366, s. c. 6 Sup. Ct. R. 391; Transfer Co. *v.* Kelly, 36 Ohio St. 86, s. c. 38 Am. R. 558; New York, etc., R. Co. *v.* Cooper, 85 Va. 939, s. c. 9 S. E. R. 321, 37 Am. & Eng. R. Cas. 33; note to Gray *v.* Philadelphia, etc., R. Co., 22 Am. & Eng. R. Cas. 351; Elliott on Roads and Streets, 632; Beach on Contrib. Neg., § 110; Booth on Street Railways, § 362. But see Lockhart *v.* Lichtenthaler, 46 Pa. St. 151, with which compare O'Toole *v.* Pittsburgh, etc., R. Co., 158 Pa. St. 99. The same rule obtains where one is riding in the private vehicle of another, and the doctrine of Thorogood *v.* Bryan, 8 C. B. 115, is now denied both in England and in nearly all of the states. The Bernina, L. R. 12 Prob. Div. 58, reported also in note to Borough of Carlisle *v.* Brisbane, 113 Pa. St. 544, 57 Am. R. 483, 494; Masterson *v.* New York, etc., R. Co., 84 N. Y. 247, s. c. 38 Am. R. 510; Robinson *v.* New York, etc., R. Co., 66 N. Y. 11, s. c. 23 Am. R. 1; Town of Knightstown *v.* Musgrove, 116 Ind. 121, s. c. 9 Am. St. R. 827; Philadelphia, etc., R. Co. *v.* Hogeland, 66 Md. 149, s. c. 59 Am. R. 159, 57 Am. R. 492; Louisville, etc., R. Co. *v.* Creek, 130 Ind. 139; Lake Shore, etc., R. Co. *v.* McIntosh, 140 Ind. 261, s. c. 38 N. E. R. 476; Street Railway Co. *v.* Eadie, 43 Ohio St. 91; Nesbit *v.* Garner, 75 Iowa 314, s. c. 39 N. W. R. 516; Roach *v.* Western etc., R. Co., 93 Ga. 785, s. c. 21 S. E. R. 67; Alabama, etc., R. Co. *v.* Davis, 69 Miss. 444, s. c. 13 So. R. 693, and text books above cited. But see Prideaux *v.* City of Mineral Point, 43 Wis. 513, s. c. 28 Am. R. 558; Carlisle *v.* Sheldon, 38 Vt. 440; Lake Shore, etc., R. Co. *v.* Miller, 25 Mich. 274; Mullen *v.* City of Owosso, 100 Mich. 103, s. c. 43 Am. St. R. 436, and note; Whittaker *v.* City of Helena, 14 Mont. 124, s. c. 35 Pac. R. 904. Where, however, he has control and should look out for himself, his failure to do so may prevent a recovery. Brickell *v.* New York, etc., R. Co., 120 N. Y. 290, s. c. 17 Am. St. R. 648; Dean *v.* Pennsylvania R. Co., 129 Pa. St. 514, s. c. 18 Atl. R. 718, 15 Am. St. R. 733; Miller *v.* Louisville, etc., R. Co., 128 Ind. 97, s. c. 25 Am. St. R. 416, and note; Louisville, etc., R. Co. *v.* Stommel, 126 Ind. 35; Yahn *v.* City of Ottumwa, 60 Iowa 429; Galveston, etc., R. Co. *v.* Kutac, 76 Tex. 473, s. c. 13 S. W. R. 327.

[1] Wabash, etc., R. Co. *v.* Shacklet, 105 Ill. 364, s. c. 44 Am. R. 791, and cases cited in following note.

[2] Tompkins *v.* Clay St. R. Co., 66 Cal. 163, s. c. 4 Pac. R. 1165, (may sue both, and, by dismissing as to one which the evidence does not make a case against, recover from the other upon sufficient evidence); Barrett *v.* Third Ave. R. Co., 45 N. Y. 628; Schneider *v.* Second Ave. R. Co., 133 N. Y. 583, s. c. 30 N. E. R. 752; Flaherty *v.* Northern Pac. R. Co., 39 Minn. 328, s. c. 40 N. W. R. 160; Georgia Pac. R. Co. *v.* Hughes, 87 Ala. 610, s. c. 6 So. R. 413; Cuddy *v.* Horn, 46 Mich. 596, s. c. 41 Am. R. 178; Colegrove *v.* New York, etc., R. Co., 20 N. Y. 492, s. c. 75 Am. Dec. 418, and note; Louisville, etc., R. Co. *v.* Case, 9 Bush. (Ky.) 728; Downey *v.* Philadelphia, etc., R. Co., 161 Pa. St. 588, s. c. 29 Atl. R. 126, s. c. 58 Am. & Eng. R. Cas. 594. But where both companies were in fault it was held that neither could recover against

§ 1179. **Directing a verdict in crossing cases.**—Where there is an omission of the duty of the traveler to look and listen before attempting to cross a railroad track the general rule is that it is the duty of the trial court to direct a verdict for the defendant.[1] In such cases the duty of the traveler is definitely fixed by law and there is no question of fact to be submitted to the jury.[2] There may be cases where the facts are such that it

the other and that the jury in returning a verdict against both could not at the same time return a verdict over in favor of one of them against the other. Texas, etc., R. Co. *v.* Doherty, (Tex. App.), 15 S. W. R. 44.

[1] Braudy *v.* Detroit, etc., R. Co., (Mich.) 64 N. W. R. 1056; Gardner *v.* Detroit, etc., Railroad Co., 97 Mich. 240, 56 N. W. R. 603; Blount *v.* Grand Trunk, etc., R. Co., 61 Fed. R. 375; (citing Union Pac. Railway Co. *v.* McDonald, 152 U. S. 262, s. c. 14 Sup. Ct. R. 619; Delaware, etc., Railroad Co. *v.* Converse, 139 U. S. 469, s. c. 11 Sup. Ct. R. 569; Elliott *v.* Chicago, etc., Railway Co., 150 U. S. 245, s. c. 14 Sup. Ct. R. 85.) The rule in relation to directing a verdict was thus stated in North Pennsylvania R. Co. *v.* Commercial Bank, 123 U. S. 727, 733, s. c. 8 Sup. Ct. R. 266: "It would be an idle proceeding to submit the evidence to the jury when they could justly find only in one way." See, also, Schofield *v.* Chicago, etc., Railway Co., 114 U. S. 615, 618, s. c. 5 Sup. Ct. R. 1125; Randall *v.* Baltimore, etc., Railroad Co., 109 U. S. 478, 482, s. c. 3 Sup. Ct. R. 322; Oleson *v.* Lake Shore, etc., R. Co., 143 Ind. 405, s. c. 42 N. E. R. 736, (citing Elliott's Gen. Practice, § 889); Grippen *v.* New York, etc., R. Co., 40 N. Y. 34, 47; Heaney *v.* Long Island, etc., R. Co., 112 N.Y.122; McCrory *v.* Chicago, etc., R. Co., 31 Fed. R. 531; Cordell *v.* New York, etc., R. Co., 70 N. Y. 119, 125; Sala *v.* Chicago, etc., R. Co., 85 Iowa 678, s. c. 52 N. W. R. 664. The cases of Nixon *v.* Chicago, etc., R. Co., 84 Iowa 331, s. c. 51 N. W. R. 187, and Shufelt *v.* Flint, etc., R. Co., 96 Mich. 327, s. c. 55 N. W. R. 1013, supply apt examples of the duty of the court to direct a verdict.

[2] Beach on Contributory Negligence, (2nd ed.), § 180. In Hollinger *v.* Canadian, etc., R. Co., 20 Ont. App. 244, s. c. 55 Am. & Eng. R. Cas. 269, s. c. 21 Ont. App. 705, 55 Am. & Eng. R. Cas. 192, a somewhat different view is taken, but it is difficult to reconcile that view with the doctrine of the English courts. Davey *v.* London, etc., R. Co., L. R. 11 Q. B. D. 213, L. R. 12 Q. B. D. 70; Scott *v.* Dublin, etc., R. Co., 11 Irish C. L. 377. The conclusion asserted in the case first cited is certainly in conflict with the great number of cases which hold that the negligence of the defendant does not absolve the plaintiff from the duty of exercising ordinary care. The true rule is that laid down in Grippen *v.* New York, etc., R. Co., 40 N. Y. 34, where it was held that: "The law will not permit a party to neglect his own means of self preservation on the plea that he assumed that other parties would be duly careful, and for that reason subject himself to injury, which by due care he might nevertheless have avoided. The right to assume that others will perform their duty to be duly careful does not war-

would not be proper for the court to direct a verdict although the plaintiff did not look and listen, as for instance, where, without any fault, he was misled by the negligent acts of the company, and so, on the other hand, there may be cases where it would be proper to direct a verdict, although the plaintiff did look and listen, as, for instance, where he looked and listened from a place where looking and listening would be of no avail.

rant him in omitting due precautions. On the contrary, such an omission makes the negligence of both concur in producing the result." See, also, McGrath *v.* New York, etc., R. Co., 59 N. Y. 468, 473.

CHAPTER XLVII.

DUTY TO FENCE.

§ 1180. Common law rule.
1181. Statutory duty to fence.
1182. Statutes rest upon police power.
1183. Constitutionality of statutes imposing duty to fence.
1184. Kind of fence required.
1185. Repair of fences—Casualties and trespassers.
1186. Transfer of duty to fence.
1187. Fences erected by land-owner.
1188. Agreement to fence.
1189. Waiver of duty to fence.
1190. To whom duty to fence is owing.
1191. Injuries to passengers resulting from neglect of duty to fence.
1192. Injuries to employes resulting from neglect of duty to fence.
1193. Places allowed to remain unfenced — Highways and crossings.
1194. Fences at depot and station grounds.
1195. Fences in cities, towns and villages.
1196. Fences at embankments.
1197. Fences at oblique approaches to highways.
1198. Cattle-guards.
§ 1199. Wing fences.
1200. Gates and bars.
1201. Place of entry of animals on railway track.
1202. Determining places where fences required—Questions of law and fact.
1203. Injuries to animals on highway.
1204. Rate of speed — Stopping train.
1205. Duty to look out for animals.
1206. Signals.
1207. Actual collision with animal —Injuries caused by fright.
1208. Liability of lessees, mortgagees and receivers.
1209. Contributory negligence.
1210. Animals abandoned by their owner.
1211. Animals attracted to railroad tracks.
1212. Ownership of animals.
1213. Presumption of negligence.
1214. Burden of proof—Evidence.
1215. Pleading and practice.
1216. Notice and demand for damages.
1217. Appraisement of damages.
1218. Measure of damages.
1219. Double damages.
1220. Attorney's fees.

§ 1180. **Common law rule.**—At common law, as it existed in England and in a great number of states in this country, the owner of animals is bound, at his peril, to keep them con-

fined on his own premises.[1] If he does not keep them so confined and they escape to the premises of others he may be held liable for the trespass.[2] No person is obliged, according to the common law rule, to fence his premises against the animals of others but has a right to rely on others performing their duty by keeping their animals confined. Since this rule is applicable to all owners of property it follows that at common law railway companies are not bound to fence their tracks so as to prevent animals from entering thereon.[3] If animals escape from their owner's premises and find their way onto the right of way of a railway company and are injured the railway company is not liable at common law unless the injuries inflicted on the animals are the result of wantonness or wilfulness on the part of the railway employes.[4] If the injur-

[1] 3 Blackst. Com., 211; Rust *v.* Low, 6 Mass. 90; Bostwick *v.* Minneapolis, etc., Co., 2 N. Dak. 440, 49 Am. & Eng. R. Cas. 527.

[2] Savannah, etc., Co. *v.* Geiger, 21 Fla. 669.

[3] Cornwall *v.* Sullivan, etc., Co., 28 N. H. 161; Hurd *v.* Rutland, etc., Co., 25 Vt. 116; Boston, etc., Co. *v.* Briggs, 132 Mass. 24, 7 Am. & Eng. R. Cas. 541; Eames *v.* Salem, etc., Co., 98 Mass. 560; Stucke *v.* Milwaukee, etc., Co., 9 Wis. 202; Perkins *v.* Eastern, etc., Co., 29 Me. 307; Morse *v.* Rutland, etc., Co., 27 Vt. 49; Chapin *v.* Sullivan, etc., Co., 39 N. H. 53; Tower *v.* Providence, etc., Co., 2 R. I. 404; Pennsylvania Co. *v.* Riblet, 66 Pa. St. 164; Indianapolis, etc., Co. *v.* Harter, 38 Ind. 557; Bostwick *v.* Minneapolis, etc., Co., 2 N. Dak. 440, 49 Am. & Eng. R. R. Cas. 527; Baltimore, etc., Co. *v.* Lamborn, 12 Md. 257; Robinson *v.* Flint, etc., Co., 79 Mich. 323; Henry *v.* Dubuque, etc., Co., 2 Iowa 288; North Eastern, etc., Co. *v.* Sineath, 8 Rich. (S. Car.) 185.

[4] Maynard *v.* Boston, etc., Co., 115 Mass. 458; Williams *v.* Michigan, etc., Co., 2 Mich. 259; Halloran *v.* New York, etc., Co., 2 E. D. Smith, 257; Bennett *v.* Chicago, etc., Co., 19 Wis. 145; Vandegrift *v.* Rediker, 22 N. J. L. 185; Woolson *v.* Northern, etc., Co., 19 N. H. 267; Spinner *v.* New York, etc., Co., 67 N. Y. 153; Indianapolis, etc., Co. *v.* Harter, 38 Ind. 557; Stucke *v.* Milwaukee, etc., Co., 9 Wis. 202; Louisville, etc., Co. *v.* Ballard, 2 Metc. (Ky.) 165; Tower *v.* Providence, etc., Co., 2 R. I. 404; Perkins *v.* Eastern, etc., Co., 29 Me. 307; Railroad Co. *v.* Skinner, 19 Pa. St. 298; Pittsburgh, etc., Co. *v.* Stuart, 71 Ind. 500; Atchison, etc., Co. *v.* Betts, 10 Colo. 431, 31 Am. & Eng. R. R. Cas. 563; Drake *v.* Philadelphia, etc., Co., 51 Pa. St. 240; Central Branch, etc., Co. *v.* Lea. 20 Kan. 353; International, etc., Co. *v.* Cocke, 64 Tex. 151, s. c. 23 Am. & Eng. R. R. Cas. 226; Denver, etc., Co. *v.* Olsen, 4 Colo. 239; Fisher *v.* Farmers', etc., Co., 21 Wis. 73; Price *v.* New Jersey, etc., Co., 32 N. J. L. 19; Darling *v.* Boston, etc., Co., 121 Mass. 118; Jeffersonville, etc., Co. *v.* Underhill, 48 Ind. 389. The rule is thus stated in the recent case of Moses

ies sustained by the animals are caused by mere negligence on the part of the company or its employes the company is not, ordinarily, liable where this rule obtains, although there are some authorities which hold that if the company is guilty of negligence even where the common law rule is in force, it will be liable.[1] The weight of authority is to the effect, however, that it is liable only for wilfulness or gross negligence amounting to wantonness. Since such animals as find their way onto the premises of a railway company are wrongfully there, being trespassers, it follows that if they cause any injury to the trains of the railway company their owner will be liable for such injuries.[2] In a number of states in this country, however, the strict rule of the common law requiring the owner of animals to keep them confined has not been adopted.[3]

v. Southern Pacific R. Co., 18 Ore. 385, 42 Am. & Eng. R. Cas. 555: "As the plaintiff is bound at common law to keep his cattle within his own enclosure, and is liable for all damages done by them when they stray upon the lands of others, he is the party in fault, and it results, if he suffers them to stray upon the track of a railroad, they are there without right, and as trespassers, through his wrongful conduct, and, if injured or killed by the negligence of the railroad or its agents, in the management of its train, he must abide the consequences, upon the ground that the defendant company owes no duty of care to trespassing cattle on their tracks, except not wantonly or wilfully to destroy them, and that, in permitting the cattle to be at large wrongfully or by his own fault, he has contributed to produce the injury of which he complains, and is precluded from a recovery. When such a state of facts exists, nothing but wilfulness on the part of the agents of the company, or, as the authorities sometimes put it, such negligence as would amount to wilfulness, would make the company liable in damages for the killing of cattle upon their tracks, so exposed by the fault of their owner."

[1] Gorman *v.* Pacific, etc., R. Co., 26 Mo. 441; Isbell *v.* New York, etc., R. Co., 27 Conn. 393; Rockford, etc., R. Co. *v.* Irish, 72 Ill. 404; McCoy *v.* California, etc., R. Co., 40 Cal. 532; Vicksburg, etc., R. Co. *v.* Patton, 31 Miss. 156; Trout *v.* Virginia, etc., R. Co., 23 Gratt. (Va.) 619; South, etc., R. Co. *v.* Williams, 65 Ala. 74; Kentucky, etc., R. Co. *v.* Lebus, 14 Bush. 518; Needham *v.* San Francisco, etc., R. Co., 37 Cal. 409; Witherell *v.* Milwaukee, etc., R. Co., 24 Minn. 410; Cincinnati, etc., R. Co. *v.* Smith, 22 Ohio St. 227; Jackson *v.* Rutland, etc., Co., 25 Vt. 150.

[2] Child *v.* Hearn, L. R. 9 Exch. 176; Annapolis, etc., R. Co. *v.* Baldwin, 60 Md. 88, 45 Am. R. 711; Housatonic, etc., R. Co. *v.* Knowles, 30 Conn. 313; Sinram *v.* Pittsburgh, etc., R. Co., 28 Ind. 244; Railroad Co. *v.* Skinner, 19 Pa. St. 298; Hannibal, etc., R. Co. *v.* Kenney, 41 Mo. 271; Drake *v.* Philadelphia, etc., Co., 51 Pa. St. 240.

[3] Louisville, etc., R. Co. *v.* Cochran,

The rigidity of the rule has been greatly relaxed in several jurisdictions and where it is the general custom to permit cattle and other animals to run at large on uninclosed lands it is held that an owner is guilty of no wrong in not keeping his animals confined.[1] The modification of the rule has not the

(Ala.) 16 So. R. 797; Campbell *v.* Bridwell, 5 Ore. 311; Moses *v.* Southern Pacific R. Co., 18 Ore. 385, 42 Am. & Eng. R. Cas. 555; Savannah, etc., R. Co. *v.* Geiger, 21 Fla. 669, s. c. 29 Am. & Eng. R. Cas. 274; Alabama, etc., R. Co. *v.* Jones, 71 Ala. 487; Alabama, etc., Co. *v.* McAlpine, 71 Ala. 545; Campbell *v.* New York, etc., R. Co., 50 Conn. 128; Little Rock, etc., R. Co. *v.* Finley, 37 Ark. 562; Blaine *v.* Chesapeake, etc., R. Co., 9 W. Va. 252; Timm *v.* Northern, etc., R. Co., 3 Wash. Ter. 299; Evans *v.* Burlington, etc., R. Co., 21 Iowa 374; Farmer *v.* Wilmington, etc., R. Co., 88 N. Car. 564.

[1] Kerwhaker *v.* Cleveland, etc., R. Co., 3 Ohio St. 172, s. c. 62 Am. Dec. 246; Central Ohio, etc., R. Co. *v.* Lawrence, 13 Ohio St. 66. The reason for the modification of the rule is thus stated in Kerwhaker *v.* Cleveland, etc., R. Co., 3 Ohio St. 172: "Admitting the rule of the common law of England in relation to cattle and other live stock running at large to be such as stated, the question arises whether it is applicable to the condition and circumstances of the people of this state, and in accordance with their habits, understandings, and necessities. * * * Cattle, hogs, and all other kinds of live stock not known to be breachy and unruly and dangerous, have been allowed at all times and in all parts of the state to run at large and graze on the range of uncultivated and uninclosed lands. And this prevails not only throughout the country, but also in the villages and cities, except where it may be, to a limited extent, restrained by local municipal ordinances. For many years, in the early settled parts of the state, the people were unable, and at the present time in some parts of the state they are yet unable to clear and inclose more ground than that actually needed for cultivation, and there is not at this time inclosed pasture lands sufficient to confine one-half of the live stock in the state. Even a statutory enactment, imposing the severest criminal punishment for permitting these animals to run at large, could not be enforced without either slaughtering or driving a large portion of them from the state. It has been the habit of the people to inclose their grounds for the purpose of cultivation, and to fence against the animals running at large. And it has been only within a few years, and that only in the better improved parts of the state, that uncultivated pasture grounds have been inclosed. And this has not been done because the owners considered themselves required by law to confine their stock within inclosures, but for their own convenience and advantage. So that it has been the general custom of the people of this state, since its first settlement, to allow their cattle, hogs, horses, etc., to run at large and range upon the uninclosed lands of the neighborhood in which they are kept; and it has never been understood by them that they were tort-feasors, and liable in damages for letting their stock thus run at large. The existence or enforcement of such a law would have greatly retarded the settlement of the

effect, however, of requiring owners of premises to fence against animals running at large, in all jurisdictions. Since in many jurisdictions it is held that animals may lawfully be at large it necessarily results that if they enter upon uninclosed premises of third persons they are not necessarily trespassers and their owner is not liable for trespass in such cases. This modification of the common law rule has this effect upon the duty of railway companies to animals upon their tracks: It makes them liable for injuries negligently inflicted where, as we have seen, under the ancient common law rule they were liable only for injuries wantonly or wilfully inflicted.[1] And in such cases the owner of animals is not guilty of contributory negligence in permitting his animals to run at large.[2] But where he allows them to run at large in the immediate vicinity of an uninclosed railroad he can not, perhaps, be said to be exercising such a degree of care as would ordinarily be exercised by a prudent man and there are some authorities which deny his right to recover under such circumstances.[3]

country, and have been against the policy of both the general and the state governments. The common understanding upon which the people of this state have acted since its first settlement has been that the owner of land was obliged to inclose it, with a view to its cultivation; that without a lawful fence he could not, as a general thing, maintain an action for a trespass thereon by the cattle of his neighbor running at large, and that to leave uncultivated lands uninclosed was an implied license to cattle and other stock at large to traverse and graze them. Not only, therefore, was this alleged rule of the common law inapplicable to the circumstances and conditions of the people of this state, but inconsistent with the habits, the interests, necessities and understanding of the people."

[1] Little Rock, etc., Co. *v.* Finley, 37 Ark. 562, s. c. 11 Am. & Eng. R. Cas. 469; Williams *v.* Northern, etc., R. Co., 3 Dak. 168, s. c. 11 Am. & Eng. R. Cas. 421; Savannah, etc., R. Co. *v.* Geiger, 21 Fla. 669; Louisville, etc., R. Co. *v.* Milton, 14 B. Mon. 75; Donovan *v.* Hannibal, etc., R. Co., 89 Mo. 147; Jones *v.* Columbia, etc., R. Co., 20 S. Car. 249; New Orleans, etc., R. Co. *v.* Field, 46 Miss. 573; Georgia, etc., R. Co. *v.* Neely, 56 Ga. 540; Smith *v.* Chicago, etc., R. Co., 34 Iowa 506; Kuhn *v.* Chicago, etc., R. Co., 42 Iowa 420; Mobile, etc., R. Co. *v.* Williams, 53 Ala. 595; Gorman *v.* Pacific, etc., R. Co., 26 Mo. 441.

[2] Matter of Rensselaer, etc., R. Co., 4 Paige 553.

[3] North Pennsylvania, etc., R. Co. *v.* Rehman, 49 Pa. St. 101; Drake *v.* Philadelphia, etc., R. Co., 51 Pa. St. 240.

§ 1181. **Statutory duty to fence.**—As we have seen, at common law no duty rested upon a railway company to fence its track and it was not liable for animals killed or injured upon its tracks merely because it failed to erect fences. And this is true even in many states in which the ancient common law rule is not adopted or followed. There are some authorities, however, which seem to hold that a railway company is obliged to fence its track independent of statutory enactment,[1] but the overwhelming weight of authority is that such duty exists only as a result of legislative enactments.[2] Although it is not bound to fence at common law, yet if a company fails to do so it will be held to a greater degree of care in the management of its trains than if its tracks were fenced.[3] There now exist in nearly all of the states statutes imposing the duty upon a railway company to fence both sides of its right of way at all points where inconvenience will not result to the public or to the company in the transaction of its business.[4] Such statutes are not construed so as to have a retrospective effect,[5] but they generally apply to roads already constructed at the time of their passage,[6] unless it is clear that they are intended only to be applicable to roads thereafter to be constructed.[7] These

[1] Trow *v.* Vermont, etc., Co., 24 Vt. 487; Quimby *v.* Vermont, etc., Co., 23 Vt. 387.

[2] Campbell *v.* New York, etc., Co., 50 Conn. 128, s. c. 13 Am. & Eng. R. R. Cas. 589; Clark *v.* Ohio, etc., Co. 34 W. Va. 200, 45 Am. & Eng. R. Cas. 475; Blaine *v.* Chesapeake, etc., Co., 9 W. Va. 252.

[3] Morss *v.* Boston, etc., Co., 2 Cush. 536; Joliet, etc., Co. *v.* Jones, 20 Ill. 221; Atlantic, etc., Co. *v.* Burt, 49 Ga. 606; Memphis, etc., Co. *v.* Orr, 43 Miss. 279; Boston, etc., Co. *v.* Briggs, 132 Mass. 24, 7 Am. & Eng. R. Cas. 541; Kerwhacher *v.* Cleveland, etc., Co., 3 Ohio St. 172; Fernon *v.* Dubuque, etc., Co., 22 Iowa 528; Macon, etc., Co. *v.* Vaughn, 48 Ga. 464; Vicksburg, etc., Co. *v.* Patton, 31 Miss. 156; New Orleans, etc., Co. *v.* Field, 46 Miss. 573; Gorman *v.* Pacific, etc., Co., 26 Mo. 441.

[4] Moses *v.* Southern Pacific Co. 18 Ore. 385, 42 Am. & Eng. R. Cas. 555; Donegan *v.* Erhardt, 119 N.Y. 468, 42 Am. & Eng. R. Cas. 580.

[5] Girtman *v.* Central, etc., Co., 1 Ga. 173; Stearns *v.* Old Colony, etc., Co., 1 Allen 493. They apply only to animals killed after the passage of the law. Indianapolis, etc., Co. *v.* Kercheval, 16 Ind. 84.

[6] Boston, etc., Co. *v.* Briggs, 132 Mass. 24; Galena, etc., Co. *v.* Crawford, 25 Ill. 529; Shurley *v.* New York, etc., Co. (Pa. St.) 15 Atl. R. 567.

[7] Sawyer *v.* Vermont, etc., Co., 105 Mass. 196; Baxter *v.* Boston, etc., Co., 102 Mass. 383.

statutes usually apply to companies from the time they begin to run trains,[1] but in some states a specified time is given the company after the completion of its road in which to construct fences. And if injuries occur before the expiration of the time allowed the company in which to fence its track its liability will be governed by the principles of the common law,[2] but after the expiration of such time the liability will be governed by the provisions of the statute.[3] While the duty rests upon the company to fence its track there is some question as to whether the company can be made to perform that duty by an individual. Since the company is liable for all damages which result from its failure to perform its duty in regard to fencing the track it is argued that this is a sufficient remedy for aggrieved persons. The consequent liability for a failure to perform its duty to fence may be sufficient to compel the performance of the duty, but there are cases in which resort has been had to the courts to compel the company to properly fence its track. It has been held that mandamus is a proper remedy to compel the peformance of this duty.[4] In some of the statutes provision is made by which land-owners may, after notice to a railway company and its refusal to construct a fence, build the fence and recover the cost from the railway company.[5] As to the liability of a company for its failure to fence its track the general rule is that where animals come upon the track by reason of there being no proper fence and are injured the company is liable irrespective of the manner in which it operates its

[1] Baltimore, etc., Co. *v.* McClellan, 59 Ind. 440; Holden *v.* Rutland, etc., Co., 30 Vt. 297; Clark *v.* Vermont, etc., Co. 28 Vt. 103; Comings *v.* Hannibal, etc., Co., 48 Mo. 512; Continental, etc., Co. *v.* Ives, 30 Mich. 448; Silver *v.* Kansas City, etc., Co., 78 Mo. 528, s. c. 19 Am. & Eng. R. Cas. 642.

[2] Rockford, etc., Co. *v.* Connell, 67 Ill. 216; Gilman, etc., Co. *v.* Spencer, 76 Ill. 192; McCall *v.* Chamberlain, 13 Wis. 637.

[3] Toledo, etc., Co. *v.* Crane, 68 Ill. 355; Peoria, etc., Co. *v.* Barton, 80 Ill. 72. See, also, Cincinnati, etc., Co. *v.* Harris, 61 Ind. 290, where the time in which to construct a fence was fixed by agreement between the company and a land-owner conveying a right of way.

[4] People *v.* Rochester, etc., Co., 76 N. Y. 294, s. c. 14 Hun 371; Ohio, etc., Co. *v.* People, 121 Ill. 483, 30 Am. & Eng. R. Cas. 427.

[5] Welles *v.* Northern Central, etc., Co., 150 Pa. St. 620.

trains.[1] Negligence in failing to fence is the gist of the action and where it is shown that the animals entered upon the track where it was not properly fenced a *prima facie* case is made out,[2] and it has been held that a railway company is liable in damages because it fails to fence, thus rendering an abutting farm less valuable.[3] Where a railway was built through a fenced pasture and the company failed to fence its track thus compelling the owner of the pasture to keep watch over his cattle to prevent them from destroying his other crops and from trespassing on the lands of others it was held that he was entitled to recover from the railway company reasonable compensation for his extra efforts necessitated in the care of his cattle.[4] Where the duty rests upon the company to fence its track the company must, as a general rule, erect the fences along the margin or border of the entire right of way.[5]

§ 1182. **Statutes rest upon police power.**—The running of railway trains and locomotives is necessarily attended with many dangers. This results from the great force used, the large bodies placed in motion, and the rapidity with which trains are run. The object of a railway being the carrying of passengers and freight from place to place, and as the performance of such an object is necessarily attended with many dangers, it follows that every practicable safe-guard should be

[1] Blair *v.* Milwaukee, etc., Co., 20 Wis. 254; Toledo, etc., Co. *v.* Lavery, 71 Ill. 522; Hindman *v.* Oregon, etc., Co., 17 Ore. 614, s. c. 38 Am. & Eng. R. Cas. 310; Chicago, etc., Co. *v.* James, 26 Neb. 194, 41 N. W. R. 993; Minneapolis, etc., Co. *v.* Beckwith, 129 U. S. 26; McDonnell *v.* Pittsfield, etc., Co., 115 Mass. 564; Keliher *v.* Connecticut, etc., Co., 107 Mass. 411; Jacksonville, etc., Co. *v.* Harris, 33 Fla. 217, s. c. 61 Am. & Eng. R. Cas. 379; Hill *v.* Missouri, etc., Co., 121 Mo. 477, s. c. 61 Am. & Eng. R. Cas. 412.

[2] Missouri, etc., Co. *v.* Bradshaw, 33 Kan. 533; Missouri, etc., Co. *v.* Baxter, 45 Kan. 520, 45 Am. & Eng. R. Cas. 471; Eaton *v.* Oregon, etc., Co., 19 Ore. 391, 24 Pac. R. 415, 45 Am. & Eng. R. Cas. 481; Wadsworth *v.* Union, etc., Co., 18 Colo. 600, s. c. 56 Am. & Eng. R. Cas. 145.

[3] Nelson *v.* Minneapolis, etc., Co. 41 Minn. 131, 40 Am. & Eng. R. Cas. 234; Emmons *v.* Minneapolis, etc., Co., 38 Minn. 215, s. c. 35 Am. & Eng R. Cas. 126.

[4] Nelson *v.* St. Louis, etc., Co., 49 Kan. 165.

[5] Ohio, etc., R. Co. *v.* People, 121 Ill. 483; Gould *v.* Great Northern R. Co. (Minn.) 65 N. W. R. 125.

used and every precaution taken to prevent injury to persons or property carried. One of the sources of danger to railway trains is from collisions with animals on the track. Such danger has been recognized by nearly all of our state legislatures and their statutory enactments are for the purpose of reducing this danger as much as possible. Where any particular kind of property is inherently dangerous, or the operation of certain property is necessarily dangerous, it is within the power of the state under what is called its police power to prescribe such regulations in the use of such property as will render consequent danger as small as possible. Since imposing upon railway companies the duty of fencing their tracks is for the sole purpose of lessening the danger in running trains it is held that the enactment of such fencing statutes is a valid exercise of the police power and it is upon that power that such statutes rest.[1]

[1] Wadsworth *v.* Union Pacific Co., 18 Colo. 600, s. c. 56 Am. & Eng. R. Cas. 145; Thorpe *v.* Rutland Railroad Co., 27 Vt. 140; Illinois, etc., R. Co. *v.* Crider, 91 Tenn. 489, s. c. 56 Am. & Eng. R. Cas. 157; Gorman *v.* Pacific Railway Co., 26 Mo. 441; Wilder *v.* Maine, etc., Railroad Co., 65 Me. 332; Small *v.* Chicago, etc., Railroad Co., 50 Iowa 338; Missouri, etc., Co. *v.* Humes, 115 U. S. 512, s. c. 22 Am. & Eng. R. Cas. 557; Missouri, etc., Railway Co. *v.* Harrelson, 44 Kan. 253, s. c. 24 Pac. R. 465; Missouri, etc., Co. *v.* Eckel, 49 Kan. 794, s. c. 56 Am. & Eng. R. Cas. 174; Corwin *v.* New York, etc., Co., 13 N. Y. 42; Blair *v.* Milwaukee, etc., Co., 20 Wis. 254; Indianapolis, etc., Co. *v.* Parker, 29 Ind. 471; Toledo, etc., Co. *v.* Fowler, 22 Ind. 316; Indianapolis, etc., Co. *v.* Kercheval, 16 Ind. 84; Davis *v.* Hannibal, etc., Co., 19 Mo. App. 425; Minneapolis, etc., Co. *v.* Beckwith, 129 U. S. 26, s. c. 38 Am. & Eng. R. Cas. 267; Missouri, etc., Co. *v.* Roads, 33 Kan. 640, 23 Am. & Eng. R. Cas. 165; Campbell *v.* New York, etc., Co., 50 Conn. 128, s. c. 13 Am. & Eng. R. Cas. 89. In Sullivan *v.* Oregon, etc., Co. 24 Ore. 408, 42 Am. & Eng. R. Cas. 625, it is said: "That the legislature, in the exercise of the police power of the state, may require all railroads to fence their track, and for neglect or failure to perform this duty render them liable for whatever injury is done, or for double the value of the stock killed, and that such legislation is not obnoxious to the clause of the constitution in question, has been frequently decided, and can not be questioned. The danger attending the running of steam railway cars, and liability to serious injury or loss of life of its passengers by collisions with animals straying upon its track where allowed to roam at large, makes it a requirement of duty to exercise the utmost care, and to take every precaution to keep its track clear, so as to prevent accidents from such collisions. How can this be better done, and the track kept

§ 1183. **Constitutionality of statutes imposing duty to fence.**—Legislative enactments imposing upon railway companies the duty to fence their tracks usually impose burdens in addition to the mere duty to fence. While, perhaps, the statutes of no two states are alike, among all the statutes of the different states will be found many provisions imposing different burdens upon the company. Besides the duty to fence will be found provisions rendering the company liable for double damages, for the plaintiff's attorney fee, changing the burden of proof, requiring signals, and imposing absolute liability. The question of the constitutionality of these statutes and their various provisions has been presented and decided in many cases, and some of the provisions have been held constitutional and some unconstitutional. A provision merely requiring the company to fence and rendering it liable for negligence in failing to do so is constitutional.[1] Such a provision is, as we have seen, a valid exercise of the police power and on that ground its constitutionality is upheld.[2] Where a

comparatively secure from stock going upon it, than by requiring the railroad company to fence its track, and in default thereof, to hold it liable for the value of the stock killed by such collision, when the plaintiff is not contributorily negligent. Such a precaution, where stock is allowed to run at large, is a police regulation, and as a security against the loss of life and property in the operation of dangerous machinery, is based upon the same principle, and finds its authority in the same power, which regulates the storage of gunpowder or other dangerous explosives. This being so, the legislature may require railroad companies to inclose their tracks with fences, and provide that they may be held liable for all stock killed, caused by their neglect to maintain such fences; and, if the act in question has imposed this duty on the defendant, and attached a liability for its neglect, it is a valid exercise of the police power, and not subject to the constitutional objection urged." See, also, Jolliffe *v.* Brown, (Wash.) 44 Pac. R. 149.

[1] Chicago, etc., R. Co. *v.* Dumser, 109 Ill. 402; Kansas, etc., R. Co. *v.* Mower, 16 Kan. 573; Thorpe *v.* Rutland, etc., R. Co., 27 Vt. 140; Railroad Co. *v.* Crider, 91 Tenn. 489; Blair *v.* Milwaukee, etc., Railroad Co., 20 Wis. 254; Pennsylvania Railroad Co. *v.* Riblet, 66 Pa. St. 164; Small *v.* Chicago, etc., Railroad Co., 50 Iowa 338; Missouri, etc., R. Co. *v.* Harrelson, 44 Kan. 253, 45 Am. & Eng. R. Cas. 457; Ohio, etc., R. Co. *v.* McClelland, 25 Ill. 140; Schmidt *v.* Milwaukee, etc., R. Co., 23 Wis. 186; Louisville, etc., R. Co. *v.* Belcher, 89 Ky. 193, 40 Am. & Eng. R. Cas. 228.

[2] *Ante*, § 1182; Hayes *v.* Michigan, etc., Railroad Co., 111 U. S. 228; Barnett *v.* Atlantic, etc., Railroad Co., 68

statute provided that a railway company should be required to put in fences and cattle guards when the land-owner, through whose lands the right of way passed, demanded it, it was held not to be unconstitutional on the ground that it made the land-owner sole judge of the necessity of the fence.[1] Statutes frequently provide that a railway company killing stock shall be liable for double damages where the stock was killed because of the failure of the company to discharge its duty to fence. Such statutes are not unconstitutional on the ground that they deny to companies the equal protection of the laws or deprive them of their property without due process of law.[2] Double damages are imposed in the nature of a penalty for a failure to perform a statutory duty and it is held that the legislature may prescribe to what extent such damages may be awarded.[3] And a provision that the plaintiff may recover a reasonable attorney's fee in addition to the actual damage done has also been held constitutional in some jurisdictions.[4] In some of the

Mo. 56; Cairo, etc., Railroad Co. *v.* Peoples, 92 Ill. 97; Dacres *v.* Oregon, etc., Navigation Co., 1 Wash. St. 525; Wilder *v.* Maine, etc., Railroad Co., 65 Me. 332. "Authority for exacting it (the duty to fence) is found in the general police power of the state to provide against accidents to life and property in any business or employment, whether under the charge of private persons or of corporations. Under this power the state, or the municipality exercising a delegated authority, prescribes the manner in which buildings in cities shall be constructed, and the thickness and height of their walls; excludes the use of all inflammable materials, forbids the storage therein of powder, nitroglycerine and other explosive substances, and compels the removal of decayed vegetable and animal matter, which would otherwise infect the air and engender disease. In few instances could the power be more wisely or beneficently exercised than in compelling railroad corporations to enclose their roads with fences, having gates at crossings, and cattle guards. The speed and momentum of the locomotive render such protection against accident in thickly settled portions of the country absolutely essential." Missouri, etc., R. Co. *v.* Haines, 115 U. S. 512.

[1] Birmingham, etc., Co. *v.* Parsons 100 Ala. 662, 56 Am. & Eng. R. Cas. 223, 27 L. R. R. 263. *Contra* Ohio, etc., R. Co. *v.* Todd (Ky.), 45 Am. & Eng. R. Cas. 461.

[2] Minneapolis, etc., R. Co. *v.* Beckwith, 129 U. S. 26.

[3] Missouri, etc., R. Co. *v.* Haines, 115 U. S. 512; Minneapolis, etc., R. Co. *v.* Beckwith, 129 U. S. 26; Day *v.* Woodworth, 13 How. 363; Phillips *v.* Missouri, etc., R. Co., 86 Mo. 540, 24 Am. & Eng. R. Cas. 368. But see *ante*, § 669.

[4] Perkins *v.* St Louis, etc., R. Co., 103 Mo. 52, 15 S. W. R. 320; Kansas Pacific, etc., R. Co. *v.* Yanz, 16 Kan. 583; Peoria,

states statutes have been passed imposing an absolute liability on railway companies for animals killed or injured on their tracks independent of negligence on the part of the company. Such statutes are unconstitutional for they violate the provision of the constitution against taking property without due process of law,[1] and a statute which provided that when animals were killed on a railway track they should be appraised and their value thus determined should thereupon become due and payable was held unconstitutional in recent cases as denying the right of trial by jury.[2] So, where a statute provided that killing stock by a railway company should be a misdemeanor and subjected the officials of the road to indictment unless the damages were paid within a certain time it was held to be unconstitutional.[3] A statute which provided, however, that absolute liability could be escaped by the erection of a proper fence was upheld as constitutional.[4] Suits for injuries to animals usually fall within general statutes of limitation, but it has been held that a special statute or clause in the charter of a railway company providing that an action for injury to stock shall be brought within a particular time is constitutional.[5] And a statute which changes the rules of evidence by casting the burden of proof upon the defendant to relieve

etc., R. Co. *v.* Duggan, 109 Ill. 537. *Contra*, Wilder *v.* Chicago, etc., R. Co., 70 Mich. 382; Schut *v.* Chicago, etc., Co., 70 Mich. 433; Rinear *v.* Grand Rapids, etc., R. Co., 70 Mich. 620. See *post*, § 1220.

[1] Oregon, etc., R. Co. *v.* Smalley, 1 Wash. 206, 42 Am. & Eng. R. Cas. 550; Bielenberg *v.* Montana, etc., R. Co., 8 Mont. 271, 38 Am. & Eng. R. Cas. 275; Jensen *v.* Union, etc., R. Co., 6 Utah 253; Cateril *v.* Union, etc , R. Co., 2 Idaho 540, 21 Pac. R. 416; Dacres *v.* Oregon, etc., R. Co., 1 Wash. 525, 20 Pac. R. 601; Zeigler *v.* South, etc , R. Co., 58 Ala. 594; Memphis, etc., Co. *v.* Lyon, 62 Ala. 71; Thompson *v.* Northern, etc., R. Co , 8 Mont. 279; Denver, etc., R. Co. *v.* Outcalt, 2 Colo. App. 395; Birmingham, etc., R. Co. *v.* Parsons, 100 Ala. 662, 27 L. R. A. 263; Denver, etc., R. Co. *v.* Wheatley (Colo. App.), 43 Pac. 450.

[2] Dacres *v.* Oregon, etc., R. Co., 1 Wash. 525, 20 Pac. R. 601; Graves *v.* Northern, etc., R. Co., 5 Mont. 556, s. c. 51 Am. R. 81.

[3] State *v.* Divine, 98 N. Car. 778.

[4] Kansas, etc., R. Co. *v.* Mower, 16 Kan. 573.

[5] O'Bannon *v.* Louisville, etc., R. Co., 8 Bush. 348; Mortimer *v.* Louisville, etc., R. Co., 10 Bush. 485; Lucas *v.* Kentucky, etc., R. Co. (Ky.), 45 Am. & Eng. R. Cas. 520.

itself of the *prima facie* case arising from proof of the killing has also been held constitutional.[1]

§ 1184. **Kind of fence required.**—Since railway companies are required to fence their tracks it necessarily follows, that, in order to make the performance of the duty to fence meet the objects which it was intended to accomplish, there must be some rule prescribing what kind of a fence shall be built. Some of the statutes imposing the duty to fence define what kind of a fence shall be deemed sufficient, and in such cases the company is bound to construct such a fence as that prescribed by the statute.[2] Where a railway fence statute is silent as to the kind of fence that shall be constructed it is held that a company is bound to construct such a fence as required by general fence laws,[3] or such a one as a good husbandman generally keeps in the vicinity where the fence is required.[4] Where no certain kind of fence is required by statute or general fence laws the kind of fence may be determined by agreement between the parties,[5] and in some cases where the statute

[1] Lucas *v.* Kentucky, etc., R. Co. (Ky.), 45 Am. & Eng. R. Cas. 520.

[2] Lee *v.* Minneapolis, etc., R. Co., 66 Iowa 131; Chicago, etc., R. Co. *v.* James, 26 Neb. 194, s. c. 41 N. W. R. 993; Brown *v.* Milwaukee, etc., R. Co., 21 Wis. 39; Chicago, etc., R. Co. *v.* Umphenour, 69 Ill. 198; Bay City, etc., R. Co. *v.* Austin, 21 Mich. 390.

[3] Toledo, etc., R. Co. *v.* Thomas, 18 Ind. 215; Enright *v.* San Francisco, etc., R. Co., 33 Cal. 230; King *v.* Chicago, etc., R. Co., 79 Mo. 328; Halverson *v.* Minneapolis, etc., R. Co., 32 Minn. 88, s. c. 19 Am. & Eng. R. Cas. 526.

[4] Toledo, etc., R Co. *v.* Thomas, 18 Ind. 215; Ferris *v.* Van Buskirk, 18 Barb. 397; Eames *v.* Salem, etc., R. Co., 98 Mass. 560; Bronson *v.* Coffin, 108 Mass. 175. "The requirement is that the railroad company shall be liable if it fails to fence its road against live stock running at large. This means such a fence as is reasonably sufficient to prevent live stock from going upon the track. The term 'fence' has a signification and meaning well understood in the law, as well as in common parlance. It does not mean an impassable barrier, or such a structure as is absolutely insurmountable by any live stock, however breachy or vicious the animals may be. Farmers, or others, desiring to protect their lands and crops from the incursions of live stock, erect such fences as are reasonably sufficient for that purpose; and we think that where there is a requirement to erect fences, such as are usually understood to be sufficient must be held to have been in the mind of the legislature." Shellabarger *v.* Chicago, etc., R. Co., 66 Iowa 18, 19 Am. & Eng. R. Cas. 527.

[5] Enright *v.* San Francisco, etc., R. Co., 33 Cal. 230; Ellis *v.* London, etc., R. Co., 2 H. & N. 424. That is, the

does not require a particular kind of fence such fences as are required as division fences between different land-owners are adopted as the standard.[1] Fences are not required to be such that they shall prove to be barriers under exceptional or unusual circumstances. If they are such as confine cattle or animals of ordinary disposition they will be deemed sufficient. If animals are breachy or become restive because of lack of food furnished them by the owner and get on the track and are injured because of such disposition to be breachy or because of such restiveness the company will not be liable.[2] A bluff, embankment or hedge may be a sufficient fence if it is as effective to prevent the entry of animals as an artificial fence.[3] Fences may ordinarily be erected of any material used for fences. They may be erected of wire,[4] but as a wire fence, if a barbed one, is dangerous to animals, the company may be liable for injuries to animals caused by running against the fence.[5] If, however, it appears that wire fences such as that erected by the company are in general use in the vicinity we do not believe the company would be liable for injuries caused by animals running against such a fence unless there was some negligence on the part of the company.[6] Where the fence attempted to be erected by a railway company is such that it will cause injury to the lands of an adjoining proprietor its erection may be enjoined. Thus, where the company commenced to plant a row of willows along its right of way, expecting them to serve as a fence and as posts on which to nail boards, an adjoining land-owner was granted an injunction on showing that the roots of the willows would extend into his

owner of the stock can not complain if the fence is such as was agreed upon between him and the company.

[1] Corwin *v.* New York, etc., R. Co., 13 N. Y. 42; Davidson *v.* Michigan, etc., R. Co., 49 Mich. 428.

[2] Toledo, etc., R. Co. *v.* Thomas, 18 Ind. 215; Chicago, etc., R. Co. *v.* Utley, 38 Ill. 410.

[3] Hilliard *v.* Chicago, etc., R. Co., 37 Iowa 442.

[4] Halverson *v.* Minneapolis, etc., R. Co., 32 Minn. 88, 19 Am. & Eng. R. Cas. 526.

[5] Atlanta, etc., R. Co. *v.* Hudson, 62 Ga. 679; Gould *v.* Bangor, etc., R. Co., 82 Me. 122.

[6] Guilfoos *v.* New York, etc., R. Co., 69 Hun 593, 23 N. Y. Supp. 925. See Perkins *v.* St. Louis, etc., R. Co., 103 Mo. 52, 15 S. W. R. 320.

soil and destroy its usefulness.[1] When the company is required to fence the fence must be reasonably sufficient to protect all domestic animals, and swine fall within the rule the same as larger animals.[2]

§ 1185. Repair of fences—Casualties and Trespassers.—Where a railway company has performed its duty by the erection of proper fences along its right of way there still remains the additional obligation of using ordinary care in maintaining such fences or seeing that they are kept in proper repair.[3] The reason for this rule is apparent. If the company were not required to keep up its fences they would soon fall into decay so that they would not accomplish the object for which they were intended. Accidents and casualties may also happen which injure or destroy the usefulness of a fence. Whether a company is liable for injuries to stock caused by reason of its fences being out of repair must depend on the degree of diligence exercised by the company in the discovery of the defect and repairing it after discovered. Having once erected such fences as the company is bound to erect it may assume that they will remain in repair for a reasonable length of time,

[1] Brock *v.* Connecticut, etc., R. Co., 35 Vt. 373.

[2] Lee *v.* Minneapolis, etc., R. Co., 66 Iowa 131, 20 Am. & Eng. R. Cas. 476; Missouri, etc., R. Co. *v.* Roads, 33 Kan. 640, 23 Am. & Eng. R. Cas. 165. See, also, Missouri, etc., R. Co. *v.* Baxter, 45 Kan. 520, 26 Pac. R. 49, s. c. 45 Am. & Eng. R. Cas. 471. But where there was a law in a certain township against hogs running at large it seems that in such township a railway company was under no obligation to fence against them. Atchison, etc , R. Co. *v.* Yates, 21 Kan. 613; Leebrick *v.* Republican, etc., R. Co., 41 Kan. 756.

[3] Chicago, etc., R. Co. *v.* Guertin, 115 Ill. 466, 24 Am. & Eng. R. Cas. 385; Young *v.* Hannibal, etc., R. Co., 82 Mo. 428; Chubbuck *v.* Hannibal, etc., Railroad Co., 77 Mo. 591; Pittsburg, etc., R. Co. *v.* Smith, 38 Ohio 410, 13 Am. & Eng. R. Cas. 579; Henderson *v.* Chicago, etc., R. Co., 43 Iowa 620; Stephenson *v.* Grand Trunk, etc., R. Co., 34 Mich. 323; Estes *v.* Atlantic, etc., R. Co., 63 Me. 308; Lemmon *v.* Chicago, etc., R. Co., 32 Iowa 151; Clardy *v.* St. Louis, etc., R. Co., 73 Mo. 576, s. c. 7 Am. & Eng. R. Cas. 555; Carey *v.* Chicago, etc., R. Co., 61 Wis. 71, s. c. 20 Am. & Eng. R. Cas. 469; Robinson *v.* Grand Trunk, etc., R. Co., 32 Mich. 322; Miller *v.* Chicago, etc., Co., 66 Iowa 546, 23 Am. & Eng. R. Cas. 235. "The duty to maintain a legal fence is as urgent as the duty to erect one. The same reasons and policy apply to each." Congdon *v.* Central Vermont, etc., R. Co., 56 Vt. 390, 26 Am. & Eng. R. Cas. 460.

and if injuries occur on account of defects within a reasonable time after the erection of the fence the company will not be liable unless it had actual notice of the defects or ought to have had notice thereof and a sufficient time had elapsed in which to make repairs.[1] And even where the company has no right to rely on the assumption that a fence will remain in repair a reasonable length of time it must have notice, either actual or constructive, of a defect and a reasonable time in which to repair it after notice before it can be held liable.[2] But where the company has failed to erect any fence at all the rule requiring notice and a reasonable time in which to make the repairs does not apply.[3] Notice of the defect need not be actual; notice will be presumed where the defect has existed for a sufficient length of time to charge the company with notice.[4] What will

[1] Illinois, etc., R. Co. *v.* McKee, 43 Ill. 119; Illinois, etc., R. Co. *v.* Dickerson, 27 Ill. 55.

[2] Brady *v.* Rensselaer, etc., R. Co., 1 Hun (N. Y.) 378; Murray *v.* New York, etc., R. Co., 4 Keyes 274; Chicago, etc., R. Co. *v.* Barrie, 55 Ill. 226; Robinson *v.* Grand Trunk, etc., R. Co., 32 Mich. 322; Brown *v.* Milwaukee, etc., R. Co., 21 Wis. 40; Davis *v.* Chicago, etc., R. Co., 40 Iowa 292; Chicago, etc., R. Co. *v.* Saunders, 85 Ill. 288; Norris *v.* Androscoggin, etc., R. Co., 39 Me. 273; Chicago, etc., R. Co. *v.* Umphenour, 69 Ill. 198; Stephenson *v.* Grand Trunk, etc., R. Co., 35 Mich. 323; Hilliard *v.* Chicago, etc., R. Co., 37 Iowa 442; Clardy *v.* St. Louis, etc., R. Co., 73 Mo. 576, s. c. 7 Am. & Eng. R. Cas. 555. In Ohio where the statute imposed upon the company the duty of keeping the fence in repair it was held that the company could not escape liability by showing that it had no notice of the defects. Pittsburg, etc., R. Co. *v.* Smith, 38 Ohio St. 410, 13 Am. & Eng. R. Co. 579.

[3] Hannibal, etc., R. Co. *v.* Morris, 79 Mo. 367, s. c. 19 Am. & Eng. R. Cas. 666. The rule requiring a railway company to keep its fences in repair is thus stated in the case of Hannibal, etc., R. Co. *v.* Rutledge, 78 Mo. 286, s. c. 19 Am. & Eng. R. Cas. 669: "It does not perform its duty to the public by merely erecting a fence. It must keep it up and in repair. It does not, however, become the absolute insurer of the fence. The fence is liable to many casualties, against which no reasonable care and vigilance could guard. A wind storm, a water freshet, a fire, breachy stock or trespassers might destroy it. In such a case it would be utterly unreasonable to hold the corporation liable for stock killed which entered through a defect thus occasioned. The law allows reasonable time to discover the defect and repair it. In other words, it holds the company to the exercise of due care and no more."

[4] Fritz *v.* Kansas City, etc., R. Co., 61 Iowa 323, 13 Am. & Eng. R. Cas. 558; Jebb *v.* Chicago, etc., R. Co., 67 Mich. 160, 31 Am. & Eng. R. Cas. 532; Baltimore, etc., R. Co. *v.* Schultz, 43 Ohio 270, 22 Am. & Eng. R. Cas. 579; Varco *v.*

be a sufficient length of time to charge the company with notice of the defect must depend on the circumstances of each case and is usually a question of fact for the jury.[1] It has been held that if a land-owner knows of the existence of a defect in a railway fence between the right of way and his land it is his duty to notify the company of the defect. If he fails to do so and his stock get upon the track because of such defect and are injured he will, in some jurisdictions at least, be held guilty of such contributory negligence as will preclude a recovery.[2] And where a land-owner has agreed or assumed to maintain a fence along his land it is his duty to repair defects in the fence and he will be guilty of contributory negligence if he fails to do so.[3] After a company has notice of defects in its fences, whether actual or constructive, a reasonable time must elapse in which to make the repairs before the company can be held liable.[4] If, after knowledge, the company negligently delays in making the necessary repairs it may be held liable. The question of whether or not the company was negligent in making the repairs after the defects were discovered is ordinarily one to be submitted to and determined by the jury.[5] Where the defects are caused by

Chicago, etc., R. Co., 30 Minn. 18, s. c. 11 Am. & Eng. R. Cas. 419; King *v.* Chicago, etc., R. Co., 90 Mo. 520; Brentner *v.* Chicago, etc., R. Co., 58 Iowa 625.

[1] Evans *v.* St. Paul, etc., Co., 30 Minn. 489; Wait *v.* Burlington, etc., Co., 74 Iowa 207, 35 Am. & Eng. R. Cas. 194.

[2] Carey *v.* Chicago, etc., R. Co., 61 Wis. 71, s. c. 20 Am. & Eng. R. Cas. 469; Poler *v.* New York, etc., R. Co., 16 N. Y. 476; Chicago, etc., R. Co. *v.* Seirer, 60 Ill. 295. Compare Dunn *v.* Chicago, etc., R, Co., 68 Iowa, 674, s. c. 7 Am. & Eng. R. Cas. 573.

[3] Pittsburgh, etc., R. Co. *v.* Heiskell, 38 Ohio St. 666, 13 Am. & Eng. R. Cas. 555.

[4] Cleveland, etc., R. Co. *v.* Brown, 45 Ind. 90; Perry *v.* Dubuque, etc., R. Co., 36 Iowa 102; Chicago, etc., R. Co. *v.* Harris, 54 Ill. 528; Chicago, etc., R. Co. *v.* Barrie, 55 Ill. 226; Toledo, etc., R. Co. *v.* Cohen, 44 Ind. 444; McDowell *v.* New York, etc., R. Co., 37 Barb. 195; Henderson *v.* Chicago, etc., R. Co., 43 Iowa 620; Crosby *v.* Detroit, etc., R. Co. 58 Mich. 458, 23 Am. & Eng. R. Cas. 191. Whether or not the company had sufficient time in which to make repairs is a matter of defense which it must set up. St. Louis, etc., R. Co. *v.* Busby, 81 Mo. 43, s. c. 22 Am. & Eng. R. Cas. 589.

[5] Chicago, etc., R. Co. *v.* Saunders, 85 Ill. 288; McDowell *v.* New York, etc., R. Co., 37 Barb. (N. Y.) 195; Indianapolis, etc., R. Co. *v.* Hall, 88 Ill. 368. In the case of Crosby *v.* Detroit, etc., R. Co., 58 Mich. 458, s. c. 23 Am. & Eng. R. Cas. 191, section men going along a track on a pleasant day just before sundown discovered a gap in

casualties or by trespassers the rule above given still prevails, that is, the company can not be held responsible until it is shown that it had, or ought to have had, knowledge of the defects and a reasonable time in which to repair them.[1] The burden of showing that a company had knowledge of defects in its fences is on the plaintiff.[2] When it becomes necessary for the company to repair a defective fence it must furnish the material; it has no right to take timber or poles from adjoining lands.[3]

the fence along the right of way. No steps were taken to repair it that evening, but it was repaired early the next morning. In the meantime plaintiff's animal got on the track through this gap and was injured. There was evidence tending to show that the gap could have been repaired the evening before the injury and the court submitted the question of negligence in using diligence in making the repair to the jury. On appeal this was held to be no error, the court saying, *inter alia:* "A railroad corporation should be held to the same vigilance and activity in keeping a fence in repair as good business men engaged in any calling or industry where fences are required, would naturally exercise in the prudent care of their own property liable to be injured or destroyed by the breaking or burning of a fence. And the question whether an ordinarily prudent farmer, having crops inclosed from animals running outside, discovering such a break in his fence as this, at the time of the day these trackmen found this gap, would not at once have set about repairing it, is, in my view of the law, a fair question to submit to a jury, if it is not absolutely certain that he would do so. I think no fair, unbiased panel of twelve men would answer such a question in the negative. And even if there is a fair chance of difference among candid, unprejudiced men upon any question of this kind, then it can not be taken by a court away from the jury. And a disregard of the same degree of care in saving the property of others from injury by its action that an ordinarily prudent man would exercise in protecting his own property, is negligence in this corporation, as it would be in an individual."

[1] Great Western, etc., R. Co. *v.* Helm, 27 Ill. 198; Chicago, etc., R. Co. *v.* Saunders, 85 Ill. 288; Norris *v.* Androscoggin, etc., R. Co., 39 Me. 273; Brown *v.* Milwaukee, etc., R. Co., 21 Wis. 39; Spinner *v.* New York, etc., R. Co., 67 N. Y. 153; Chicago, etc., R. Co. *v.* Barrie, 55 Ill. 226; Indianapolis, etc., R. Co. *v.* Hall, 88 Ill. 368; Fitterling *v.* Missouri Pacific Co., 79 Mo. 504; Walthers *v.* Missouri, etc., Co., 78 Mo. 617; Case *v.* St. Louis, etc., R. Co., 75 Mo. 668.

[2] Comstock *v.* Des Moines, etc., Railroad Co., 32 Iowa 376; New Orleans, etc., Railroad Co. *v.* Enochs, 42 Miss. 603; Toledo, etc., Co. *v.* Cohen, 44 Ind. 444; Aylesworth *v.* Chicago, etc., R. Co., 30 Iowa 459; Perry *v.* Dubuque, etc., R. Co., 36 Iowa 102.

[3] Carey *v.* Milwaukee, etc., R. Co., 61 Wis. 71, s. c. 20 Am. & Eng. R. Cas. 469.

§ 1186. **Transfer of duty to fence.**—The general rule is that where a duty is imposed upon a property owner by statute he can not escape liability for a failure to properly perform that duty by employing a third person to do it. Applying this rule to a railroad company, where the railway company is under a statutory obligation to fence its track it can not escape liability on account of its track not being properly fenced by claiming that it has employed a third person to perform that duty.[1] If the company employs a third person to erect the fence it is still charged with seeing that the fence is a sufficient one and if injuries occur because of the insufficiency of the fence the company will be liable.[2] The duty of fencing rests upon the company owning the road and that duty continues, in the absence of statutory enactments exempting it from liability, even in cases where the trains are run by contractors in the work of construction,[3] or, as a general rule, by other persons operating the road with the consent of the owner.[4]

§ 1187. **Fence erected by land-owner.**—It frequently happens that where a railway company does not erect fences along its right of way they are erected by the adjoining proprietor of lands. Often the land-owner erects fences by virtue of an agreement between himself and the railway company,[5] but there are a great number of cases in which fences have been voluntarily erected by the land-owner. In some states, as we have heretofore seen,[6] where the company refuses to erect the fence, the adjoining land-owner may do so and recover the cost from the railway company. Where, without any agree-

[1] Silver *v.* Kansas City, etc., R. Co., 78 Mo. 528, s. c. 19 Am. & Eng. R. Cas. 642; Shepard *v.* Buffalo, etc., R. Co., 35 N. Y. 641; Hole *v.* Sittingbourne, etc., Railroad Co., 6 Hurl. & N. 488; Ryder *v.* Thomas, 13 Hun 296; McCafferty *v.* Spuyton, etc., Railroad Co., 61 N. Y. 178.

[2] Illinois, etc., R. Co. *v.* Swearingen, 47 Ill. 206; Norris *v.* Androscoggin, etc., R. Co., 39 Me. 273; Gill *v.* Atlantic, etc., R. Co., 27 Ohio St. 240.

[3] Houston, etc., R. Co. *v.* Meador, 50 Tex. 77; Chicago, etc., R. Co. *v.* McCarthy, 20 Ill. 385; Huey *v.* Indianapolis, etc., R. Co., 45 Ind. 320.

[4] Indianapolis, etc., R. Co. *v.* Solomon, 23 Ind. 534; Wyman *v.* Penobscot, etc., R. Co., 46 Me. 162; Fort Wayne, etc., R. Co. *v.* Hinebaugh, 43 Ind. 354.

[5] *Post*, § 1188.

[6] *Ante*, § 1181.

ment between an adjoining land-owner and the railway company, such land-owner erects a fence between his lands and the right of way the company is not necessarily exempted from liability for non-performance of its statutory duty and may be held liable for stock killed or injured which got on the track where the company had so failed to erect the fence.[1] But if it appears that the fences erected by the adjoining land-owners, although erected without any agreement, were sufficient, or in other words, were as good fences as the company could have been required to erect in the performance of its statutory duty then it is not liable as for a failure to erect and maintain a fence.[2]

§ 1188. **Agreement to fence.**—Agreements to fence are often made between adjoining land-owners and railway companies. Such contracts have been held valid notwithstanding a statutory duty rests upon a railway company to see that its track is securely fenced.[3] Where the owner of lands adjoining the right of way of a railway company agrees with the company to construct and maintain proper fences between his lands and the railway company's right of way the track will be regarded as fenced as to such owner and if his stock get upon the track by reason of his failure to perform his agreement to fence and are injured the railway company is not liable,[4] unless it appear

[1] Louisville, etc., R. Co. *v.* White, 94 Ind. 257, 20 Am. & Eng. R. Cas. 449; Jeffersonville, etc., R. Co. *v.* Sullivan, 38 Ind. 262; Fort Wayne, etc., R. Co. *v.* Mussetter, 48 Ind. 286.

[2] Jeffersonville, etc., R. Co. *v.* Sullivan, 38 Ind. 262. In Hovorka *v.* Minneapolis, etc., R. Co., 31 Minn. 221, 13 Am. & Eng. R Cas. 605, it was said: "Where the owner of the adjoining lands builds the fence, the railroad company may, with his assent, or acquiescence, adopt it. In the absence of any agreement it will still be its duty to maintain it in good condition and to restore it if removed by the owner. But so long as it remains and is kept in good condition, no matter by whom, so that domestic animals do not get upon the track by reason of any defect in it, the company is not liable as for failure to perform the duty to fence imposed on it by the statute. The statutory duty is discharged, though performed for the company by a mere volunteer."

[3] Jackson *v.* Rutland, etc., R. Co., 25 Vt. 150.

[4] Terre Haute, etc., R. Co. *v.* Smith, 16 Ind. 102; Pittsburgh, etc., R. Co. *v.* Heiskell, 38 Ohio St. 666, 13 Am. & Eng. R. Cas. 555; Ells *v.* Pacific, etc., R. Co., 48 Mo. 231; Busby *v.* St. Louis, etc., R. Co., 81 Mo. 43; Evansville,

that the injuries were wilfully or wantonly inflicted.[1] Such a contract to fence, is not binding, however, on third persons unless they hold under such owner or are in privity with him[2] and as to such persons the company is bound to fence. Contracts to fence may be oral or written or even implied.[3] When they are oral they are usually binding only between the parties by whom they were made,[4] but where they are written they are charges which run with the land and bind subsequent grantees of the original parties.[5] A land-owner's contract to maintain a fence between his lands and a railway right of way is binding on his tenant and the tenant can not recover for stock injured on the railway tracks.[6] The remedy for a failure to erect a fence according to agreement is an action for breach of con-

etc., R. Co. *v.* Mosier, 101 Ind. 597. In the case of Bond *v.* Evansville, etc., R. Co., 100 Ind. 301, s. c. 23 Am. & Eng. R. Cas. 200, it is said: "It has long been held by this court that where a person, through whose land a railroad is constructed, agrees to build and maintain fences along the right of way, the road will be regarded as fenced as to him, and that if he fails to build and maintain such fences, and his animals pass to the track and are killed, he can not recover from the company on the ground that it has not fenced the track as required by statute."

[1] Cincinnati, etc., R. Co. *v.* Waterson, 4 Ohio St. 424.

[2] Cincinnati, etc., R. Co. *v.* Ridge, 54 Ind. 39; Bond *v.* Terre Haute, etc., R. Co., 100 Ind. 301; Wabash R Co. *v.* Williamson, 104 Ind. 154, 23 Am. & Eng. R. Cas. 203; Gilman *v.* European, etc., R. Co., 60 Me. 235; Silver *v.* Kansas City, etc., R. Co., 78 Mo. 528; Hamilton *v.* Missouri, etc., R. Co., 87 Mo. 85.

[3] Bond *v.* Terre Haute, etc., R. Co., 100 Ind. 301.

[4] Wilder *v.* Maine, etc., R. Co., 65 Me. 332; St. Louis, etc., R. Co. *v.* Todd, 36 Ill. 409; Day *v.* New York, etc., R. Co., 53 Barb. 250; Vandergrift *v.* Delaware R. Co., 2 Hous. (Del.) 287; Kentucky, etc., R. Co. *v.* Kenney, 82 Ky. 154, 20 Am. & Eng. R. Cas. 458.

[5] Easter *v.* Little Miami, etc., R. Co., 14 Ohio St. 48; Cook *v.* Milwaukee, etc., R. Co., 36 Wis. 45; Gill *v.* Atlantic, etc., R. Co., 27 Ohio St. 240. In Kentucky, etc., R. Co. *v.* Kenney, 82 Ky. 154, 20 Am. & Eng. R. Cas. 458, the court said: "It is equally certain, however, that a written agreement, such as this deed embraces, showing an intention to charge the land by the covenant, which in its very nature inheres in the land and contains mutual promises connected with the grant as a part of it, runs with the land and is enforceable by and against subsequent grantees." Midland R. Co. *v.* Fisher, 125 Ind. 19.

[6] St. Louis, etc., R. Co. *v.* Washburn, 97 Ill. 253; Indianapolis, etc., R. Co. *v.* Shimer, 17 Ind. 295. *Contra*, Corry *v.* Great Western R. Co., L. R. 7 Q. B. D. 322, 2 Am. & Eng. R. Cas. 612.

tract and not for tort.[1] Such agreements not being binding on third persons who are entitled to recover for stock injured or killed on a railway track not properly fenced, it has been held that if such injuries were caused by the failure of the adjoining land-owner to erect fences according to agreement and the company has been compelled to respond in damages it has its remedy against the land-owner therefor.[2] Agreements to fence are often made in which the company instead of the adjoining owner agrees to maintain the fence. Companies often take such an obligation upon themselves in consideration of a grant of right of way across an owner's lands. Where a railway company obtains a right of way through a farm, and in consideration of the grant of such right of way agrees to erect and maintain secure fences it is bound to pay for animals killed or injured by its trains in cases where the animals come upon the track through the fault of the company in failing to erect fences according to the terms of its contract.[3] Such agreements when recited in the condemnation proceedings or the instrument by which the railway company obtains its rights are charges which run with the land and are binding upon the company even after the land-owner has conveyed to subsequent grantees.[4] If the company fails to perform an agreement to fence, and animals are killed by reason thereof, the measure of damages is not what it would cost to erect the fence, but the

[1] Chicago, etc., R. Co. *v.* Barnes, 116 Ind. 126. Equity will not rescind such a contract on the ground that its breach can be adequately compensated for in damages. Stringer *v.* Keokuk, etc., R. Co., 59 Iowa 277, 11 Am. & Eng. R. Cas. 608.

[2] Warren *v.* Kansas, etc., R. Co., 41 Iowa 484.

[3] Donald *v.* St. Louis, etc., R. Co., 44 Iowa 157; Fernow *v.* Dubuque, etc., R. Co., 22 Iowa 528; Conger *v.* Chicago, etc., R. Co., 15 Ill. 366; Poler *v.* New York, etc., R. Co., 16 N. Y. 476; Raridon *v.* Central Iowa, etc., R. Co 65 Iowa 640, 19 Am. & Eng. R. Cas. 615; Smith *v.* Chicago, etc., R. Co., 38 Iowa 518; Chicago, etc., R. Co. *v.* Ward, 16 Ill. 522; Hull *v.* Chicago, etc., R. Co., 65 Iowa 713, 22 N. W. R. 940; Chicago, etc., R. Co. *v.* Barnes, 116 Ind. 126; Hull *v.* Chicago, etc., R. Co., 65 Iowa 713, 20 Am. & Eng. R. Cas. 341. Its liability in such case is the same as in those cases where the duty to fence is statutory. Gulf, etc., R. Co. *v.* Washington, 49 Fed. 347.

[4] Huston *v.* Cincinnati, etc., R. Co., 21 Ohio St. 235.

value of the animals killed or injured or other damage done.[1] Or, in other words, the company will be liable for all damages which proximately flow from its failure to perform its contract duty.

§ 1189. **Waiver of duty to fence.**—In the preceding section we have seen that an adjoining owner of lands may contract to construct and maintain fences himself, and if he fails to do so and his stock are injured on account of such failure, he can not recover. Since the owner is permitted to contract for the construction of the fence by himself, and since his right to recover in such cases depends upon whether or not he has performed his duty, it would seem to follow on principle that an owner could agree with a company that no fence at all should be erected along his lands or that he should waive the performance of the duty imposed upon the railway company to see that its track is securely fenced. Such is the rule, for it is firmly established that the owner of adjoining lands may waive the building of a fence and thus cut off his right to recover if his animals are injured;[2] unless they are injured intentionally or negligently.[3] Such waiver of the duty to fence results from an agreement on the part of the adjoining owner to maintain the fences himself,[4] or there may be an express contract in which the duty is clearly and specifically waived. The waiver of the duty to fence, however, is valid, so far as exempting the railway company from liability for animals injured is concerned, only between the company and the landowner and his privies. Third persons to whom the duty to fence is owing are not bound by such a waiver although their stock enter the track where the erection of a fence was waived.[5]

[1] Louisville, etc., R. Co. *v.* Sumner, 106 Ind. 55, 24 Am. & Eng. R. Cas. 641; Chicago, etc., R. Co. *v.* Barnes, 116 Ind. 126.

[2] Manwell *v.* Burlington, etc., R. Co., 80 Iowa 662; Hurd *v.* Rutland, etc., R. Co., 25 Vt. 116.

[3] Jackson *v.* Rutland, etc., R. Co., 25 Vt. 150; Tyson *v.* Keokuk, etc., R. Co., 43 Iowa 207; Enright *v.* San Francisco, etc., R. Co., 33 Cal. 230; Cornwall *v.* Sullivan, etc., R. Co., 28 N. H. 161.

[4] Indianapolis, etc., R. Co. *v.* Petty, 25 Ind. 413; Eames *v.* Worcester, etc., R. Co., 105 Mass. 193; Tombs *v.* Rochester, etc., R. Co., 18 Barb. 583.

[5] See authorities cited in note 2, p. 1822; Cincinnati, etc., R. Co. *v.* Ridge, 54 Ind. 39.

§ 1190. **To whom duty to fence is owing.**—Statutes requiring railway companies to erect and maintain fences along their rights of way rest, as we have heretofore seen,[1] upon the police power of the state. The exercise of the police power of the state by the enactment of police regulations is for the benefit of the whole public as a general rule. And since statutes imposing the duty to fence upon railway companies rest upon the police power it follows that they are for the benefit of the general public, and to this effect is the almost unanimous weight of judicial authority.[2] Such statutes are not intended merely for the protection of the adjoining land-owners unless it clearly and unmistakably appears from the language used that it was the intention of the legislature to protect only such owners.[3] Where the animals are unlawfully on the adjoining premises from which they escape to the company's track, there is some conflict in the authorities as to whether or not the company is liable to the owner of such animals. The weight of authority is to the effect that the company may be liable in such cases,[4] and this we believe to be the correct rule although there are some authorities which hold that the company is not liable.[5]

[1] *Ante*, § 1182.

[2] New Albany, etc., R. Co. *v.* Maiden, 12 Ind. 10; Indianapolis, etc., R. Co. *v.* Guard, 24 Ind. 222; Curry *v.* Chicago, etc., R. Co., 43 Wis. 665; Indianapolis, etc., R. Co. *v.* Townsend, 10 Ind. 38; Indianapolis, etc., R. Co. *v.* McKinney, 24 Ind. 283; McCall *v.* Chamberlain, 13 Wis. 637; Fawcett *v.* York, etc., R. Co., 16 Q. B. 610; Sherman *v.* Anderson, 27 Kan. 333; Kaes *v.* Missouri Pacific R. Co., 6 Mo. App. 397; Walsh *v.* Virginia, etc., R. Co., 8 Nev. 110; Duncan *v.* St. Louis, etc., R. Co., 91 Mo. 67; Laude *v.* Chicago, etc., R. Co., 33 Wis. 640. The rule is thus stated in Missouri, etc., R. Co. *v.* Roads, 33 Kan. 640, 23 Am. & Eng. R. Cas. 165: "Upon this question the general rule appears to be that where a statute requiring railroads to fence their tracks is a general police regulation, intended to protect domestic animals generally, and also for the safety of persons and property passing over the road, and is not designed merely for the benefit of the adjoining land-owner, that the railroad company is held to be under a general obligation to the public, and is liable for animals injured and killed on its unfenced track, even though they were unlawfully upon the land from which they passed onto the railroad track."

[3] Conway *v.* Canada, etc., R. Co., 7 Ont. R. (Q. B. Div.) 673, s. c. 19 Am. & Eng. R. Cas. 650.

[4] Pittsburgh, etc., R. Co. *v.* Allen, 40 Ohio St. 206, s. c. 19 Am. & Eng. R. Cas. 657; Purdy *v.* New York, etc., R. Co., 61 N. Y. 353; Nashville, etc., R. Co. *v.* Peacock, 25 Ala. 229.

[5] Towns *v.* Cheshire R. Co., 21 N. H. 363; Cornwall *v.* Sullivan R. Co., 28

Where the animals are on the adjoining premises by consent of the owner of such premises there is no question as to the liability of the company.[1] And on the ground that a railway company can not contract with another for the performance of a statutory duty imposed upon it and thus escape liability it is held liable to third persons whose stock get upon its track because of the failure of an adjoining owner to fulfil his agreement to fence.[2] Some statutes imposing upon railway companies the duty to fence make the company liable for all injuries which are occasioned by reason of the failure to fence, while others limit the liability to animals and some, according to their language, to particular species of animals. As to the liability, however, the general rule is that the statute is applicable to every kind of animal and this even though the statute designates a particular species of animal.[3] Thus the term "cattle" in a railway fence statute has been held to include horses, mules, sheep and swine,[4] and the term "cattle and horses" to include mules and asses.[5] The company is not bound to fence against dogs for they are animals that a fence does not ordinarily restrain.[6] But if a dog is on the track and the company

N. H. 161; Bemis *v.* Connecticut, etc., R. Co., 42 Vt. 375; McDonnell *v.* Pittsfield, etc., R. Co., 115 Mass. 564; Walsh *v.* Virginia City, etc., R. Co., 8 Nev. 110; Pittsburgh, etc., R. Co. *v.* Methven, 21 Ohio St. 586.

[1] St. Louis, etc., R. Co. *v.* Dudgeon, 28 Kan. 283; Sawyer *v.* Vermont, etc., R. Co., 105 Mass. 196.

[2] *Ante*, § 1189; Pittsburgh, etc., R. Co. *v.* Allen, 40 Ohio St. 206, s. c. 19 Am. & Eng. R. Cas. 657.

[3] Halverson *v.* Minneapolis, etc., R. Co. 32 Minn. 88, 19 Am. & Eng. R. Cas. 526; Missouri, etc., R. Co. *v.* Baxter, 45 Kan. 520, 26 Pac. R. 49; Watier *v.* Chicago, etc., R. Co., 31 Minn. 91. The statute applies to a "crazy" horse—one not possessed of even "horse sense." Liston *v.* Central, etc., R. Co., 70 Iowa 714, 26 Am. & Eng. R. Cas. 593.

[4] Child *v.* Hearn, L. R. 9 Exch. 176; Louisville, etc., R. Co. *v.* Ballard, 2 Met. (Ky.) 177; Lee *v.* Minneapolis, etc., R. Co., 66 Iowa 131, 20 Am. & Eng. R. Cas. 476; Randall *v.* Richmond, etc., R. Co., 104 N. Car. 410.

[5] Toledo, etc., R. Co. *v.* Cole, 50 Ill. 184; Ohio, etc., R. Co. *v.* Brubaker, 47 Ill. 462. A fencing statute has no application, however, to horses harnessed to a wagon. Cohoon *v.* Chicago, etc., R. Co., 90 Iowa 169, 61 Am. & Eng. R. Cas. 364. But it has been held that cattle yoked to a cart and in charge of a driver were within the provisions of a fencing statute. Randall *v.* Richmond, etc., R. Co., 104 N. Car. 410.

[6] Bay City, etc., R. Co. *v.* Austin, 21 Mich. 390.

negligently kill it, the company may be liable.[1] The same degree of diligence, however, is not, it seems, required as in the case of other animals.[2] The tendency of the modern decisions is to make the statutes as broad as possible and to embrace all animals which are likely to be injured or to cause injury. The reason for requiring fences against animals is found in the fact that they are not possessed of intelligence sufficient to enable them to avoid injury. If animals were able to recognize the danger necessarily incurred in going upon a railway track there would be no need for fence laws and we would not find them on our statute books. On a somewhat similar reason is based the duty of a railway company to fence its track against children. Where a child *non sui juris* gets upon a railway track because it was not properly fenced and is injured, the company, it has been held, is liable upon the ground that it is as much the duty of the company to fence against such children as against animals, but this is a doctrine that should be very carefully limited and applied.[3] The duty to fence, however,

[1] Wilson *v.* Wilmington, etc., R. Co., 10 Rich. Law 52; Jemison *v.* Southwestern, etc., R. Co., 75 Ga. 444; St. Louis, etc., R. Co. *v.* Hauks, 78 Tex. 300, Fink *v.* Evans, 95 Tenn. 413, 32 S. W. R. 307.

[2] In the case of Jones *v.* Bond, 40 Fed. R. 281, 40 Am. & Eng. R. Cas. 192, it was said: "I have, within my judicial experience, tried quite a number of cases for injuries to persons and property against railroad companies and receivers, from alleged carelessness and negligence on the part of employes operating railroad trains, and have read the opinions of the courts in many cases, but this is the first dog case that has been brought to my attention, and, therefore, I am at a loss to know what rule to apply. I presume the reason that other cases of like kind have not been before the courts is that the dog is very sagacious and watchful against hazards, and possesses greater ability to avert injury than almost any other animal; in other words, takes better care of himself against impending dangers than any others. He can mount an embankment, or escape from dangerous places, where a horse or cow would be altogether helpless; hence the same care to avoid injuries to an intelligent dog on a railroad is not required on the part of those operating a train that is required in regard to other animals. The presumption is that such dog has the instinct and ability to get out of the way of danger, and will do so, unless its freedom of action is interfered with other circumstances at the time and place." See Fink *v.* Evans, 95 Tenn. 413, 32 S. W. R. 307.

[3] Marcott *v.* Marquette, etc., R. Co., 49 Mich. 99, s. c. 8 Am. & Eng. R. Cas. 306; Union Pacific R. Co. *v.* McDonald, 152 U. S. 262, 60 Am. & Eng. R. Cas. 1; Hayes *v.* Michigan, etc., Rail-

extends only to injuries which the child may receive on the railway company's premises. Its duty does not extend to fencing children from the premises of others.[1]

§ 1191. Injuries to passengers resulting from neglect of duty to fence.—Very frequently collisions with animals on the track of a railway train result disastrously both to the train and persons on it. Trains are often thrown from the track, property destroyed and persons seriously injured. Where a railway company is engaged in carrying passengers the duty rests upon it to use the highest practicable degree of care for their safety, and as one of the safeguards for the protection of passengers on a train consists in keeping animals off the track and avoiding collisions, and since the duty to fence the right of way rests upon the police power, being a duty which the company owes to the public,[2] it is

road Co., 111 U. S. 228, s. c. 15 Am. & Eng. R. Cas. 394; Keyser *v.* Chicago, etc., R. Co., 66 Mich. 390, 31 Am. & Eng. R. Cas. 399; Stuettgen *v.* Wisconsin, etc., R. Co., 80 Wis. 498; Chicago, etc., R. Co. *v.* Grablin, 38 Neb. 90; Isabel *v.* Hannibal, etc., R. Co., 60 Mo. 475; Singleton *v.* Eastern, etc., Railroad Co., 7 Com. B. (N. S.) 287. "The object of the statute requiring the company to fence its tracks was to prevent injury from passing trains to persons and animals coming upon and using the same, and when an injury occurs without fault of the plaintiff to either in consequence of the negligence of the company to maintain the required fence, it must be held such negligence as will authorize a remedy. The child in this case was too young to know or understand anything of the danger or consequences of going upon the track before a passing train, and, of course, no wrong, fault, or negligence could properly be attributable to him in going where he did, or in doing what he did. The statute requires the defendant to fence its road with a good fence, four and one-half feet high. It seems to me that it can not be successfully contended that such a fence would not have been a very formidable obstruction to the child's going upon the defendant's right of way. It may have been sufficient to prevent his going there entirely, and, if so, evidence of the negligence of the company to place the fence there was competent and material." Keyser *v.* Chicago, etc., R. Co. 56 Mich. 559, 19 Am.& Eng. R. Cas. 91. The rule does not apply to children of age sufficient to exercise discretion as to their own safety. Nolan *v.* New York, etc., R. Co., 53 Conn. 461, 25 Am. & Eng. R. Cas. 342. See Fitzgerald *v.* St. Paul, etc., R. Co., 29 Minn. 336, 8 Am. & Eng. R. Cas. 310, where a doctrine contrary to that stated in the text is laid down and enforced.

[1] Morrissey *v.* Providence, etc., R. Co., 15 R. I. 271, 3 Atl. R. 10; O'Donnell *v.* Providence, etc., R. Co., 6 R. I. 211.

[2] "The law imposed upon the appel-

justly held that the duty to fence applies to passengers and they are entitled to a performance of that duty. That this duty is owing to passengers is declared in many cases.[1] Where an animal got on the track and was struck by a train and was knocked off the track to one side, but so near the track that a train subsequently passing struck it and was derailed, thereby causing plaintiff's injury, it was held that the company was liable.[2]

lant the duty of fencing its road for the safety and protection of the public." Cincinnati, etc., R. Co. *v.* Hildreth, 77 Ind. 504; Jeffersonville, etc., R. Co. *v.* Dunlap, 112 Ind. 93, and cases cited.

[1] Briggs *v.* St. Louis, etc., R. Co., 111 Mo. 168; Atchison, etc., R. Co. *v.* Elder, 149 Ill. 173, 36 N. E. R. 565; Gulf, etc., R. Co. *v.* Wilson, 79 Tex. 371, 15 S. W. R. 280; Pittsburgh, etc., R. Co. *v.* Allen, 40 Ohio St. 206, s. c. 19 Am. & Eng. R. Cas. 657; Blair *v.* Milwaukee, etc, Co., 20 Wis. 254; Sullivan *v.* Philadelphia, etc., R. Co., 30 Pa. St. 234; Barnett *v.* Atlantic, etc., Co., 68 Mo. 56; Brown *v.* New York, etc., Co., 34 N. Y. 404; Fleming *v.* St. Paul, etc., R. Co., 27 Minn. 111, s. c. 6 N. W. R. 448. See Ditchett *v.* Spuyten-Duyvil, etc., R. Co., 67 N. Y. 425. In a recent case, Fordyce *v.* Jackson, 56 Ark. 594, 20 S. W. R. 528, 20 S. W. R. 597, it was said: "It is apparent to those who operate railroads that roaming cattle are a constant menace to the safety of an unguarded track. The railway's obligation to every one whom it undertakes to carry in the relation of a passenger, is, that it will take every reasonable precaution to avert injury to his person, whether from collision with cattle or from other danger which it has reason to apprehend. The omission of any reasonable precaution to effect that end is negligence. Arkansas, etc., R. Co. *v.* Canman, 52 Ark. 517, 13 S. W. R. 280. This obligation requires of the employes in charge of trains faithful watchfulness, to prevent accidents by collision with cattle; and it requires the company to keep a clear right of way, to afford them the facility of performing that duty. If these or other precautions are insufficient to guard against the danger, and a fence will render the track safe from the intrusion of cattle, the company's obligation demands the more effective precaution. If the want of a proper fence makes the railway unsafe, and an accident happens to a passenger in consequence, the company are responsible to him, although they are under no obligation to the adjacent land-owner or the owner of cattle to fence the track. Buxton *v.* North Eastern R. Co., L. R. 3 Q. B. 549; Lackawanna, etc., R. Co. *v.* Chenewith, 52 Pa. St. 382; Gulf, etc., R. Co. *v.* Wilson, 79 Tex. 371, 15 S. W. R. 280; Cornwall *v.* Sullivan R. Co., 28 N. H. 161, 169."

[2] Mexican, etc., R. Co. *v.* Lauricella, (Tex.) 26 S. W. R. 301. This case, however, rests more on the negligence of the company in permitting the animal to remain in dangerous proximity to the track than on its failure to fence.

§ 1192. **Injuries to employes resulting from neglect of duty to fence.**—The duty imposed upon a railway company to fence its track is held by some of the cases to be one owing to the employes[1] of the company, as well as to passengers, adjoining land-owners and the general public. Where animals come upon the track because of the failure of the company to discharge its duty to maintain proper fences to keep stock off the track, and injury results to an employe because of a collision with such animal, the company will, according to the weight of authority, be liable for such injury.[2] But where there is

[1] There is conflict of authority upon the question of liability to employes, and there is reason for holding that in the absence of a specific statute there is no liability, but the weight of authority is that there is a general liability. *Post*, § 1270.

[2] Quackinbush *v.* Wisconsin, etc., R. Co., 62 Wis. 411, s. c. 22 N. W. R. 519; Dickson *v.* Omaha, etc., R. Co., 124 Mo. 140, 59 Am. & Eng. R. Cas. 305. The recent case of Atchison, etc. R. Co. *v.* Reesman, 60 Fed. R. 370, is one of the best reasoned cases, declaring the doctrine that there is a liability. In that case many cases are reviewed and cited. See Eames *v.* Texas, etc., R. Co., 63 Tex. 660, s. c. 22 Am. & Eng. R. Cas. 540. A clear statement of the rule is found in the recent case of Donnegan *v.* Erhardt, 119 N. Y. 468, s. c. 23 N. E. R. 1051, 42 Am. & Eng. R. Cas. 580. That statement is as follows: "A railroad company, for the safety of its passengers, as well as its employes upon its engines and cars, is bound to use suitable care and skill in furnishing, not only adequate engines and cars, but also a safe and proper track and road-bed. The track must be properly laid, and the road-bed properly constructed, and reasonable prudence and care must be exercised in keeping the track free from obstructions, animate and inanimate; and if, from want of proper care, such obstructions are permitted to be or come upon the track, and a train is thereby wrecked, and any person thereon is injured, the railroad company, upon plain common law principles, must be held responsible. Experience shows that animals may stray upon a railroad track, and that, if they do, there is danger that a train may come in collision with them, and be wrecked; and adequate measures, reasonable in their nature, must be taken to guard against such danger. Independently of any statutory requirement, a jury might find, upon the facts of a case, that it was the duty of a railroad company to fence its track, to guard against such danger. But, whatever the rule would be independently of the statute, there is no reasonable doubt that it imposes the absolute duty upon a railroad company to fence its tracks. That duty, it is reasonable to suppose, was imposed, not only to protect the lives of animals, but also to protect human beings upon railroad trains. It is made an unqualified duty; and for a violation thereof, causing injury the railroad company incurs responsibility." The court cited the following authorities: Corwin *v.* New York, etc., R. Co., 13 N. Y. 42; Jetter *v.* Hudson, etc., R. Co., 2 Keyes, (N. Y.) 154; Staats *v.* New York, etc., R. Co., 3 Keyes (N.

neither a common law nor a statutory duty resting upon a railway company to fence its track it has been held that it is not liable for the death of an engineer caused by his train colliding with an animal on the track.[1] In a suit by an employe for damages on account of injuries received because the track was not properly fenced, the sufficiency of the fence, negligence in failing to maintain it, and other questions affecting the company's liability are governed by substantially the same rules respecting negligence and the like as other cases between employer and employe.[2] Some of the authorities place the liability of the company on the ground that the company as master owes the duty to the employe as servant to furnish him a safe place to work, and that the law of master and servant applies to such cases.[3] The rule that the employe assumes the risks of the service applies to such cases. Thus, where an employe took service with a railway company, knowing that its track was not fenced and he was afterward killed in a collision with an animal on the track, it was held that his death was caused by a risk of the service which he had assumed and that there could be no recovery.[4] But it has been held that where the accident was caused by a defect in the fence the employe can not be held to have assumed such a risk although he knew that cattle had been seen on the track before, unless he had knowledge of the defect itself.[5]

§ 1193. Places allowed to remain unfenced—Highways and crossings.—Although the duty rests upon railway companies

Y.) 196; Brown *v.* New York, etc., R. Co., 34 N. Y. 404; Shepard *v.* Buffalo, etc., R. Co., 35 N. Y. 641; Purdy *v.* New York, etc., R. Co., 61 N. Y. 353; Jones *v.* Seligman, 81 N. Y. 190, s. c. 3 Am. & Eng. R. Cas. 236; Graham *v.* Delaware, etc., Canal Co., 46 Hun 386. In the decision from which we just quoted the case of Langlois *v.* Buffalo, etc., R. Co., 19 Barb. 364, was overruled.

[1] Cowan *v.* Union Pacific R. Co., 35 Fed. R. 43.

[2] Wabash, etc., R. Co. *v.* Brown, 2 Bradw. (Ill.) 516; Dewey *v.* Chicago, etc., R. Co., 31 Iowa 373.

[3] See Dickson *v.* Omaha, etc., R. Co., 124 Mo. 140, 59 Am. & Eng. R. Cas. 305, 46 Am. St. R. 429.

[4] Sweeney *v.* Central Pacific R. Co., 57 Cal. 15, s. c. 8 Am. & Eng. R. Cas. 151; Fleming *v.* St. Paul, etc., R. Co., 27 Minn. 111, s. c. 6 N. W. R. 448.

[5] Magee *v.* North Pacific R. Co., 78 Cal. 430.

to securely fence their tracks, there are certain parts of the track which the company is under no obligation to fence. There are certain parts of the track which must necessarily be used by the public and to fence these parts would prevent their use by the public,[1] so that where the track must be used by the public for crossings and the like the company is excused from fencing.[2] When a public highway crosses a railway and the crossing is used by the public the company is not bound to fence its track at such point, and if animals are injured on the crossing the company is not liable unless guilty of negligence or wilfulness.[3] Although a statute imposing the duty to fence may not in express terms except highways, the court, from the necessities of the case, will give the statute such a construction as to exempt the company from the duty to fence at a public

[1] In Atchison, etc., R. Co. *v.* Shaft, 33 Kan. 521, it was said: "The great weight of authority, however, is that railroad companies are not absolved from complying with the express terms of the statutes requiring them to inclose their roads with good and lawful fences, except where some paramount interest of the public intervenes, or some paramount obligation or duty to the public rests upon the railroad companies rendering it improper for them not to fence their roads." The court cited the following authorities: Tracy *v.* Troy, etc., R. Co., 38 N. Y. 433; Bradley *v.* Buffalo, etc., R. Co., 34 N. Y. 427; Cleveland, etc., R. Co. *v.* McConnell, 26 Ohio St. 57; Railroad Co. *v.* Newbrander, 40 Ohio St. 15; White Water Valley R. Co. *v.* Quick, 30 Ind. 384; Cleveland, etc., R. Co. *v.* Crossley, 36 Ind. 370; Toledo, etc., R. Co. *v.* Chapin, 66 Ill. 504; Latty *v.* Burlington, etc., R. Co., 38 Iowa 250; Mundhenk *v.* Central Iowa R. Co., 57 Iowa 718; Flint, etc., R. Co. *v.* Lull, 28 Mich. 510.

[2] The statutes imposing the duty to fence are construed so as not to lead to absurdity and injustice. Gallagher *v.* New York, etc., R. Co., 57 Conn. 442, 40 Am. & Eng. R. Cas. 197.

[3] Cox *v.* Minneapolis, etc., R. Co., 41 Minn. 101, 38 Am. & Eng. R. Cas. 287; Soward *v.* Chicago, etc., R. Co., 33 Iowa 386; Flint, etc., R. Co. *v.* Lull, 28 Mich. 510; Hurd *v.* Rutland, etc., R. Co., 25 Vt. 116; Ohio, etc., R. Co. *v.* Rowland, 50 Ind. 349; Iba *v.* Hannibal, etc., R. Co., 45 Mo. 469; Indiana, etc., Railway Co. *v.* Quick, 109 Ind. 295; Bechdolt *v.* Grand Rapids, etc., R. Co., 113 Ind. 343, 35 Am. & Eng. R. Cas. 168; Atchison, etc., R. Co. *v.* Holt, 29 Kan. 149; McPheeters *v.* Hannibal, etc., R. Co., 45 Mo. 22; Long *v.* Central Iowa R. Co., 64 Iowa 657; International, etc., R. Co. *v.* Cocke, 64 Tex. 151; Blair *v.* Milwaukee, etc., R. Co., 20 Wis. 254. Where the animal goes through a defective fence and thence over a cattle-guard onto a public crossing where it is killed the company is liable. Kansas, etc., R. Co. *v.* Burge, 40 Kan. 734, 736, 40 Am. & Eng. R. Cas. 181.

crossing.[1] The question of whether or not a crossing is a public crossing is generally determined by the use to which it is put, and not by the manner in which the crossing may have been acquired.[2] If the crossing is used by the public the company is excused from fencing, and it is immaterial whether the right to cross was acquired by condemnation, prescription, dedication or otherwise.[3] Where a railroad is built longitudinally along and in the street the company is not bound to fence. The construction of a fence in such a case would prevent the use of the highway by the public, and on that ground its erection is excused.[4] But where a railway right of way runs parallel to a highway, the erection of a fence is required,[5] unless its erection would destroy the use of the highway as such. And the company is required to erect a fence in such cases although the entire width of the right of way can not be enclosed and part of it has to be thrown into the highway.[6] But where one railway track runs parallel with another railway track only fifty feet away it is not required to erect a fence between the two tracks.[7] If a highway which crosses a railway right of way has been vacated or abandoned the company is bound to fence.[8] But it seems if the abandonment has been recent and there has been no order of vacation the erection of a fence is not required.[9] Where private crossings are con-

[1] Gallagher *v.* New York, etc., R. Co., 57 Conn. 442, 40 Am. & Eng. R. Cas. 197.

[2] Atchison, etc., R. Co. *v.* Griffis, 28 Kan. 539, s. c. 13 Am. & Eng. R. Cas. 532.

[3] Luckie *v.* Chicago, etc., R. Co., 76 Mo. 639; Jenkins *v.* Chicago, etc., R. Co., 27 Mo. App. 578.

[4] Rippe *v.* Chicago, etc., R. Co., 42 Minn. 34, 40 Am. & Eng. R. Cas. 231.

[5] Indianapolis, etc., R. Co. *v.* McKinney, 24 Ind. 283; Andre *v.* Chicago, etc., R. Co., 30 Iowa 107; Rozzelle *v.* Hannibal, etc., R. Co., 79 Mo. 349; Patton *v.* West End, etc., R. Co., 14 Mo. App. 589; Rutledge *v.* Hannibal, etc., R. Co., 78 Mo. 286.

[6] Louisville, etc., R. Co. *v.* Shanklin, 94 Ind. 297; Jeffersonville, etc., R. Co. *v.* Sweeney, 32 Ind. 430; Emmerson *v.* St. Louis, etc., R. Co., 35 Mo. App. 621; Evansville, etc., Railroad Co. *v.* Tipton, 101 Ind. 197; Wabash Railroad Co. *v.* Forshee, 77 Ind. 158; Lake Erie, etc., R. Co. *v.* Rooker, 13 Ind. App. 600, 41 N. E. R. 470.

[7] Gallagher *v.* New York, etc., R. Co., 57 Conn. 442, 40 Am. & Eng. R. Cas. 197.

[8] Jeffersonville, etc., R. Co. *v.* O'Connor, 37 Ind. 95; Louisville, etc., R. Co. *v.* Shanklin, 94 Ind. 297.

[9] Indiana, etc., R. Co. *v.* Gapen, 10 Ind. 292.

structed across the right of way the railway company is bound to fence at such crossing or to erect gates and bars sufficient to serve as a fence,[1] unless the land-owner has requested that the fence be left open.[2] In some states the matter of private crossings and the erection of fences and gates and bars is regulated by statute, and where such is the case the provisions of the statute must govern.[3]

§ 1194. **Fences at depot and station grounds.**—Railroad companies are not required to fence their tracks at their depots and about their station grounds. Where passengers and freight are received and discharged, public convenience requires that there should be unobstructed access to the buildings and tracks, and, therefore, fences are not required.[4] The company not being required to maintain fences at such places it follows that it will not be liable for stock there injured unless it was guilty of wilfulness or negligence.[5] The exception

[1] Omaha, etc., R. Co. *v.* Severin, 30 Neb. 318, 45 Am. & Eng. R. Cas. 122; McKinley *v.* Chicago, etc., R. Co., 47 Iowa 76; Mackie *v.* Central, etc., R. Co., 54 Iowa 540; Peoria, etc., R. Co. *v.* Barton, 80 Ill. 72; Pittsburgh, etc., R. Co. *v.* Cunnington, 39 Ohio St. 327.

[2] Indianapolis, etc., R. Co. *v.* Shimer, 17 Ind. 295; Tyson *v.* Kansas, etc., R. Co., 43 Iowa 207; Bellefontaine, etc., R. Co. *v.* Suman, 29 Ind. 40.

[3] In Indiana the owner must keep up the fence at private crossings. Louisville, etc., R. Co. *v.* Etzler, 119 Ind. 39, 40 Am. & Eng. R. Cas. 205; Hunt *v.* Lake Shore, etc., R. Co., 112 Ind. 69; Pennsylvania Co. *v.* Spaulding, 112 Ind. 47, 35 Am. & Eng. R. Cas. 184; Evansville, etc., R. Co. *v.* Mosier, 114 Ind. 447, 17 N. E. R. 109.

[4] Schneekloth *v.* Chicago, etc., R. Co., (Mich.) 65 N. W. R. 663; McGrath *v.* Detroit, etc., R. Co., 57 Mich. 555; Rinear *v.* Grand Rapids, etc., R. Co., 70 Mich. 620, 35 Am. & Eng. R. Cas. 166; Bechdolt *v.* Grand Rapids, etc., R. Co., 113 Ind. 343, 35 Am. & Eng. R. Cas. 168; Galena, etc., R. Co. *v.* Griffin, 31 Ill. 303; Smith *v.* Chicago, etc., R. Co., 60 Iowa 512; Atchison, etc., R. Co. *v.* Shaft, 33 Kan. 521; Kobe *v.* Northern Pacific R. Co., 36 Minn. 518; Schooling *v.* St. Louis, etc., R. Co., 75 Mo. 518; Johnson *v.* Chicago, etc., R. Co., 75 Iowa 157; Peoria, etc., R. Co. *v.* Barton, 80 Ill. 72; Louisville, etc., R. Co. *v.* Hall, 93 Ind. 245; Schneir *v.* Chicago, etc., R. Co., 40 Iowa 337; Prickett *v.* Atchison, etc., R. Co., 33 Kan. 748; Flagg *v.* Chicago, etc., R. Co , 96 Mich. 30, s. c. 21 L. R. A. 835.

[5] Bechdolt *v.* Grand Rapids, etc. R. Co., 113 Ind. 343; Moses *v.* Southern Pacific R. Co., 18 Ore. 385, s. c. 42 Am. & Eng. R. Cas. 555; Indiana, etc., R. Co. *v.* Quick, 109 Ind. 295; Indiana, etc., R. Co. *v.* Sawyer, 109 Ind. 342.

applies to passenger stations,[1] freight depots,[2] and the space used for the convenience of the company in switching its cars and making up trains and supplying its engines with fuel and water.[3] The exemption of switch grounds is founded on the danger to employes which would necessarily result were the tracks fenced. The safety of the employes at points where they almost continually pass up and down the track in the performance of their duties is far more important than would be the safety afforded to animals and property from the erection of fences at such tracks.[4] The general rule is that some

[1] Chicago, etc., R. Co. *v.* Clonch, (Kan. App.) 43 Pac. R. 1140. "Depot or station grounds are a place where passengers get on and off the cars, and where goods are loaded and unloaded and all grounds necessary or convenient and actually used for these purposes." Fowler *v.* Farmers', etc., Trust Co., 21 Wis. 78.

[2] McGrath *v.* Detroit, etc., R. Co., 57 Mich. 555, 22 Am. & Eng. R. Cas. 574. Three hundred feet from a highway crossing the track was unfenced. On the other side of the crossing there was a depot. It was held that the road should have been fenced beyond the crossing although freight was occasionally received and discharged there. Moser *v.* St. Paul, etc., R. Co., 42 Minn. 480. See, also, Anderson *v.* Stewart, 76 Wis. 43; Peyton *v.* Chicago, etc., R. Co., 70 Iowa 522, 30 N. W. R. 877.

[3] Davis *v.* Burlington, etc., R. Co., 26 Iowa 549; Swearingen *v.* Missouri, etc., R. Co., 64 Mo. 73; Blair *v.* Milwaukee, etc., R. Co., 20 Wis. 254; Flint, etc., R. Co. *v.* Lull, 28 Mich. 510. In Peters *v.* Stewart, 72 Wis. 133, it is said: "It appears, in effect, from the undisputed evidence, that at the side of the main track, and opposite the side-track mentioned, there were at the time in question, a water-tank for replenishing engines, and another building, within which there was a telegraph office with telegraphic instruments, a ticket-office, and a place for eating and sleeping, and which building was occupied by the company's station men and agent, who operated the telegraph, sold tickets for the company to passengers, operated the switch and tank and handled baggage and freight; that there was a platform between the building and the track; that trains were in the habit of stopping there, and receiving and discharging passengers and freight. True, the accommodations were quite limited, but, under the decisions of this court, we must hold that this station building was a depot, and that the railroad grounds in connection therewith were 'depot grounds' within the meaning of the statute."

[4] See Cincinnati, etc., R. Co. *v.* Jones, 111 Ind. 259, s. c. 31 Am. & Eng. R. Cas. 491; Cox *v.* Atchison, etc., R. Co., 128 Mo. 362, 31 S.W. R. 3. In Penn. Co. *v.* Mitchell, 124 Ind. 473, the court declared the rule as follows: "It is abundantly settled that a railroad company is not liable for injuries to animals that enter upon its track at places, where, to maintain fences, would interfere with the dis-

public interest must intervene rendering the construction and maintenance of fences inconvenient and dangerous or their erection will not be excused.[1] A mere private convenience of the company,[2] or increased cost of constructing a fence, is not sufficient to relieve the company from its duty to fence. A point remote from a depot, where freight is occasionally received, does not fall within the rule of exemption.[3] Where it is impossible to fence both sides of the track the railway company will not be required to do so,[4] and where a fence would interfere with the business of an adjoining owner of a saw-mill, hay-press or other business, it has been held that its erection will not be required.[5] It is held that the question as to whether the place at which an animal is killed or injured is reasonably necessary for depot purposes, may be for the jury,[6]

charge of its duty to the public, or with the rights of the public in the use of the highway, or in doing business with the company, nor at any place where fences and connecting cattle-guards would make the running and handling of trains, or the necessary and proper switching of cars, more hazardous to its employes."

[1] Greeley *v.* St. Paul, etc., R. Co., 33 Minn. 136; Kobe *v.* Northern Pacific R. Co., 36 Minn. 518; Hurt *v.* St. Paul, etc., R. Co., 39 Minn. 485; Bradley *v.* Buffalo, etc., R. Co., 34 N. Y. 427; Toledo, etc., R. Co. *v.* Chapin, 66 Ill. 504; Mundhenk *v.* Central Iowa R. Co., 57 Iowa 718; Flint, etc., R. Co. *v.* Lull, 28 Mich. 510. In International, etc., R. Co. *v.* Cocke, 64 Tex. 151, s. c. 23 Am. & Eng. R. Cas. 226, the court said: "The general terms of our statute imposing a liability on railway companies for injuries done to animals, unless their railways are fenced, do not apply to such places as public necessity or convenience require should be left unfenced, such as the streets of a city or town, depot, and contiguous grounds, the crossings of highways, and other like places." See, also, International, etc., R. Co. *v.* Dunham, 68 Tex. 231.

[2] Hurt *v.* St. Paul, etc., R. Co., 39 Minn. 485; Tracy *v.* Troy, etc., Co., 38 N. Y. 433; Comstock *v.* Des Moines, etc., R. Co., 32 Iowa 376; Bellefontaine, etc., R. Co. *v.* Reed, 33 Ind. 476; Morris *v.* St. Louis, etc., R. Co., 58 Mo. 78.

[3] Jaeger *v.* Chicago, etc., R. Co., 75 Wis. 130, 40 Am. & Eng. R. Cas. 194; Dinwoodie *v.* Chicago, etc., R. Co., 70 Wis. 160; Smith *v.* Chicago, etc., R. Co., 60 Iowa 512. Neither do switches and side tracks which are remote from and constitute no part of the depot yard. Chicago, etc., R. Co. *v.* Hans, 111 Ill. 114.

[4] Indiana, etc., R. Co. *v.* Leak, 89 Ind. 596.

[5] Indianapolis, etc., R. Co. *v.* Kinney, 8 Ind. 402; Ohio, etc., R. Co. *v.* Rowland, 51 Ind. 285; Cincinnati, etc., R. Co. *v.* Wood, 82 Ind. 593.

[6] Grosse *v.* Chicago, etc., R. Co., (Wis.) 65 N. W. R. 185, and cases cited.

but where only one conclusion can be drawn it is a question for the court.[1]

§ 1195. **Fences in cities, towns and villages.**—Where a railway track passes through a city, town or village, the company is bound to fence the same as at other places,[2] unless it is exempted by statute[3] or the convenience of the public[4] require that the track should not be fenced. It is not necessary that there should be an incorporated town; all that is necessary is that lots be regularly laid out and that the track be crossed by streets and alleys open to the public.[5] In many of the states in which statutes imposing the duty to fence are in force the statute itself in express terms exempts the company from the duty to fence in cities, towns and villages.[6] Where no such exemption is created by the statute the courts have created one, and it is now well settled that a railway company is not bound to fence its track in a city, town or village where the mainte-

[1] See Grosse *v.* Chicago, etc., R. Co., (Wis.) 65 N. W. R. 185.

[2] Flint, etc., R. Co. *v.* Lull, 25 Mich. 510; Bradley *v.* Buffalo, etc., R. Co., 34 N. Y. 427; Tracy *v.* Troy, etc., R. Co., 38 N. Y. 433; Cleveland, etc., R. Co. *v.* McConnell, 26 Ohio St. 57; Greely *v.* St. Paul, etc., R. Co. 33 Minn. 136, 19 Am. & Eng. R. Cas. 559; Union, etc., R. Co. *v.* Dyche, 28 Kans. 200; Ells *v.* Pacific R. Co., 48 Mo. 231; La Paul *v.* Truesdale, 44 Minn. 275, 45 Am. & Eng. R. Cas. 468. In Toledo, etc., Co. *v.* Cupp, 9 Ind. App. 244, 36 N. E. R. 445, the rule is thus stated: "The fact that appellant's railroad passed through an addition to a city, which was laid out, platted and divided into streets and alleys, did not, of itself, absolve the railroad company from the duty of securely fencing its track; for wherever a railroad company can build and maintain a fence to inclose its track without interfering with the rights of the public, or with the free use of private property or of its own property, then it is bound to maintain the fence, whether it be in the country, in a village, in a town, or in a city. Ohio, etc., R. Co. *v.* Rowland, 50 Ind. 349; Wabash R. Co. *v.* Forshee, 77 Ind. 158; Wabash R. Co. *v.* Tretts, 96 Ind. 450; Ohio, etc., Ry. Co. *v.* Neady, 5 Ind. App. 328, 32 N. E. R. 213."

[3] Meyer *v.* North Missouri, etc., R. Co., 35 Mo. 352; Elliott *v.* Hannibal, etc., R. Co., 66 Mo. 683; Toledo, etc., R. Co. *v.* Spangler, 71 Ill. 568; Illinois, etc., R. Co. *v.* Bull, 72 Ill. 537. See Chicago, etc., R. Co. *v.* Hogan, 30 Neb. 686, 46 N. W. R. 1015.

[4] Parker *v.* Rensselaer, etc., R. Co., 16 Barb. 315; Crawford *v.* New York Central R. Co., 18 Hun (N. Y.), 108; Towns *v.* Cheshire R. Co., 21 N. H. 363; Peoria, etc., R. Co. *v.* Barton, 80 Ill. 72.

[5] Gerren *v.* Hannibal, etc., R. Co., 60 Mo. 405; Toledo, etc., R. Co. *v.* Spangler, 71 Ill. 568; Illinois, etc., Co. *v.* Williams, 27 Ill. 48.

[6] Note, 3 *supra*.

nance of a fence would interfere either with the rights of the public or the railway company in the discharge of its business.[1] Where the track extends along a street the company is not bound to fence,[2] neither is it required to fence at street crossings.[3] The test for determining whether a fence should be constructed in a city, town or village is whether or not the erection of a fence would interfere with the rights of the public or the discharge of the duties of the company. Where the track is crossed by streets and alleys at frequent intervals, such as streets and alleys between blocks and lots of ordinary size, no fence is required;[4] but where the lots of land are very large and the streets cross at wide intervals fences must be erected.[5] And where streets or platted grounds end at the right of way of a railway company it is bound to fence;[6] so it is at the edge or boundary of the city, town or village.[7]

§ 1196. **Fences at embankments.**—A railway company is ordinarily required to fence its track at embankments. The test is whether or not the embankment is as effectual a barrier against the entry of animals as a fence would be if erected. Where there is an embankment, bluff or other natural object which furnishes a security against the entry of animals as efficient as a fence the company will not be required to maintain

[1] Morris *v.* St. Louis, R. Co., 58 Mo. 78; Atchison, etc., R. Co. *v.* Shaft, 33 Kan. 521, 6 Pac. R. 908.

[2] Edwards *v.* Hannibal, etc., R. Co., 66 Mo. 567; Rhea *v.* St. Louis, etc., R. Co., 84 Mo. 345; Kobe *v.* Northern Pacific R. Co., 36 Minn. 518.

[3] St. Louis, etc., R. Co. *v.* Francis, 58 Ind. 389; Wabash, etc., R. Co. *v.* Forshee, 77 Ind. 158.

[4] Pittsburgh, etc., R. Co. *v.* Laufman, 78 Ind. 319.

[5] Coyle *v.* Chicago, etc., R. Co., 62 Iowa 518, s. c. 17 N. W. R. 771; Wymore *v.* Hannibal, etc., R. Co. 79 Mo. 247, 13 Am. & Eng. R. Cas. 523: Ells *v.* Pacific R. Co., 48 Mo. 231; International, etc., R. Co. *v.* Dunham, 68 Tex. 231; Elliott *v.* Hannibal, etc., R. Co., 66 Mo. 683. "There are places within a corporated town where the railroad may fence, as where there are no streets or alleys, and the public travel would not be interrupted by such fence." Young *v.* Hannibal, etc., R. Co., 79 Mo. 336.

[6] Kirkland *v.* Missouri Pacific R. Co., 82 Mo. 466; La Paul *v.* Truesdale, 44 Minn. 275.

[7] Kirkland *v.* Missouri, etc., R. Co., 82 Mo. 466; McCormick *v.* St. Louis, etc., R. Co., 20 Mo. App. 640; Nashville, etc., R. Co. *v.* Hughes, 94 Tenn. 450, s. c. 29 S. W. R. 723.

a fence.[1] But where the embankment will not prevent the entry of animals the erection of a fence will not be excused.[2] Proof that animals habitually or frequently went over an embankment onto the railway company's tracks has been held conclusive evidence that it is not sufficient.[3] An embankment, on which the track of a railway company is laid, erected in the bed of a canal must be protected by proper fences.[4] And the road must be fenced, where it is erected on the tow-path of an abandoned canal.[5] Where a railway company has a bridge so near a public highway that animals may get onto the bridge from the highway the company is bound to take some steps to prevent animals from getting onto the bridge.[6]

§ 1197. **Fences at oblique approaches to highways.**—Where a railway crosses a highway at an oblique angle more or less difficulty exists in locating wing fences and cattle-guards so as to protect animals from injury at such places. To permit the wing fences at such places to be erected at right angles to the track would cause a part of the right of way without the limits of the highway to be thrown open or the highway to be obstructed, and a sort of pocket or trap would result into which animals might be caught and driven on the track and injured. The rule is that at such crossings the company must construct its cattle-guards and erect its wing fences on the margin of the highway so that the highway is not encroached upon, and all of the right of way not in the highway is fenced and protected.

[1] Hilliard *v.* Chicago, etc., R. Co., 37 Iowa 442; *ante*, § 1184. Where a horse entered upon the railway track upon snow which had drifted against the company's fence and was killed it was held that the company was not liable since it was under no obligation to remove such snow-drifts. Patten *v.* Chicago, etc., R. Co., 75 Iowa 459, 39 N. W. R. 708.

[2] Toledo, etc., R. Co. *v.* Sweeney, 41 Ill. 226; Shepard *v.* Buffalo, etc., R. Co., 35 N. Y. 641.

[3] Toledo, etc., R. Co. *v.* Sweeney, 41 Ill. 226; Veerhusen *v.* Chicago, etc., R. Co., 53 Wis. 689.

[4] White Water, etc., R. Co. *v.* Quick, 31 Ind. 127. See Schermerhorn *v.* Hudson River, etc., R. Co., 38 N. Y. 103, where it was held that the railway company was not bound to fence its track, erected in and over a river.

[5] White Water, etc., R. Co. *v.* Quick, 30 Ind. 384.

[6] Cincinnati, etc., R. Co. *v.* Jones, 111 Ind. 259, 31 Am. & Eng. R. Cas. 491.

If the company erects the fences back from the highway so as to form a pocket it may be liable for animals killed at such place on the ground that it has not properly fenced its tracks.[1] If a fence or cattle guard is not placed on the margin of the highway where it is practicable to do so, and an animal is injured on the track between the margin of the highway and the point where the road is fenced, the company will be liable.[2]

§ 1198. **Cattle-guards.**—"Cattle-guards," or "cattle pits" as they are sometimes termed, are structures erected under or across the tracks of a railway company to prevent animals from going from adjacent lands or tracks into and upon inclosed lands or tracks.[3] Their erection is rendered necessary by reason of the fact that it would be impossible to maintain fences across the track.[4] Trains must run over tracks, and a barrier against animals must be of such a nature that it will not obstruct trains. The points at which a railway company must maintain cattle-guards are pretty clearly settled. The general rule is that wherever a railway company is under obligation to fence its tracks it is bound to maintain cattle-guards at the boundary line between the fenced and unfenced parts of its track.[5] In

[1] Andre *v.* Chicago, etc., R. Co., 30 Iowa 107; Ft. Wayne, etc., R. Co. *v.* Herbold, 99 Ind. 91; Jeffersonville, etc., R. Co. *v.* Morgan, 38 Ind. 190.

[2] White *v.* Utica, etc., R. Co. 15 Hun 333; Evansville, etc., R. Co. *v.* Barbee, 74 Ind. 169; Ehret *v.* Kansas City, etc., R. Co., 20 Mo. App. 251; Hamilton *v.* Missouri Pacific, etc., R. Co., 87 Mo. 85; Coleman *v.* Flint, etc., R. Co., 64 Mich. 160, 31 N. W. R. 47; Indianapolis, etc., R. Co. *v.* Bonnell, 42 Ind. 539. See also Soward *v.* Chicago, etc., R. Co., 30 Iowa 551. Where the company has erected its cattle-guard as near the highway as could conveniently be done it will not be liable. Indianapolis, etc., R. Co. *v.* Irish, 26 Ind. 268.

[3] Heskett *v.* Wabash, etc., R. Co., 61 Iowa 467, s. c. 13 Am. & Eng. R. Cas. 549; Missouri, etc., R. Co. *v.* Morrow, 32 Kan. 217. In the latter case it was said: "Proper cattle-guards are such as will prevent cattle from passing along the right of way of the railway company into an improved or fenced field."

[4] In the case of Pennsylvania, etc., R. Co. *v.* Spaulding, 112 Ind. 47, the court, in speaking of a statutory provision requiring a railway company to erect cattle-guards, said: "The reason of that requirement is that, at such open and public crossings there is no other way of preventing the ingress of animals to portions of the railroad not so crossed by the public."

[5] Missouri, etc., R. Co. *v.* Ricketts, 45 Kan. 617, 26 Pac. R. 50, 45 Am. &

some states the duty to maintain cattle-guards is imposed by statute in express terms.[1] Some authorities seem to hold that the company is not under any obligation to maintain cattle-guards unless that obligation is imposed by statute, contract or prescription,[2] but the great weight of authority is to the effect that if a fence is required cattle-guards are also required.[3] And under statutes imposing the duty to fence companies are bound to erect and maintain cattle-guards, for cattle-guards are regarded as part of a secure fence.[4] In cities, towns

Eng. R. Cas. 485. The duty can not be so delegated to a contractor as to relieve the company from liability. Houston, etc., R. Co. *v.* Meador, 50 Tex. 77. "It is always the duty of a railroad company operating a railroad to see that proper cattle-guards exist wherever its railroad enters and leaves improved or fenced land, whether such railway company owns the railroad, or is simply operating it under a lease." Missouri, etc., R. Co. *v.* Morrow, 32 Kan. 217.

[1] Mundhenk *v.* Central, etc., R. Co., 57 Iowa 718, 11 Am. & Eng. R. Cas. 463; Corwin *v.* New York, etc., R. Co., 13 N. Y. 42; Brady *v.* Rensselaer, etc., R. Co., 1 Hun 378. In McGhee *v.* Guyn, (Ky.) 32 S. W. R. 915, the court said: "It is well settled that a neglect on the part of the company to erect suitable cattle-guards at public crossings, and keep them in repair, when a statute so requires, renders it liable for injuries to cattle escaping from a highway upon its track by reason of such defect."

[2] Ward *v.* Pudacah, etc., R. Co., 4 Fed. R. 862.

[3] Pittsburgh, etc., R. Co. *v.* Eby, 55 Ind. 567; Louisville, etc., R. Co. *v.* Spain, 61 Ind. 460; Dunnigan *v.* Chicago, etc., R. Co., 18 Wis. 28; Evansville, etc., R. Co. *v.* Barbee, 74 Ind. 169; Grand Rapids, etc., R. Co. *v.* Jones, 81 Ind. 523; Texas, etc., R. Co. *v.* Young, 60 Tex. 201, 13 Am. & Eng. R. Cas. 544.

[4] Indianapolis, etc., R. Co. *v.* Irish, 26 Ind. 268; New Albany, etc., R. Co. *v.* Pace, 13 Ind. 411; Evansville, etc., R. Co. *v.* Barbee, 74 Ind. 169; Smith *v.* Chicago, etc., R. Co., 38 Iowa 518; Towns *v.* Cheshire R. Co., 21 N. H. 363; Mackie *v.* Central, etc., R. Co., 54 Iowa 540; Nelson *v.* Vermont, etc., R. Co., 26 Vt. 717; Wait *v.* Bennington, etc., R. Co., 61 Vt. 268. Cattle-guards, however, are not such a part of the fence as to authorize a person whose cattle are injured by reason of a defective cattle-guard to recover double damages as in the case of a defective fence. Moriarty *v.* Central Iowa R. Co., 64 Iowa 646, s. c. 20 Am. & Eng. R. Cas. 438. In the case of Atchison, etc., R. Co. *v.* Shaft, 33 Kan. 521, s. c. 19 Am. & Eng. R. Cas. 529, it was said: "Under the statute railroads must be 'enclosed'; in the language of the statute, they must be 'enclosed with a good and lawful fence, to prevent such animals from being on such road.' * * * Building fences along the sides of the railroad is not alone sufficient. The railroads must be 'enclosed,' as aforesaid, with fences or other barriers, and whenever for that purpose cattle-guards are necessary at the crossings of public highways or other public places, cattle-guards must be put in." The court cited the following author-

and villages and other places where the company is excused from fencing because of public necessity or the inconvenience or danger to the employes of the company in the performance of their duties the company is not ordinarily bound to maintain cattle-guards.[1] But the company is bound to erect them at the margin of highways,[2] and at the edge of a town or a depot ground where the company's fence commences.[3] The true test, it seems to us, for determining whether a cattle-guard should be erected at any particular point is whether the company is bound to fence at that point. Wherever the company's track emerges from ground which the company is bound to fence and passes onto ground which the company is not bound to fence there should be a cattle-guard placed on the dividing line.[4] At private crossings the company is under no obligation to maintain cattle-guards,[5] unless the duty is imposed by

ities: Union Pacific R. Co. *v.* Harris, 28 Kan. 206; Missouri, etc., R. Co. *v.* Manson, 31 Kan. 337, s. c. 2 Pac. R. 800; Missouri, etc., R. Co. *v.* Morrow, 32 Kan. 217, 4 Pac. R. 87; Pittsburgh, etc., R. Co. *v.* Eby, 55 Ind. 567; Bradley *v.* Buffalo, etc., R. Co., 34 N. Y. 427; Tracy *v.* Troy, etc., R. Co., 38 N. Y. 433; Peoria, etc., R. Co. *v.* Barton, 80 Ill. 72; Flint, etc., R. Co. *v.* Lull, 28 Mich. 510; Cleveland, etc., R. Co. *v.* Newbrander, 40 Ohio St. 15, s. c. 11 Am. & Eng. R. Cas. 480; Mundhenk *v.* Central Iowa R. Co., 57 Iowa 718, s. c. 11 Am. & Eng. R. Cas. 463.

[1] Parker *v.* Rensselear, etc., R. Co., 16 Barb. 315; Vanderkar *v.* Rensselaer, etc., R. Co., 13 Barb. 390.

[2] White Water R. Co. *v.* Bridgett, 94 Ind. 216, s. c. 20 Am. & Eng. R. Cas. 443. If an intervening space is left between the edge of the highway and the cattle-guard and an animal is there injured the company is liable. Louisville, etc., R. Co. *v.* Porter, 97 Ind. 267, s. c. 20 Am. & Eng. R. Cas. 446.

[3] Missouri, etc., R. Co. *v.* Manson, 31 Kan. 337, 13 Am. & Eng. R. Cas. 540; Mundhenk *v.* Central, etc., R. Co., 57 Iowa 718, 11 N. W. R. 656. Where the erection of cattle-guards would not obstruct the company's business, but would be a safeguard; they shoud be constructed, even in a town or village. Brace *v.* New York, etc., R. Co., 27 N. Y. 269; Toledo, etc., R. Co. *v.* Owen, 43 Ind. 405. A railway company is not guilty of negligence in constructing and maintaining a cattle-guard at a point where station grounds end and whence the company is bound to fence its tracks. Fuller *v.* Lake Shore, etc., R. Co., (Mich.) 66 N. W. R. 593.

[4] Missouri, etc., R. Co. *v.* Morrow, 32 Kan. 217, 19 Am. & Eng. R. Cas. 630.

[5] Pennsylvania R. Co. *v.* Spaulding, 112 Ind. 47; Bartlett *v.* Dubuque, etc., R. Co., 20 Iowa 188; Cook *v.* Milwaukee, etc., R. Co., 36 Wis. 45; Brooks *v.* New York, etc., R. Co., 13 Barb. 594; Sather *v.* Chicago, etc., R. Co. 40 Minn. 91, 38 Am. & Eng. R. Cas. 283; Greeley *v.* St. Paul, etc., R. Co., 33 Minn. 136; Omaha, etc. R. Co. *v.* Sev-

statute.[1] In determining what is a sufficient cattle-guard the weight of authority is perhaps to the effect that the question is one for the jury,[2] but it seems to us on principle that if a company maintains such cattle-guards as are in general use by first-class railroads it has performed its duty,[3] and if cattle get over such a guard and are injured the company is not liable unless guilty of wilfulness or negligence amounting to wantonness. The company must use care to see that its cattle-guards are in proper repair[4] and to remove materials such as snow and ice which fill them up and thus impair their usefulness.[5] But where a snow-storm has been so great as to render it impossible for the company to even clear its tracks for the passage of trains it is not bound to clear its cattle-guards of snow.[6]

§ 1199. **Wing fences.**—What are known as wing fences are fences extending from the cattle-guards to and connecting with the fences erected along the margin of the right of way. Wherever the company is bound to fence and has erected a cattle-guard it is bound to erect wing fences at such point[7]

erin, 30 Neb. 318, 45 Am. & Eng. R.Cas. 122; Dent *v.* St. Louis, etc., R. Co., 83 Mo. 496; Fitterling *v.* Missouri, etc., R. Co., 79 Mo, 504; Bond *v.* Evansville, etc., R. Co., 100 Ind. 301, s. c. 23 Am. & Eng. R. Cas. 200. And it is no defense to an action for killing an animal at a private crossing to show that cattle-guards were there erected unless they were erected in compliance with a statutory requirement. Pennsylvania R.Co. *v.* Spaulding, 112 Ind. 47.

[1] See Trout *v.* Virginia, etc., R. Co., 23 Gratt. (Va.) 619; Chapin *v.* Sullivan, etc., R. Co., 39 N. H. 564; Birmingham, etc., R. Co. *v.* Parsons, 100 Ala. 662, 27 L. R. A. 268.

[2] Railroad Co. *v.* Newbrander, 40 Ohio St. 15; Swartout *v.* New York, etc., R. Co., 7 Hun (N. Y.) 571; Chicago, etc., R. Co. *v.* Farrelly, 3 Ill. App. 60.

[3] The mere fact that an animal runs or jumps over a cattle-guard is not sufficient to establish that it is defective. Barnhart *v.* Chicago, etc., R. Co., (Iowa) 66 N. W. R. 902; Timins *v.* Chicago, etc., R. Co., 72 Iowa 94, 33 N. W. R. 379.

[4] Chicago, etc., R. Co. *v.* Reid, 24 Ill. 144.

[5] Hance *v.* Cayuga, etc., R. Co., 26 N. Y. 428; Dunnigan *v.* Chicago, etc., Co., 18 Wis. 28. Compare Blais *v.* Minneapolis, etc., R. Co., 34 Minn. 57.

[6] See Wait *v.* Bennington, etc., R.Co., 61 Vt. 268, 17 Atl. R. 284; Stacey *v.* Winona, etc., R. Co. 42 Minn. 158, 40 Am. & Eng. R. Cas. 217.

[7] Union, etc., R. Co. *v.* Harris, 28 Kan. 206. See Brassfield *v.* Patton, 32 Mo. App. 572. But at private crossings wing fences are not required. Missouri, etc., R. Co. *v.* Fitterling, 79

for a wing fence is regarded as part of a secure fence,[1] and is necessary to render the track "securely fenced in."[2] The duty rests upon the company to protect its track for the full width of its right of way, and this duty must be discharged by the erection of proper cattle-guards and wing fences.[3] Wing fences must be placed along the margin of the highway. If they are erected at an improper distance from the margin and animals are killed within such distance the company will be liable.[4]

§ 1200. **Gates and bars.**—At private crossings, as we have before seen, railway companies are bound to fence their tracks. But at such places a permanent and immovable fence can not be maintained, for such a fence would prevent the crossing from being used. At such points openings are usually left in the fence and gates or bars erected through which the adjoining owners may pass, and at such places the railway company is bound to erect gates, bars or other appliances which will prevent the entry of animals and yet enable adjoining owners to pass over the right of way.[5] The company must also ex-

Mo. 594, s. c. 20 Am. & Eng. R. Cas. 454.

[1] Edwards *v.* Kansas City, etc., R. Co., 74 Mo. 117; Jeffersonville, etc., R. Co. *v.* Avery, 31 Ind. 277.

[2] In the case of Louisville, etc., R. Co. *v.* Thomas, 106 Ind. 10, it was said: "There were no fences on either side of the cattle-guard, leading from it to the east and west fences on the north and south sides of appellant's railroad track. If there had been such wing fences leading out from the cattle-guard, and connecting with the east and west fences on each side of the railroad track, it could have been correctly said that such track, at the point where appellee's mare entered thereon, was, in the language of the statute, 'securely fenced in.' In that event the eastward journey of the mare on, along and over appellant's railroad track, would have terminated of necessity at the cattle-guard, and she would have gone no further, except in retracing her previous steps. As it was, in the absence of such wing fences leading out from the cattle-guard and connecting it, one on each side with the east and west fences, it can not be said with legal accuracy that, at the point where appellee's mare entered upon appellant's railroad track, such track was then and there 'securely fenced in.'"

[3] Missouri, etc., R. Co. *v.* Manson, 31 Kans. 337, 13 Am. & Eng. R. Cas. 540.

[4] Louisville, etc., R. Co. *v.* Porter, 97 Ind. 267, s. c. 20 Am. & Eng. R. Cas. 446.

[5] Pittsburgh, etc., R. Co. *v.* Cunningham 39 Ohio St. 327, 13 Am. & Eng. R. Cas. 529; Hurd *v.* Rutland, etc., R. Co., 25 Vt. 116; Mackie *v.* Central, etc., R.

ercise due care to see that gates and bars which it erects are kept in proper repair.[1] As a general rule it is the duty of the company to exercise care to keep gates and bars erected in fences along its right of way closed,[2] and to see that such gates are provided with proper fastenings for keeping them closed.[3] Where such gates are left open by the agents, servants or customers of the railway company the railway company will generally be liable for injuries to animals which come upon the track through such open gates.[4] And the company will generally be liable where the gates are left open by third persons or strangers if the company knows that they are open or they have been open for such a length of time as to charge the company with notice,[5] but not otherwise.[6] The company is entitled to a reasonable time in which to learn that gates and bars are open or out of repair, and it will not be liable until it has had reasonable opportunity to close the gate or bars or

Co., 54 Iowa 540, 6 N. W. R. 723; Estes *v.* Atlantic, etc., R. Co., 63 Me. 308; Chicago, etc., R. Co. *v.* Harris, 54 Ill. 528. The company may erect gates at places other than public crossings where their erection is deemed advisable. Detroit, etc., R. Co. *v.* Hayt, 55 Mich. 347.

[1] Illinois, etc., R. Co. *v.* Arnold, 47 Ill. 173; Waldron *v.* Portland, etc., R. Co., 35 Me. 422; Chicago, etc., R. Co. *v.* Harris, 54 Ill. 528; Mackie *v.* Central, etc., R. Co., 54 Iowa 540, 6 N. W. R. 723; Hammond *v.* Chicago, etc., R. Co., 43 Iowa 168. The company must take notice of the tendency of the material out of which gates or bars are constructed to decay and act accordingly. Hovorka *v.* Minneapolis, etc., R. Co., 34 Minn. 281, s. c. 25 N. W. R. 595. And proof is admissible that gates or bars were repaired after an accident. Page *v.* Great Western, etc., R. Co., 24 L. T. Rep. 585.

[2] Chicago, etc., R. Co. *v.* Harris, 54 Ill. 528. See Savage *v.* Chicago, etc., R. Co., 31 Minn. 419, 13 Am. & Eng. R. Cas. 566; Simmons *v.* Poughkeepsie, etc., R. Co., 37 N. Y. S. 532.

[3] Payne *v.* Kansas City, etc., R. Co., 72 Iowa 214, 35 Am. & Eng. R. Cas. 113; Vernon *v.* Grand Trunk, etc., R. Co., 2 Mont. (Can.) S. C. 181.

[4] Toledo, etc., R. Co. *v.* Nelson, 77 Ill. 160; Chapman *v.* New York, etc., R. Co., 33 N. Y. 369; Spinner *v.* New York, etc., R. Co., 67 N. Y. 153; Cleveland, etc., R. Co. *v.* Swift, 42 Ind. 119; Brady *v.* Rensselaer, etc., R. Co., 3 Thomp. & C. (N. Y.) 537. See Lemon *v.* Chicago, etc., R. Co., 59 Mich. 618.

[5] Bartlett *v.* Dubuque, etc., R. Co., 20 Iowa 188; Illinois, etc., R. Co. *v.* Arnold, 47 Ill. 173; Chicago, etc., R. Co. *v.* MaGee, 60 Ill. 529; Chicago, etc., R. Co. *v.* Saunders, 85 Ill. 288; Indianapolis, etc., R. Co. *v.* Hall, 88 Ill. 368; Henderson *v.* Chicago, etc., R. Co., 48 Iowa 216; Davenport *v.* Chicago, etc., R. Co., 76 Wis. 399.

[6] Texas, etc., R. Co. *v.* Glenn, 8 Tex. App. 301, 30 S. W. R. 845; Koenigs *v.* Chicago, etc., R. Co., (Iowa) 65 N. W. R. 314.

make repairs.[1] Where gates are left open by the adjoining owner for whose benefit they were erected, or by his servants, the company is not liable to him.[2] But if the animals belong to a third person, the company may be liable to such person notwithstanding the gates were left open by the adjoining owner.[3] Where gates or bars are erected by land-owners for their own convenience at places along the right of way where the company is not bound to fence it is under no obligation to keep such gates closed.[4]

§ 1201. **Place of entry of animals on railway track.**—In suits for damages on account of injuries to animals on railway tracks the place where the animals came upon the track is nearly always a controlling element in determining the liability of the company. The general rule is that if the animals came upon the track at a place where the company was excused

[1] In Jacksonville, etc., R. Co. *v.* Harris, 33 Fla. 217, 39 Am. St. R. 127, the court in speaking of the duty of a railway company to keep gates and bars closed and in repair referred to the doctrine that a company had a reasonable time in which to discover and repair defects in fences and held that the same doctrine was properly applicable to the case of open or defective gates and bars, saying: "A somewhat similar doctrine is applicable where bars or gates at a crossing are left open without the company's consent or fault." The court cited a great number of cases among which were the following: Rutledge *v.* Hannibal, etc., R. Co., 78 Mo. 286; Henderson *v.* Chicago, etc., R. Co., 39 Iowa 220; Munch *v.* New York, etc., R. Co., 29 Barb. 647; Lemon *v.* Chicago, etc., R. Co., 59 Mich. 618; Goddard *v.* Chicago, etc., R. Co., 54 Wis. 548; Chicago, etc., R. Co. *v.* Saunders, 85 Ill. 288; Indianapolis, etc., R. Co. *v.* Truitt, 24 Ind. 162.

[2] Eames *v.* Boston, etc., R. Co., 14 Allen (Mass.) 151; Henderson *v.* Chicago, etc., R. Co., 48 Iowa 216; Waldron *v.* Portland, etc., R. Co., 35 Me. 422; Richardson, etc., R. Co., 56 Wis. 347; Chicago, etc., R. Co. *v.* Seirer, 60 Ill. 295; Bond *v.* Evansville, etc., R. Co., 100 Ind. 301, s. c. 23 Am. & Eng. R. Cas. 200; Hook *v.* Worcester. etc., R. Co., 58 N. H. 251; Rouse *v.* Osborne, (Kan. App.) 42 Pac. R. 843. The person for whose benefit the gates are erected assumes the increased risk caused by having gates instead of fences. Evansville, etc., R. Co. *v.* Mosier, 101 Ind. 597, 35 Am. & Eng. R. Cas. 196. See, also, Tombs *v.* Rochester, etc., R. Co., 18 Barb. 583; Henderson *v.* Chicago, etc., R. Co., 43 Ia. 620; Harrington *v.* Chicago, etc., R. Co., 71 Mo. 384.

[3] Laude *v.* Chicago, etc., R. Co., 33 Wis. 640.

[4] Indianapolis, etc., R. Co. *v.* Adkins, 23 Ind. 340; Indianapolis, etc., R. Co. *v.* Shimer, 17 Ind. 295; Koutz *v.* Toledo, etc., R. Co., 54 Ind. 515.

from fencing there can be no liability unless the injuries were wilfully or negligently inflicted.[1] The condition of the fence at the actual place of entry is the test for determining the company's liability.[2] If the animals entered at a place where a fence was required and are injured at a point where no fence is required, the company may be liable;[3] but if the animals entered at a point where a fence was not required, and were injured at a point where no fence was required there is no liability, in the absence of wilfulness or negligence.[4] But where the animal entered upon the track at a highway or other place where a fence is not required and is chased along the track onto ground that should be fenced or properly guarded by cattle-guards, but is not, and the injury is caused because it is not, the company may be liable.[5] In the absence of wilfulness or negligence the material question is, was the track fenced at the point where the animal came upon it, for the negligence of the company in not fencing and thus keeping the animal

[1] Jeffersonville, etc., R. Co. *v.* Huber, 42 Ind. 173; Illinois, etc., R. Co. *v.* Bull, 72 Ill. 537; Indianapolis, etc., R. Co. *v.* Warner, 35 Ind. 515; Davis *v.* Burlington, etc., R. Co., 26 Iowa 549; Peoria, etc., R. Co. *v.* Barton, 80 Ill. 72; Weir *v.* St. Louis, etc., R. Co., 48 Mo. 558; Bremmer *v.* Green Bay, etc., R. Co., 61 Wis. 114, 19 Am. & Eng. R. Cas. 575; Great Western, etc., R. Co. *v.* Morthland, 30 Ill. 451; Snider *v.* St. Louis, etc., R. Co., 73 Mo. 465, 7 Am. & Eng. R. Cas. 558; Schneir *v.* Chicago, etc., R. Co., 40 Iowa 337; Asher *v.* St. Louis, etc., R. Co., 79 Mo. 432; Louisville, etc., R. Co. *v.* Harrigan, 94 Ind. 245.

[2] Indiana, etc., R. Co. *v.* Quick, 109 Ind. 295; Coryell *v.* Hannibal, etc., R. Co., 82 Mo. 441; Chicago, etc., R. Co. *v.* Farrelly, 3 Bradw. 60; Toledo, etc., R. Co. *v.* Howell, 38 Ind. 447; Jeffersonville, etc., R. Co. *v.* Lyon, 72 Ind. 107; Smith *v.* Missouri Pacific R. Co., 29 Mo. App. 65; Wabash, etc., R. Co. *v.* Brown, 2 Bradw. 516; Wabash, etc., R. Co. *v.* Tretts, 96 Ind. 450; Yeager *v.* Chicago, etc., R. Co., 1 Mo. App. R. 434.

[3] Toledo, etc., R. Co. *v.* Howell, 38 Ind. 447. And the company will be liable where stock entered at a place requiring a fence although they afterward wandered along and off the track and again entered it at a place where no fence was required. Jeffersonville, etc., R. Co. *v.* Lyon, 72 Ind. 107; Atchison, etc., R. Co. *v.* Cash, 27 Kan. 587.

[4] Atchison, etc., R. Co. *v.* Cash, 27 Kan. 587; Great Western, etc., R. Co. *v.* Morthland, 30 Ill. 451; Eaton *v.* Oregon, etc., R. Co., 19 Ore. 371, 24 Pac. R. 413; Bennett *v.* Chicago, etc., R. Co., 19 Wis. 145.

[5] Evansville, etc., R. Co. *v.* Barbee, 74 Ind. 169; Jantzen *v.* Wabash, etc., Ry. Co., 83 Mo. 171.

out is regarded as the cause of the injury and it is on such negligence that a recovery is predicated.[1]

§ 1202. Determining places where fences are required—Questions of law and fact.—There are, as we have seen, certain places where railway companies are not bound to fence their tracks. Whether a company is under an obligation to fence its track at any particular point is, if the facts are undisputed, generally a question of law for the court.[2] Thus, where a company is excused from fencing at highway crossings, depot grounds or station grounds, it is a question for the court whether the company was bound to fence at those points.[3] Often, however, the question resolves itself into one of fact, or of mixed law and fact. While it is purely a question of law whether or not a railway company shall fence at its depot grounds or at points where the erection of a fence would interfere with the company in transacting its business, it is a question of fact whether a certain point constitutes part of the depot grounds[4] or whether the erection of a fence at any particular place would interfere with the company's employes in the performance of their duties.[5] Thus, it

[1] See Cecil *v.* Pacific, etc., R. Co., 47 Mo. 246; Foster *v.* St. Louis, etc., R. Co., 90 Mo. 116; Moore *v.* Wabash, etc., R. Co., 81 Mo. 499; Alsop *v.* Ohio, etc., R. Co., 19 Bradw. (Ill.) 292; Cox *v.* Minneapolis, etc., R. Co., 41 Minn. 101, 38 Am. & Eng. R. Cas. 287; Sullivan *v.* Oregon, etc., R. Co., 19 Ore. 319, 42 Am. & Eng. R. Cas. 625. In the case of Wabash, etc., R. Co. *v.* Tretts, 96 Ind. 450, it was said: "The place of entry is the material question in cases of this character. If animals enter at a place where the railroad company is bound to fence, the company is liable, although they were killed at a point where the company was under no duty to fence."

[2] Illinois, etc., R. Co. *v.* Whalen, 42 Ill. 396; Chicago, etc., R. Co. *v.* Engle, 76 Ill. 317. See Rinear *v.* Grand Rapids, etc., R. Co., 70 Mich. 620, 38 N. W. R. 599.

[3] Toledo, etc., R. Co. *v.* Cory, 39 Ind. 218, where it was said: "It was for the court to tell the jury whether under the law the appellant was required to fence the road at the point where the cattle entered upon the track, but it was a question of fact, to be determined by the jury from the testimony of witnesses, whether the railroad had fenced its track in such a manner as to prevent cattle from entering thereon."

[4] Rhines *v.* Chicago, etc., R. Co., 75 Iowa 597, s. c. 39 N. W. R. 912; McDonough *v.* Milwaukee, etc., R. Co., 73 Wis. 223, 40 N. W. R. 806; Grosse *v.* Chicago, etc., R. Co., (Wis.) 65 N. W. R. 185.

[5] Cleveland, etc., R. Co. *v.* DeBolt, 10

is for the jury to determine whether a company is excused from putting in cattle-guards at a particular point, on the ground that their erection would interfere with the employes of the company in the performance of their duties.[1]

§ 1203. **Injuries to animals on highway.**—Ordinarily where animals are injured on highways a railway company is not liable unless the injuries were wilfully or wantonly inflicted.[2] Some of the authorities, however, hold that the company is liable if the injuries were negligently inflicted;[3] but negligence in such cases is usually regarded as a failure to observe statutory precautions, or to exercise reasonable care after the discovery of the animals to prevent injury to them. The rule determining the company's liability is, however, materially affected by the question as to whether or not the injured animal was rightfully on the highway. If the animals are wrongfully in the highway it would seem that the company is liable only for wilful injuries,[4] but where the animals are rightfully in the highway the company is bound to use due care to prevent injuring them.[5] This rule ordinarily applies only to animals which are

Ind. App. 174, 37 N. E. R. 737; Bean *v.* St. Louis, etc., R. Co., 20 Mo. App. 641.

[1] Chicago, etc., R. Co. *v.* Modesitt, 124 Ind. 212. The court in that case said: "It was for the jury to determine from the facts established by the evidence whether the company was excused from putting in a cattle-guard for the reason that it would make it dangerous to use the track."

[2] Hindman *v.* Oregon, etc., R. Co., 17 Ore. 614, 38 Am. & Eng. R. Cas. 310; Hanna *v.* Terre Haute, etc., R. Co., 119 Ind. 316; Wabash, etc., R. Co. *v.* Nice, 99 Ind. 152; Hance *v.* Cayuga, etc., R. Co., 26 N. Y. 428; McDonnell *v.* Pittsfield, etc., R. Co., 115 Mass. 564; Darling *v.* Boston, etc., R. Co., 121 Mass. 118; Munger *v.* Tonawanda, etc., R. Co., 4 N. Y. 349; Blair *v.* Milwaukee, etc., R. Co., 20 Wis. 254; Morris *v.* St. Louis, etc., Co., 58 Mo. 78; Swearingen *v.* Missouri, etc., R. Co., 64 Mo. 73; Comstock *v.* Des Moines, etc., R. Co., 32 Iowa 376; Chicago, etc., R. Co. *v.* Campbell, 47 Mich. 265.

[3] Chicago, etc., R. Co. *v.* McMorrow, 67 Ill. 218; Chapin *v.* Sullivan, etc., R. Co., 39 N. H. 564; Indianapolis, etc., R. Co. *v.* McKinney, 24 Ind. 283; Springfield, etc., R. Co. *v.* Andrews, 68 Ill. 56.

[4] Fitch *v.* Buffalo, etc., R. Co., 13 Hun (N. Y.) 668; Chicago, etc., R. Co. *v.* Cauffman, 38 Ill. 424; Corwin *v.* New York, etc., R. Co., 13 N. Y. 42; McDonnell *v.* Pittsfield, etc., R. Co., 115 Mass. 564; Hance *v.* Cayuga, 26 N. Y. 428.

[5] Beers *v.* Housatonic R. Co., 19 Conn. 566. See Chicago, etc., R. Co. *v.* Nash, 1 Ind. App. 298. This case,

being driven along the highway.[1] It does not apply to animals wrongfully running at large, for as to such animals the company is liable only for injuries wilfully inflicted.[2]

§ 1204. Rate of speed—Stopping train.—In the absence of statutory enactments regulating the speed of railway trains railway companies may run their trains at any rate of speed which may best suit their convenience.[3] They are not bound to run at a slower rate of speed because animals may come upon the track and may receive injuries by reason of such high rate of speed.[4] Railway companies being engaged in the business of conveying passengers and property, and that business being regarded of the highest importance, the speed of trains may be regulated with that end in view.[5] The slight private interest which may exist because of danger of injury to animals straying upon the track must give way to the greater interests which exist in favor of the public. No rate of speed is negligence *per se*.[6] In some states, however, statutes are

however, can not be regarded as good authority for the supreme court of Indiana has taken the opposite view of the law. Hanna *v.* Terre Haute, etc., R. Co., 119 Ind. 316.

[1] Midland, R. Co. *v.* Daykin, 17 C. B. 126.

[2] Hanna *v.* Terre Haute, etc., R. Co., 119 Ind. 316; Michigan, etc., R. Co. *v.* Fisher, 27 Ind. 96.

[3] Stern *v.* Michigan Central R. Co., 76 Mich. 591; Seawell *v.* Raleigh, etc., R. Co., 106 N. Car. 270. See Molair *v.* Railway, etc., R. Co., 31 S. Car. 510.

[4] Bemis *v.* Connecticut, etc., R. Co., 42 Vt. 375; New Orleans, etc., R. Co. *v.* Field, 46 Miss. 573; Darling *v.* Boston, etc., R. Co., 121 Mass. 118; Central Ohio, etc., R. Co. *v.* Lawrence, 13 Ohio St. 66; Baltimore, etc., R. Co. *v.* Mulligan, 45 Md. 486; Durham *v.* Wilmington, etc., R. Co., 82 N. Car. 352.

[5] Maynard *v.* Boston, etc., R. Co., 115 Mass. 458; Needham *v.* San Francisco, etc., R. Co., 37 Cal. 409; Bunnell *v.* Rio Grande R. Co. (Utah) 44 Pac. R. 927.

[6] Morse *v.* Rutland, etc., R. Co., 27 Vt. 49; Toledo, etc., R. Co. *v.* Barlow, 71 Ill. 640; New Orleans, etc., R. Co. *v.* Field, 46 Miss. 574; Pacific R. Co. *v.* Houts, 12 Kan. 328; Latty *v.* Burlington, etc., R. Co., 38 Iowa 250; Maher *v.* Atlantic, etc., R. Co., 64 Mo. 267; McKonkey *v.* Chicago, etc., R. Co., 40 Iowa 205; Western Railway of Alabama *v.* Sistrunk, 85 Ala. 352; Tonawanda R. Co. *v.* Munger, 5 Denio 255, 49 Am. Dec. 239; East Tennessee, etc., R. Co. *v.* Deaver, 79 Ala. 216. A greater degree of care, however, would be due from the company where its trains pass through a thickly populated country than in unsettled country, and evidence of a high rate of speed has been admitted as evidence of negligence. Pryor *v.* St. Louis, etc., R. Co., 69 Mo. 215; Edson *v.* Central, etc., R. Co., 40 Iowa 47.

in force regulating the speed at which trains shall run at certain points.[1] And in municipalities there are generally ordinances in force which fix the maximum rate of speed at which trains may run within corporate limits. Where a recovery is sought on the ground that the company was running its train at the time of the injury in excess of the statutory or ordinance rate it must be made to appear before a recovery can be had that such excessive speed was the cause of the injury.[2] Mere proof of the excessive speed is not sufficient.[3] There must be a showing that but for such excessive speed the injury would not have occurred.[4] Where animals are discovered upon the track the engineer is ordinarily bound to exercise some degree of care to prevent injuring them, if such care can be exercised consistent with the safety of the train or its passengers.[5] If danger would likely result to the train or passengers from an effort to stop or slacken the speed of

[1] In Alabama a statute which provided that railway companies should slacken the speed of their trains at crossings in "a curve or cut, where the engineer can not see at least one-fourth of a mile ahead," was held not to apply to crossings in straight track where the crossings were open and visible. Nashville, etc., R. Co. *v.* Hembree, 85 Ala. 481, 38 Am. & Eng. R. Cas. 300.

[2] Louisville, etc., R. Co. *v.* Caster, (Miss.) 5 So. R. 388; Toledo, etc., R. Co. *v.* Deacon, 63 Ill. 91; Monahan *v.* Keokuk, etc., R. Co., 45 Iowa 523; Houston, etc., R. Co. *v.* Terry, 42 Tex. 451; Maher *v.* Atlantic, etc., R. Co., 64 Mo. 267; Story *v.* Chicago, etc., R. Co., 79 Iowa 402.

[3] Plaster *v.* Illinois, etc., R. Co., 35 Iowa 449; Toledo, etc., R. Co. *v.* Barlow, 71 Ill. 640; Lafayette, etc., R. Co. *v.* Shriner, 6 Ind. 141.

[4] Chicago, etc., R. Co. *v.* Richardson, 28 Neb. 118, 42 Am. & Eng. R. Cas. 592; Union Pac. R. Co. *v.* Rassmussen, 25 Neb. 810. See Colorado, etc., R. Co. *v.* Caldwell, 11 Colo. 545.

[5] Newport News, etc., R. Co. *v.* Hazelip, (Ky.) 34 S. W. R. 904; Carlton *v.* Wilmington, etc., R. Co., 104 N. Car. 365, 40 Am. & Eng. R. Cas. 178; Missouri, etc., R. Co. *v.* Meithvein, (Tex. Civ. App.) 33 S. W. R. 1093. In the case last cited the court said: "We can affirm the judgment below on two grounds: 1st, because the appellant was guilty of negligence in not using efforts to stop the train. If this had been done, it is possible that the animal would not have been injured, or would not have been so severely injured. The facts in evidence, warranted the inference that, if the engineer had exercised proper diligence when he discovered the animals on the track, he might have prevented the collision." Where reasonable effort is made to stop the train and prevent the accident the company will not be liable. McGheè *v.* Gaines, (Ky.) 32 S. W. R. 602.

the train there is no obligation to stop or slacken the speed, for the safety of the train and its passengers is of the highest importance and takes precedence over the safety of animals on the track.[1] And an engineer will be justified in increasing the speed of his train so as to throw animals away from the track where such a course will secure the greatest safety for the train and the property and persons being carried thereon.[2] But where it can be done consistently with the safety of the train, it is the duty of the engineer to use reasonable care to slacken the speed of the train, or even to stop it wherever it appears that it is necessary to avoid collision with animals on the track.[3] A collision not being imminent, however, no duty rests upon the company to even slacken the speed of the train.[4] And where it appears that an effort to slacken the speed would not avoid the collision with the animals the company is excused from making the effort.[5] Thus

[1] Missouri, etc., R. Co. *v.* Reynolds, 31 Kan. 132, 13 Am. & Eng. R. Cas. 510; Cleveland, etc., R. Co. *v.* Elliott, 4 Ohio St. 474; Witherell *v.* Milwaukee, etc., R. Co., 24 Minn. 410; Parker *v.* Dubuque, etc., R. Co., 34 Iowa 399; East Tennessee, etc., R. Co. *v.* Deaver, 79 Ala. 216; Sandham *v.* Chicago, etc., R. Co., 38 Iowa 88; Mobile, etc., R. Co. *v.* Gunn, 68 Miss. 366, 8 So. R. 648; Central Ohio R. Co. *v.* Lawrence, 13 Ohio St. 66; Raiford *v.* Mississippi, etc., R. Co., 43 Miss. 233.

[2] Bemis *v.* Connecticut, etc., R. Co., 42 Vt. 375; Louisville, etc., R. Co. *v.* Milton, 14 B. Mon. 75; Chicago, etc., R. Co. *v.* Jones, 59 Miss. 465, 11 Am. & Eng. R. Cas. 450; Owens *v.* Hannibal, etc., R. Co., 58 Mo. 386; Kerwhacker *v.* Cleveland, etc., R. Co., 3 Ohio St. 172; Louisville, etc., R. Co. *v.* Ballard, 2 Metc. (Ky.) 177.

[3] Yazoo, etc., R. Co. *v.* Brumfield, 64 Miss. 637; Little Rock, etc., R. Co. *v.* Trotter, 37 Ark. 593, 11 Am. & Eng. R. Cas. 475; St. Louis, etc., R. Co. *v.* O'Loughlin, 49 Fed. R. 440. It has been held that the sufficiency of the engineer's efforts to stop the train is a question for the jury. Kansas City, etc., R. Co. *v.* Doggett, 67 Miss. 250; Cage *v.* Louisville, etc., R. Co., (Miss.) 7 So. R. 509.

[4] Little Rock, etc., R. Co. *v.* Trotter, 37 Ark. 593; Louisville, etc., R. Co. *v.* Ganote, 13 Am. & Eng. R. Co. 519. Where animals are standing at the side of the track apparently at ease no obligation rests upon the company to slacken the speed of the train. Edson *v.* Central, etc., R. Co., 40 Iowa 47; Peoria, etc., R. Co. *v.* Champ, 75 Ill. 577; St. Louis, etc., R. Co. *v.* Russell, 39 Ill. App. 443; New Orleans, etc., R. Co. *v.* Bourgeois, 66 Miss. 3.

[5] Jones *v.* Chicago, etc., R. Co., 77 Wis. 585, 46 N. W. R. 884; Savannah, etc., R. Co. *v.* Geiger, 21 Fla. 669; Chicago, etc., R. Co. *v.* Packwood, 59 Miss. 280; Alabama, etc., R. Co. *v.* Smith, 85 Ala. 208; Kansas City, etc., R. Co. *v.* Myers, (Miss.) 7 So. R. 321; East Tennessee, etc., R. Co. *v.* Deaver, 79 Ala. 216; Alabama, etc., R. Co. *v.*

where an animal jumped suddenly in front of the locomotive, and it was impossible to avoid the collision, no liability attached.[1] The company will not be liable where the employes

McAlpine, 80 Ala. 73; Mobile, etc., R. Co. *v.* Caldwell, 83 Ala. 196, 3 So. R. 445; Indiana, etc., R. Co. *v.* Overton, 117 Ind. 253; Georgia, etc., R. Co. *v.* Wall, 80 Ga. 202; Georgia, etc., R. Co. *v.* Harris, 83 Ga. 393. In Nashville, etc., R. Co. *v.* Hembree, 85 Ala. 481, 38 Am. & Eng. R. Cas. 300, it was said: "Engineers are not required to do all in their power, nor to do anything, when it is manifest that nothing they can do can possibly prevent the injury." So in New Orleans, etc., R. Co. *v.* Bourgeois, 66 Miss. 3, the court said: "It can not be said to be the duty of a railroad company to check the speed or stop its passing train every time an animal is seen near its track, unless there is something to indicate danger or the necessity of the animal going upon the track, and if an animal, when first discovered on the track, is so near the engine that collision can not be prevented by the prompt use of all proper appliances, and the animal is killed or injured, no liability for damages is thereby incurred by the company. Impossibilities are no more required by law of railroad companies than of other persons." See, also, Newport News, etc., R. Co. *v.* Mitchell, (Ky.) 33 S. W. R. 622.

[1] Little Rock, etc., R. Co. *v.* Turner, 41 Ark. 161; Chicago, etc., R. Co. *v.* Bradfield, 63 Ill. 220; Illinois, etc., R. Co. *v.* Wren, 43 Ill. 77; Louisville, etc., R. Co. *v.* Wainscott, 3 Bush. (Ky.) 149; Hyer *v.* Chamberlain, 46 Fed. R. 341. The general rule is very clearly stated in the case of Alabama, etc., R. Co. *v.* Moody, 90 Ala. 46, 45 Am. & Eng. R. Cas. 524. In that case a cow ran in front of the locomotive and was killed, it being impossible to stop the train so as to avoid the collision. The defendant was held not liable. The court said: "When the animal is discovered in dangerous proximity to the track, his (the engineer's) duty depends upon the circumstances. If they are such as to indicate danger of its getting on the track, or to induce the supposition that it will attempt to cross, the usual means to frighten it away being unavailing, it becomes the duty of the engineer to arrest the motion of the train, if need be, or to check the speed so as to bring and keep it under control until the animal has crossed, or the danger passed, but if the circumstances do not indicate apparent danger or an attempt to get on the track, then the duty to check the train does not arise. In the latter case, if the animal suddenly and unexpectedly gets on the track when the train is so near that the use of all the means within the power of the engineer could not avail to stop in time to avoid injury the omission to make the endeavor is not negligence, and the company is not liable for the ensuing injury. These principles have been so repeatedly and well settled by the decisions of this court that a reassertion will suffice without further consideration." The court cited: South, etc., R. Co. *v.* Jones, 56 Ala. 507; East Tennessee, etc., R. Co. *v.* Bayliss, 77 Ala. 429; Alabama, etc., R. Co. *v.* Chapman, 80 Ala. 615, 31 Am. & Eng. R. Cas. 394; Western R. Co. *v.* Lazarus, 88 Ala. 453.

in charge of the train exercised due care to prevent the accident unless there is a statutory right of recovery.[1]

§ 1205. **Duty to look out for animals.**—In addition to the duty resting upon a railway company to avoid injuring animals seen on its tracks wherever the same can be done without danger to the train, it has been held that the company is also bound to use ordinary care to discover animals upon the track.[2] It has been held to be the duty of an engineer to keep a lookout ahead for animals on or near the track so that he may have time to take the necessary steps to avoid injury,[3] but some of the cases state the doctrine entirely too strongly. And a failure to keep such a lookout has been held to be such negligence as to render the company liable for injuries which might have been avoided if proper vigilance in the discovery of the animals had been used.[4] It is held to be the duty of the com-

[1] Tison *v.* Savannah, etc., R. Co., (Ga.) 24 S. E. R. 456.

[2] Central, etc., R. Co. *v.* Lee, 96 Ala. 444; Alabama, etc., R. Co. *v.* Moody, 92 Ala. 279; Western, etc., R. Co. *v.* Lazarus, 88 Ala. 453; Gulf, etc., R. Co. *v.* Washington, 49 Fed. R. 347; Eddy *v.* Evans, 58 Fed. R. 151; Bemis *v.* Connecticut, etc., R. Co., 42 Vt. 375; South, etc., R. Co. *v.* Williams, 65 Ala. 74; Memphis, etc., R. Co. *v.* Sanders, 43 Ark. 225, 19 Am. & Eng. R. Cas. 497; Denver, etc., R. Co. *v.* Henderson, 10 Colo. 1, 31 Am. & Eng. R. Cas. 559; Rockford, etc., R Co. *v.* Rafferty, 73 Ill. 58; Shuman *v.* Indianapolis, etc., R. Co., 11 Ill. App. 472; Cincinnati, etc., R. Co. *v.* Smith, 22 Ohio St. 227; Baglor *v.* Baltimore, etc., R. Co., 9 W. Va. 270; Kentucky, etc., R. Co. *v.* Lebus, 14 Bush. (Ky.) 518; Little Rock, etc., Railway *v.* Holland, 40 Ark. 336; Omaha, etc., R. Co. *v.* Wright, (Neb.) 66 N. W. R. 842. In Arkansas, it seems to have been held in a recent case that the engineer is under no duty to lookout for stock upon the right of way Memphis, etc., R. Co. *v.* Kerr, 52 Ark. 162, 40 Am. & Eng. R. Cas. 171. See, also, Locke *v.* First Division, etc., R. Co., 15 Minn. 350.

[3] Missouri, etc., R. Co. *v.* Gedney, 44 Kan. 329, 45 Am. & Eng. R. Cas. 492; Carlton *v.* Wilmington, etc., R. Co., 104 N. Car. 365, 40 Am. & Eng. R. Cas. 178; Wilson *v.* Norfolk, etc., R. Co., 90 N. Car. 69; Gulf, etc., R. Co. *v.* Johnson, 54 Fed. R. 474; Washington *v.* Baltimore, etc., R. Co., 17 W. Va. 190. In Missouri, etc., R. Co. *v.* Wilson, 28 Kan. 637, it was said: "If the employes of the railroad company could, by the use of ordinary prudence, see, or, seeing the stock on the road, could without danger stop the train and avoid striking the animal, they were required to do so, because the idea is not tolerable that an injury may be inflicted, which, by ordinary care and diligence, may be avoided."

[4] Little Rock, etc., R. Co. *v.* Finley, 37 Ark. 562; Missouri, etc., R. Co. *v.* Reynolds, 31 Kan. 132, 13 Am. & Eng.

pany to use care to equip its locomotives with such headlights as would render a lookout effective.[1] The engineer and fireman on the train, however, are not bound to keep a constant lookout.[2] There are intervals of time when their attention must be directed to the management of the machinery of the locomotive and when it is impossible for short periods of time for them to watch the track. Where such is the case they are neither expected nor required to keep such lookout.[3] Thus, where the fireman was engaged in stoking his engine and the engineer in making necessary repairs it was held that the company was not liable for failure to keep a lookout during such interval.[4] In determining whether the employes were exercising ordinary care to discover animals on or near the track it has been held proper to take into consideration whether or not the track was fenced at the particular point,[5] and also, whether it was light or dark.[6] The question whether the employes exercised due care in looking out for animals on or near the track is generally

R. Cas. 510; Kendig *v.* Chicago, etc., R. Co., 79 Mo. 207; Memphis, etc., R. Co. *v.* Sanders, 43 Ark. 225; Denver, etc., R. Co. *v.* Henderson, 10 Colo. 1; Snowden *v.* Norfolk, etc., R. Co., 95 N. Car. 93; Wilson *v.* Norfolk, etc., R. Co., 90 N. Car. 69; Missouri, etc., R. Co. *v.* Gedney, 44 Kan. 329. We do not assent to the doctrine that there is a general duty to keep a lookout.

[1] Alabama, etc., R. Co. *v.* Jones, 71 Ala. 487. But if a headlight is obscured by rain the company is not liable. Louisville, etc., R. Co. *v.* Melton, 2 Lea (Tenn.) 262.

[2] Mobile, etc., R. Co. *v.* Caldwell, 83 Ala. 196; Western Ry. Co. *v.* Lazarus, 88 Ala. 453.

[3] East Tennessee, etc., R. Co. *v.* Bayliss, 75 Ala. 466, 22 Am. & Eng. R. Cas. 596. In this case the court, in speaking of an instruction, said: "It does not and was not intended to mean that the engineer should keep his eye steadily on the track before him, to the neglect of his other equally imperative duties. The movements of the eye are quick and rapid. The engineer, while attending to the other wants of his train, must be constantly on the lookout for obstructions; and he meets this requirement when he bestows on the service that steady, regular care and watchfulness which his other duties allow a very careful and prudent person to give it."

[4] See Howard *v.* Louisville, etc., R. Co., 67 Miss. 247, 7 So. R. 216; Carlton *v.* Wilmington, etc., R. Co., 104 N. Car. 365, 10 N. E. R. 516; Owens *v.* Hannibal, etc., R. Co., 58 Mo. 386.

[5] Cincinnati, etc., R. Co. *v.* Smith, 22 Ohio St. 227.

[6] St. Louis, etc., R. Co. *v.* Vincent, 36 Ark. 451. See International, etc., R. Co. *v.* Hall, (Tex. Civ. App.), 33 S. W. R. 127.

for the jury.[1] In cases of this kind it seems that the right to recover is predicated on the negligence of the company in failing to discover the animal in time to avoid injuries, and in such cases if it appear that the injury was caused by the failure to keep a proper lookout, and that there was such a duty, the company may be liable although care may have been exercised by the employes after the actual discovery of the animal.[2]

§ 1206. Signals.—In nearly all, if not quite all, of the states statutes are in force requiring railway companies at certain distances from crossings to sound the whistle of the locomotive and to ring the bell.[3] The obvious purpose of such signals is to give notice of the approach of trains. Such signals, it seems, are not required alone for the benefit of persons about to cross the track but are also required to warn and frighten animals away from the track.[4] Where animals are injured on the track of a railway company proof of the omission to give statutory signals may be evidence of negligence. The failure to give such signals is not actionable negligence *per se*,[5] but there are authorities which hold that proof of an injury to the animal and proof of a failure to give statutory signals make a *prima facie* case for the plaintiff.[6] The weight of authority is to the

[1] Kent *v.* New Orleans, etc., R. Co., 67 Miss. 608; Kansas City, etc., R. Co. *v.* Watson, 91 Ala. 483, 8 So. R. 793; East Tennessee, etc., R. Co. *v.* Bayliss, 74 Ala. 150.

[2] East Tennessee, etc., R. Co. *v.* Watson, 90 Ala. 41, 7 So. R. 813.

[3] Southern, etc., R. Co. *v.* Schmidt, 44 Kan. 374, 24 Pac. R. 496, 45 Am. & Eng. R. Cas. 489; St. Louis, etc., R. Co. *v.* Hendricks, 53 Ark. 201. Where a car which was standing on a down-grade side-track had been blocked, and in some unknown way the blocks were removed and the car ran down and killed a cow it was held that the statute as to signals did not apply. Montgomery, etc., R. Co. *v.* Perryman, 91 Ala. 413, 8 So. R. 699.

[4] Alabama, etc., R. Co. *v.* McAlpine, 71 Ala. 545; Braxton *v.* Hannibal, etc., R. Co., 77 Mo. 455; East Tennessee, etc., R. Co. *v.* Scales, 2 Lea (Tenn.) 688; St. Louis, etc., R. Co. *v.* Hendricks, 53 Ark. 201; Western, etc., R. Co. *v.* Jones, 65 Ga. 631; Palmer *v.* St. Paul, etc., R. Co., 38 Minn. 415; Howenstein *v.* Pacific R. Co., 55 Mo. 33; Nashville, etc., R. Co. *v.* Thomas, 5 Heisk. (Tenn.) 262; Memphis, etc., R. Co. *v.* Smith, 9 Heisk. (Tenn.) 860; Hohl *v.* Chicago, etc., R. Co., (Minn.) 63 N. W. R. 742. See Neely *v.* Charlotte, etc., R. Co., 33 S. Car. 136, 11 S. E. R. 636.

[5] Jackson *v.* Chicago, etc., R. Co., 36 Iowa 451; Michigan, etc., R. Co. *v.* Fisher, 27 Ind. 96.

[6] Halferty *v.* Wabash, etc., R. Co., 82 Mo. 90; Great Western, etc., R. Co.

effect that a plaintiff who is seeking a recovery for animals injured on a railway track must not only show the omission of signals but must show that such omission was the cause of the injury.[1] It has been held even where signals are not required by statute to be the duty of the company to make them whenever animals are on or near the track and such signals would be effective in frightening the animals away.[2] The company is bound to use ordinary care to prevent injuries to animals and where ordinary care requires the use of signals the company may be guilty of negligence in omitting them although they are not required by statute.[3] If the negligence of the owner of the animals

v. Geddis, 33 Ill. 304; Atchison, etc., R. Co. *v.* Morgan, 31 Kan. 77, 13 Am. & Eng. R. Cas. 499; Little Rock, etc., R. Co. *v.* Trotter, 37 Ark. 593; Turner *v.* Kansas City, etc., R. Co., 78 Mo. 578; Stoneman *v.* Atlantic, etc., R. Co., 58 Mo. 503; Central, etc., R. Co. *v.* Phillippi, 20 Kan. 9; St. Louis, etc., R. Co. *v.* Hagan, 42 Ark. 122. Where it is probable that signals will frighten animals away from or off the track it is negligence to omit them. Pennsylvania Co. *v.* Krick, 47 Ind. 368; Lapine *v.* New Orleans, etc., R. Co., 20 La. Ann. 158; Owens *v.* Hannibal, etc., R. Co., 58 Mo. 386; Indianapolis, etc., R. Co. *v.* Peyton, 76 Ill. 340; Gates *v.* Burlington, etc., R. Co., 39 Iowa 45; Washington *v.* Baltimore, etc., R. Co., 17 W. Va. 190; Bemis *v.* Connecticut, etc., R. Co., 42 Vt. 375.

[1] Southern, etc., R. Co. *v.* Schmidt, 44 44 Kan. 374, 24 Pac. R. 496, 45 Am. & Eng. R. Cas. 489; Quincy, etc., R. Co. *v.* Wellhoener, 72 Ill. 60; Memphis, etc., R. Co. *v.* Bibb, 37 Ala. 699; Hawker *v.* Baltimore, etc., R. Co., 15 W. Va. 628; Holman *v.* Chicago, etc., R. Co., 62 Mo. 562; Stoneman *v.* Atlantic, etc., R. Co., 58 Mo. 503; Rockford, etc., R. Co. *v.* Linn, 67 Ill. 109; Holman *v.* Chicago, etc., R. Co., 62 Mo. 562; Braxton *v.* Hannibal, etc., R. Co., 77 Mo, 455; Alexander *v.* Hannibal, etc., R. Co., 76 Mo. 494. "If the injury would not have occurred but for such violation of the law, then the company would be liable, otherwise it would not." Western, etc., R. Co. *v.* Main, 64 Ga. 649.

[2] Indianapolis, etc., R. Co. *v.* Hamilton, 44 Ind. 76; Missouri, etc., R. Co. *v.* Wilson, 28 Kan. 637, 11 Am. & Eng. R. Cas. 447; Alabama, etc., R. Co. *v.* Powers, 73 Ala. 244; Toledo, etc., R. Co. *v.* Fergusson, 42 Ill. 449; Gates *v.* Burlington, etc., R. Co., 39 Iowa 45; Bemis *v.* Connecticut, etc., R. Co., 42 Vt. 375; Owens *v.* Hannibal, etc., R. Co., 58 Mo. 386. "The engineer, if he saw the ox in dangerous proximity to the track, and under circumstances indicating danger of its getting on the track, should have taken steps promptly to frighten him away." South, etc., R. Co. *v.* Jones, 56 Ala. 507.

[3] In Eddy *v.* Evans, 58 Fed. R. 151, it was said: "It was the duty of the engineer to keep a careful lookout for stock on the track and, when it was discovered, to use all reasonable means to avoid injuring it. * * * The engineer testifies he ap-

contributed to their injury the company is not liable, unless by reason of some statutory provision, although the signals were not given.[1] If an owner sees his animals on a railway track at a point where they will likely be injured he must make some effort to protect them. He can not stand by and rely solely upon the railway company giving signals to frighten the animals off the track.[2]

§ 1207. **Actual collision with animal—Injuries caused by fright.**—There is a great deal of conflict and confusion among the decided cases as to whether or not there must be an actual collision between a railway train and the animal injured before liability is imposed upon the company operating the train. It is almost impossible to reconcile this conflict, and to attempt to lay down a general rule applicable to all cases would be unsafe. The reason for this difference between the cases which hold that there must be an actual collision and those which hold that an actual collision is not necessary to impose liability is to be found in the different statutes on which the liability rests. The liability in such cases depends upon the language of or construction placed upon the particular statute. If it is clear from the language of the statute that it was the intention of the legislature in enacting the statute that the company should be liable only for animals injured by actual collision with the train then it must be shown that actual collision took place. This rule is adopted in many of the states.[3] But if the statute can not be so construed as to

plied the air-brake, but he did not blow the whistle, and he gives no reason or excuse for not doing so. It was the duty of the engineer to sound the whistle, as well as to apply the brake; and the jury might well infer that, if the proper alarm signals had been sounded when the horses were first discovered, or ought to have been discovered, the horse farthest from the engine could and would have got off the track."

[1] Ohio, etc., R. Co. *v.* Eaves, 42 Ill. 288; Owens *v.* Hannibal, etc., R. Co., 58 Mo. 386.

[2] Milburn *v.* Kansas City, etc., R. Co., 86 Mo. 104, s. c. 29 Am. & Eng. R. Cas. 244.

[3] Peru, etc., R. Co. *v.* Hasket, 10 Ind. 409; Ohio, etc., R. Co. *v.* Cole, 41 Ind. 331; Lafferty *v.* Hannibal, etc., R. Co., 44 Mo. 291; Schertz *v.* Indianapolis, etc., R. Co., 107 Ill. 577, 15 Am. & Eng. R. Cas. 523; Louisville, etc., R. Co. *v.* Smith, 58 Ind. 575; Baltimore, etc., R. Co. *v.* Thomas, 60 Ind.

make the company liable only for injuries caused by actual collision the company will be liable for all injuries to animals caused by negligent operation of the train,[1] or by a failure to perform the duty imposed upon the company to maintain fences and cattle-guards.'"[2] Thus where animals come upon the track because of the failure of the company to fence and in attempting to escape from a train run into a bridge and culvert and are injured the company has been held liable.[3] The decisions holding the company liable in such cases seem to us to be founded upon good reason and logic. While it is true the train may not touch the animal still the negligence of the company in failing to construct proper fences to keep the animal off the track is the negligence on which the recovery is based and without which the injury would not have been inflicted.[4] The company has also been held liable for frightening animals upon the track because it was unfenced and thus causing them to run into wire fences along the side of the right of way and injure themselves.[5] Companies have also been held liable for injuries to animals caused by their becom-

107; Croy *v.* Louisville, etc., R. Co., 97 Ind. 126; Knight *v.* New York, etc., R. Co., 99 N. Y. 25; Holder *v.* Chicago, etc., R. Co., 11 Lea (Tenn.) 176; Seibert *v.* Missouri, etc., R. Co., 72 Mo. 565; Railroad *v.* Sadler, 91 Tenn. 508; Pennsylvania R. Co. *v.* Dunlap, 112 Ind. 93; Louisville, etc., R. Co. *v.* Thomas, 106 Ind. 10; Geiser *v.* St. Louis, etc., R. Co., 1 Mo. App. R. 672. Proof that blood and hair were found on the cow-catcher of the locomotive coming from the direction where the animal was injured is admissible as tending to show that there had been an actual collision. International, etc., R. Co. *v.* Hughes, 81 Tex. 184.

[1] Meeker *v.* Northern Pacific R. Co. 21 Ore. 513, 49 Am. & Eng. R. Cas. 518; Young *v.* St. Louis, etc., R. Co., 44 Iowa 172.

[2] Atchison, etc., R. Co. *v.* Jones, 20 Kan. 527; Young *v.* St. Louis, etc., R. Co., 44 Iowa 172. If the injury is caused by the failure to perform some statutory duty the company is liable although there is no actual collision. Lafferty *v.* Hannibal etc., R. Co., 44 Mo. 291; Ohio, etc., R. Co. *v.* Cole, 41 Ind. 331; Moshier *v.* Utica, etc., R. Co., 8 Barb. 427.

[3] Kraus *v.* Burlington, etc., R. Co., 55 Iowa 338; Young *v.* St. Louis, etc., R. Co., 44 Iowa 172.

[4] See Liston *v.* Central Iowa, etc., R. Co., 70 Iowa 714, 26 Am. & Eng. R. Cas. 593, where an animal on being frightened by a train leaps over a cattle-guard and runs along the track until it falls through a bridge injuring itself.

[5] Missouri Pacific R. Co. *v.* Eckel, 49 Kan. 794; Missouri, etc., Railway Co. *v.* Gill, 49 Kan. 441, 30 Pac. R. 414, s. c. 56 Am. & Eng. R. Cas. 182.

ing frightened at signals unnecessarily, maliciously and recklessly given by employes in charge of the train.[1] But where the animals are on the right of way through no neglect of the company and are injured because of fright or otherwise the company is not liable unless the injuries were wilfully inflicted.[2]

§ 1208. **Liability of lessees, mortgagees and receivers.**—It often happens that railways are operated by lessees, mortgagees, trustees, receivers or the like and not by the owner, and it also often happens that the owner and a lessee operate the same railway. Where a lessee is operating a line of railway the same duty ordinarily rests upon the company in regard to maintaining fences and cattle-guards, and the same liability attaches to the lessee for injury to animals by its trains, that is imposed upon or attaches to a company operating a road of which it is the owner.[3] In some jurisdictions the rule prevails that either the lessee or the owner may be sued for an injury to an animal caused by a moving train upon an unfenced track.[4] Where

[1] Cobb *v.* Columbia, etc., R. Co., 37 S. Car. 194.

[2] Richmond, etc., R. Co. *v.* Buice, 88 Ga. 180; Burlington, etc., R. Co. *v.* Shoemaker, 18 Neb. 369; Foster *v.* St. Louis, etc., R. Co., 90 Mo. 116; East Tennessee, etc., R. Co. *v.* Watters, 77 Ga. 69.

[3] Pittsburgh, etc., R. Co. *v.* Bolner, 57 Ind. 572; Pittsburgh, etc., R. Co. *v.* Currant, 61 Ind. 38; Downing *v.* Chicago, etc., R. Co., 43 Iowa 96; Pittsburgh, etc., R. Co. *v.* Hannon, 60 Ind. 417; Whitney *v.* Atlantic, etc., R. Co., 44 Me. 362; Illinois Central R. Co. *v.* Kanouse, 39 Ill. 272; Missouri, etc., R. Co. *v.* Ricketts, 46 Kan. 617, 26 Pac. R. 50, 45 Am. & Eng. R. Cas. 485; Tracy *v.* Troy, etc., R. Co., 38 N. Y. 433; Clary *v.* Midland, etc., R. Co., 37 Iowa 344; Jeffersonville, etc., R. Co. *v.* Downey, 61 Ind. 287; Stewart *v.* Chicago, etc., R. Co., 27 Iowa 282; Bean *v.* Atlantic, etc., R. Co., 63 Me. 293; Cincinnati, etc., R. Co. *v.* Bunnell, 61 Ind. 183; Clement *v.* Canfield, 28 Vt. 302; Cook *v.* Milwaukee, etc., R. Co., 36 Wis. 45; Gould *v.* Bangor, etc., R. Co., 82 Me. 122, 19 Atl. Rep. 84. "It is always the duty of a railroad company operating a railroad to see that proper cattle-guards exist wherever its railroad enters and leaves improved or fenced land, whether such company owns the railroad, or is simply operating it under a lease." Missouri Pacific R. Co. *v.* Morrow, 32 Kan. 217, 19 Am. & Eng. R. Cas. 630.

[4] Ditchett *v.* Spuyten-Duyvil, etc., R. Co., 67 N. Y. 425; Eaton *v.* Oregon, etc., R. Co., 19 Ore. 391, 26 Pac. R. 415, 43 Am. & Eng. R. Cas. 57; Hindman *v.* Oregon, etc., R. Co., 17 Ore. 619, 38 Am. & Eng. R. Cas. 310; St. Louis, etc., R.

the company owning a line had not yet completed the line, although it was operating it, and it allowed a contractor who was employed in completing the line to run his construction trains over the track it was held that the company was liable for injuries to animals caused by construction trains.[1] And it has also been held that a suit may be maintained against the contractor in such cases.[2] Where the property of a railway has gone into the hands of a receiver by whom the railroad is run and operated the company may still be liable for injuries to animals caused by the failure to discharge the statutory duty to fence notwithstanding the receiver's possession.[3] Suit may also be maintained against the receiver, and he is the proper person, ordinarily, against whom such a suit should be brought. Although the appointment of a receiver does not terminate the existence of the corporation, all the property of the corporation usually passes into his hands, and any suits affecting that property or a failure of the receiver to discharge his duty should properly be brought against the receiver.[4] So, a trustee en-

Co. *v.* Curl, 28 Kan. 622, 11 Am. & Eng. R. Cas. 458; Fontaine *v.* Southern Pac. R. Co., 54 Cal. 645. In Texas both lessor and lessee are liable. Missouri, etc., R. Co. *v.* Dunham, 68 Tex. 231, 31 Am. & Eng. R. Cas. 530; Gulf, etc., R. Co. *v.* Morris, 67 Tex. 692. The lessor is liable for injuries to animals because the road is not fenced on the ground that the lessee is agent of the lessor. Whitney *v.* Atlantic, etc., R. Co., 44 Me. 362; Bay City, etc., R. Co. *v.* Austin, 21 Mich. 390; Wyman *v.* Penobscot, etc., R. Co., 46 Me. 162.

[1] Witchita, etc., R. Co. *v.* Gibbs, 47 Kan. 274, 27 Pac. R. 991.

[2] Gardner *v.* Smith, 7 Mich. 410.

[3] Ohio, etc., R. Co. *v.* Russell, 115 Ill. 52, 23 Am. & Eng. R. Cas. 149; Louisville, etc., R. Co. *v.* Cauble, 46 Ind. 277; Ohio, etc., R. Co. *v.* Fitch, 20 Ind. 498.

[4] Kansas Pacific R. Co. *v.* Wood, 24 Kan. 619. The test in cases of this kind to determine whether an action should be brought against the company or against the receiver is whether the injuries arose from negligence of the receiver in the performance of his duties or from the failure to perform a duty which the company might have performed notwithstanding the existence of the receivership. A company could fence its line without interfering with the receiver but it could not run trains without interfering with him and rendering itself guilty of contempt of court. If the action arose from the failure to perform a duty which the company might have performed then the suit may be maintained against the company, but if it arose from a failure to perform some duty which only the receiver could perform, then the suit should be brought against the receiver. See Ohio, etc., R. Co. *v.* Russell, 115 Ill. 52, s. c. 3 N. E. R. 561. See *ante* § 581.

gaged in running and operating a railroad is liable for injuries occasioned to animals while he is so operating the road.[1] Where a company has ceased to own the road, and it is owned, controlled and operated by another corporation, the original owner is not liable for injuries to animals which are inflicted after the transfer of ownership.[2] A partnership,[3] or an individual[4] operating a railway is bound to see that the track is properly fenced.

§ 1209. **Contributory Negligence.**—Where animals are injured by a railway company's trains, there can as a rule be no recovery if the owner of the animals was guilty of contributory negligence,[5] but this may depend largely upon the statute in force in the particular jurisdiction. What will amount to contributory negligence on the part of the owner will depend much on the particular circumstances of each case and it is usually a question to be determined by the jury.[6] Where the alleged negligence of a railway company on which a recovery is sought consists in the non-performance of some statutory duty in reference to the management of the train or in the alleged negligent management of a train independent of statutory regulations, the question of the owner's contributory negligence is ordinarily easily determined. Thus, where there is no question of failure to properly fence the track, and the alleged negligence consists wholly in the management of the

[1] Farrell *v.* Union Trust Co., 77 Mo. 475.

[2] Western R. Co. *v.* Huss, 70 Ala. 565.

[3] Kansas City, etc., R. Co. *v.* Bolson, 36 Kan. 534.

[4] Liddle *v.* Keokuk, etc., R. Co., 23 Iowa 378.

[5] Leavenworth, etc., R. Co. *v.* Forbes, 37 Kan. 445, s. c. 31 Am. & Eng. R. Cas. 522; Pittsburgh, etc., R. Co. *v.* Methven, 21 Ohio St. 586; Toledo, etc., R. Co. *v.* Head, 62 Ill. 233; Williams *v.* Northern Pacific R. Co., 3 Dak. 168, s. c. 11 Am. & Eng. R. Cas. 421.

[6] Veerhusen *v.* Chicago, etc., R. Co., 53 Wis. 689; Cairo, etc, R. Co. *v.* Woosley, 85 Ill. 370; Illinois Central R. Co. *v.* Gillis, 68 Ill. 317; Illinois Central R. Co. *v.* Middlesworth, 43 Ill. 64; Timins *v.* Chicago, etc., R. Co., 72 Iowa 94, s. c. 33 N. W. R. 379; Central R. R. Co. *v.* Hamilton, 71 Ga. 461; Evans *v.* St. Paul, etc., R. Co., 30 Minn. 489; Schubert *v.* Minneapolis, etc., R. Co., 27 Minn. 360; Curry *v.* Chicago, etc., R. Co., 43 Wis. 665; Hammond *v.* Sioux City, etc., R. Co., 49 Iowa 450.

train, the fact that the owner carelessly permitted his animals to stray in the immediate vicinity of a railway track has been held to be such negligence on his part as to preclude a recovery.[1] And where the owner in driving his animals along a public highway and over a railway track carelessly allows them to remain on the track when they could easily have been driven off and they are injured he can not recover.[2] In some states, where the common law prevails and the owner is required to keep his animals up, allowing them to run at large will constitute such contributory negligence on his part as to exonerate a railway company from liability.[3] But where the common law is not in force it is not negligence to permit animals to run at large[4] and this is particularly so where there is a

[1] Wabash, etc., R. Co. *v.* Nice, 99 Ind. 152, 23 Am. & Eng. R. Cas. 169; Indianapolis, etc., R. Co. *v.* Caudle, 60 Ind. 112; Jeffersonville, etc., R. Co. *v.* Underhill, 48 Ind. 389; Schneekloth *v.* Chicago, etc., R. Co. (Mich.), 65 N. W. R. 663.

[2] Niemann *v.* Michigan, etc., R. Co., 80 Mich. 197.

[3] Tonawanda, etc., R. Co. *v.* Munger, 5 Denio (N. Y.) 255; Bowman *v.* Troy, etc., R. Co., 37 Barb. (N. Y.) 516; Maynard *v.* Boston, etc., R. Co., 115 Mass. 458; Moses *v.* Southern Pacific R. Co., 18 Ore. 385, 42 Am. & Eng. R. Cas. 555; Williams *v.* Michigan, etc., R. Co., 2 Mich. 259; Halloran *v.* New York, etc., R. Co., 2 E. D. Smith 257; Bennett *v.* Chicago, etc., R. Co., 19 Wis. 145; Woolson *v.* Northern R. Co., 19 N. H. 267; Spinner *v.* New York, etc., R. Co., 67 N. Y. 153; Indianapolis, etc., R. Co. *v.* Harter, 38 Ind. 557; Stucke *v.* Milwaukee, etc., R. Co., 9 Wis. 202; Louisville, etc., R. Co. *v.* Ballard, 2 Metc. (Ky.) 177; Tower *v.* Providence, etc., R. Co., 2 R. I. 404; Railroad Co. *v.* Skinner, 19 Pa. St. 298; Pittsburgh, etc., R. Co. *v.* Stuart, 71 Ind. 500; Baltimore, etc., Railroad Co. *v.* Mulligan, 45 Md. 486; Johnson *v.* Chicago, etc., R. Co., 29 Minn. 425; Robinson *v.* Flint, etc., R. Co., 79 Mich. 323, s. c. 45 Am. & Eng. R. Cas. 496; Chicago, etc., R. Co. *v.* Goss, 17 Wis. 428. In Hindanan *v.* Oregon, etc., R. Co., 17 Ore. 614, it was said: "Knowingly allowing cattle to range upon the track, where they necessarily expose the lives and safety of the traveling public to constant danger, is, according to my notion, the highest degree of negligence upon the part of the owner, and should be regarded as contributing to the injury."

[4] Eddy *v.* Evans, 58 Fed. R. 151; Little Rock, etc., R. Co. *v.* Finley, 37 Ark. 562; Searles *v.* Milwaukee, etc., R. Co., 35 Iowa 490; Blaine *v.* Chesapeake, etc., R. Co., 9 W. Va. 252; Moses *v.* Southern Pacific R. Co. 18 Ore. 385, 42 Am. & Eng. R. Cas. 555; Cleveland, etc., R. Co. *v.* Elliott, 4 Ohio St. 474; Kerwhaker *v.* Cleveland, etc., R. Co., 3 Ohio St. 172; Vicksburg, etc., R. Co. *v.* Patton, 31 Miss. 156; Trout *v.* Virginia, etc., R. Co. 23 Gratt. (Va.) 619; South, etc., R. Co. *v.* Williams, 65 Ala. 74; Kentucky, etc., Railroad Co. *v.* Lebus, 14 Bush. 518; Gorman *v.* Pacific R. Co.,

local law permitting cattle and other domestic animals to run at large.[1] Where it appears that the owner of animals had them in his fields around which were fences reasonably sufficient to restrain them he can not be held guilty of contributory negligence if the animals escape and wander upon a railroad track where they are injured,[2] unless, perhaps, it be shown that the animals were breachy and the owner had knowledge of their breachiness.[3] Stock in charge of a herder who permits them to escape and wander upon a railway track where they are injured will be regarded as injured because of the negligence of the herder in suffering them to escape, and for their injuries the company is not liable.[4] Wilfully or recklessly exposing one's animals to danger will always constitute such contributory negligence as to preclude a recovery if the animals are injured.[5] Thus, where an owner left open a gate

26 Mo. 441; Isbell *v.* New York, etc., R. Co., 27 Conn. 393; Rockford, etc., R. Co. *v.* Irish, 72 Ill. 404; McCoy *v.* California Pacific R. Co., 40 Cal. 532; Bethea *v.* Raleigh, etc., R. Co., 106 N. C. 279; Proctor *v.* Wilmington, etc., R. Co., 72 N. Car. 579; Orcutt *v.* Pacific Coast R. Co. 85 Cal. 291.

[1] But see Hanna *v.* Terre Haute, etc., R. Co., 119 Ind. 316.

[2] Story *v.* Chicago, etc., R. Co., 79 Iowa 402; Pearson *v.* Milwaukee, etc., R. Co., 45 Iowa 497; Doran *v.* Chicago, etc, R. Co., 73 Iowa 115; Dennis *v.* Louisville, etc., R. Co., 116 Ind. 42, 35 Am. & Eng. R.Cas. 141; Railway Co. *v.* Howard, 40 Ohio St. 6; Toledo, etc., R. Co. *v.* Milligan, 52 Ind. 505; Bulkley *v.* New York, etc., R. Co., 27 Conn. 479; Spinner *v.* New York, etc., R. Co., 67 N. Y. 153; Chicago, etc., R. Co. *v.* Goss, 17 Wis. 428.

[3] Dennis *v.* Louisville, etc., R. Co. 116 Ind. 42, 35 Am. & Eng. R. Cas. 141.

[4] Keeney *v.* Oregon, R. & N. Co. 19 Ore. 291, 24 Pac. R. 233, 42 Am. & Eng. R. Cas. 619.

[5] Jeffersonville, etc., R. Co. *v.* Dunlap, 29 Ind. 426; Moser *v.* St. Paul, etc., R. Co., 42 Minn. 480; Forbes *v.* Atlantic, etc., R. Co., 76 N. Car. 454; Hopkins *v.* Kansas Pacific R. Co., 18 Kan. 462; Tarwater *v.* Hannibal, etc., R. Co., 42 Mo. 193; Missouri Pacific R. Co. *v.* Roads, 33 Kan. 640; Rogers *v.* Newburyport, etc., R. Co., 1 Allen 16; Corwin *v.* New York, etc., R. Co., 13 N. Y. 42; Chicago, etc., R. Co. *v.* Totten, 1 Kan. App. 558, 42 Pac. R. 269. Where the plaintiff had attached a block of wood to his cow and it appeared that the block of wood prevented her from getting off the track when a train which struck her was approaching it was held that the negligence of the owner contributed to the injury. Guess *v.* Railway Co., 30 S. Car. 163. If an owner stands by when his animals are in danger and makes no effort to save them his negligence will preclude a recovery against the railway company. Moody *v.* Minneapolis, etc., R. Co., 77 Iowa 29.

between his fields and the railway track and the animals escaped from the fields and were injured on the railway tracks it was held there could be no recovery.[1] But where the alleged negligence of the railway company consists in its failure to erect and maintain proper fences there is some conflict in the authorities as to whether it is contributory negligence in an adjoining land-owner to turn his stock into a field near the railroad track when he knows that the fence between his field and the track is defective and not sufficient to turn stock. The weight of authority is, however, to the effect that it is not contributory negligence which will defeat a recovery on the part of the owner to turn his stock into a field along one side of which the company has failed to properly fence,[2] although there are authorities which hold that it is contributory negligence.[3] Where the company utterly ignores its duty to fence or to properly repair its fences it seems to us that it is not just to an adjoining owner to hold him guilty of contributory neg-

[1] Richardson *v.* Chicago, etc.. R. Co., 56 Wis. 347; Hook *v.* Worcester, etc., R. Co., 58 N. H. 251; Manwell *v.* Burlington, etc., R. Co., 80 Iowa 652, s. c. 45 Am. & Eng. R. Cas. 501; Illinois, etc., R. Co. *v.* McKee, 43 Ill. 119; Eames *v.* Boston, etc., R. Co., 14 Allen (Mass.) 151; Indianapolis, etc., R. Co. *v.* Shimer, 17 Ind. 295; Bay City, etc., R. Co. *v.* Austin, 21 Mich. 390; Bond *v.* Evansville, etc., R. Co., 100 Ind. 301. So where the owner of animals opened the gate in a fence along a railroad right of way and was driving his animals along the track intending to take them off the right of way at a gate further along the track it was held that he was guilty of such contributory negligence as to prevent his recovering for an injury to his animals while they were being so driven. Davidson *v.* Central Iowa R. Co., 75 Iowa 22, 35 Am. & Eng. R. Cas. 158.

[2] Horner *v.* Williams, 100 N. Car. 230; Roberts *v.* Richmond, etc., Railroad, 88 N. Car. 560; Farmer *v.* Wilmington, etc., Railroad Co., 88 N. Car. 564; Wilder *v.* Maine, etc., R. Co., 65 Me. 332; Shepard *v.* Buffalo, etc., R. Co., 35 N. Y. 641; McCoy *v.* California, etc., R. Co., 40 Cal. 532; Pittsburg, etc., R. Co. *v.* Smith, 38 Ohio St. 410; Evans v. St. Paul, etc., R. Co., 30 Minn. 489; Cressley *v.* Northern R., 59 N. H. 564; Donovan *v.* Hannibal, etc., R. Co., 89 Mo. 147. Some cases hold that where the injury was due to the want of a fence the company is liable, although the owner was guilty of contributory negligence in permitting his animals to be abroad. In these cases the failure of the company to perform its statutory duty is regarded as the proximate cause of the injury. Welty *v.* Indianapolis, etc., R. Co., 105 Ind. 55; Flint, etc., R. Co. *v.* Lull, 28 Mich. 510; Cincinnati, etc., R. Co. *v.* Hiltzhauer, 99 Ind. 486.

[3] Poler *v.* New York, etc., R. Co., 16 N. Y. 476.

ligence which will defeat a recovery if he turns his stock into fields adjoining the track. If this were the rule it would virtually deprive the owner of a right to pasture his stock in fields adjoining the track or else compel him to erect the fences or constantly guard his animals.[1] The railway company is the party who has failed to discharge its positive statutory duty, and on it should fall the loss. But where a railway company has been diligent in the performance of its duty in erecting and maintaining fences and the fences are destroyed by accident or are thrown down by storm or other casualty the company would have a reasonable time in which to make such repairs, and if an owner with knowledge that the fence was down should turn his cattle into the adjoining fields before a reasonable time in which to make repairs had elapsed and they are injured he should be held guilty of contributory negligence.[2] But it has been held that if repairs are not made within a reasonable time the owner may turn his animals into his fields.[3] It has also been held that although a plaintiff be guilty of such contributory negligence as would under ordinary circumstances defeat a recovery, yet, if the accident happened because the employes in charge of the train failed to exercise reasonable care to prevent the injury after the animals were discovered on the track, the contributory negligence of the plaintiff will be no defense to the action.[4]

[1] "There is no negligence in pasturing his cattle upon his own premises, although he is aware of the defective condition of the fence which it is the duty of the company to maintain between it and the railroad track. He can not be deprived of the ordinary and proper use of his property by the failure of the railroad company to perform its duty." 1 Thom. Neg. 537. See also Donovan *v.* Hannibal, etc., R. Co., 89 Mo. 147, s. c. 26 Am. & Eng. R. Cas. 588.

[2] Martin *v.* Stewart, 73 Wis. 553, s. c. 38 Am. &. Eng. R. Cas. 316; Jones *v.* Sheboygan, etc., R. Co., 42 Wis. 306; Richardson *v.* Chicago, etc, R. Co., 56 Wis. 347; Carey *v.* Chicago, etc., R. Co., 61 Wis. 71, s. c. 20 Am. & Eng. R. Cas. 469; Spinner *v.* New York, etc., R. Co., 67 N. Y. 153; Indianapolis, etc., R. Co. *v.* Wright, 13 Ind. 213.

[3] Sika *v.* Chicago, etc., R. Co., 21 Wis. 370.

[4] Wooster *v.* Chicago, etc., Co., 74 Iowa 593, s. c. 35 Am. & Eng. R. Cas. 152; Farmer *v.* Wilmington, etc., R. Co., 88 N. Car. 564; Chicago, etc., R. Co. *v.* Engle, 84 Ill. 397; Cincinnati, etc., R. Co. *v.* Smith, 22 Ohio St. 227; Kuhn *v.* Chicago, etc., R. Co., 42

§ 1210. **Animals abandoned by their owner.**—Where an owner abandons his animals he can not recover if they are injured. If his action in abandoning the animals was such as to constitute a full relinquishment of all claim to them he no doubt would be unable to recover for them on the ground that the animals were of no value or that he had no property in them. Such cases are of rare occurrence and few have found their way into the reports. But there are cases where an owner, not intending to part with the property in his animals, abandons them in the immediate vicinity of or on a railway track where danger is imminent.[1] In such cases it is held that an owner can not recover for injuries to the animals even though they were killed because the company had failed to perform its statutory duty to fence. The act of the owner in such a case amounts to positive wilfulness, but under such circumstances his contributory negligence in leaving the animals in a place of danger would, in some jurisdictions, defeat a recovery even if there was present no element of wilfulness.[2]

Iowa 420; Coyle *v.* Baltimore, etc., R. Co., 11 W. Va. 94; Georgia, etc., R. Co. *v.* Neely, 56 Ga. 540; Mississippi, etc., R. Co. *v.* Miller, 40 Miss. 45; Hannibal etc., R. Co. *v.* Kenney, 41 Mo. 271.

[1] In the case of Welty *v.* Indianapolis, etc., R. Co., 105 Ind. 55, s. c. 24 Am. & Eng. R. Cas. 371, it was said: "An owner who abandons his animal can not recover, although it entered upon the track of a railroad, and was killed at a place where the company failed to perform its statutory duty by fencing its track. Knight *v.* Toledo, etc., R. Co., 24 Ind. 402; Jeffersonville, etc., R. Co. *v.* Dunlap, 29 Ind. 426; Corwin *v.* New York, etc., R. Co., 13 N. Y. 42, see opinion, Denio, J., p. 54. Sound principle supports this rule. If an owner were permitted to voluntarily put his domestic animals in a situation where it was almost certain that they would be killed by passing trains, and yet, in the event that they were killed, recover from the railroad company, it would open the way to great frauds, since it would enable the owner to recover for property voluntarily exposed to destruction; but this would not be the only evil result, for a further evil consequence would be that the temptation to get rid of animals not needful or useful, at the expense of the railroad company, would endanger the safety of those who travel upon our railroads. Public policy requires that a man who voluntarily puts his property in a place where it is certain that it will be destroyed, shall not receive assistance from the courts. A man who willingly abandons his property to destruction, or purposely abandons it to a known danger, has no right, either in law or morals, to invoke the assistance of the courts of justice to secure pay for it."

[2] *Ante*, § 1209.

§ 1211. **Animals attracted to railroad tracks.**—It sometimes happens that animals which are injured on the tracks of a railway company are attracted there by some kind of food, such as hay, salt, grain or the like, which is being shipped over the company's road. Since these injuries usually take place at depot or station grounds where the company is excused from fencing, it follows that if a recovery can be had at all, it must be based on other negligence than that in failing to fence. Negligence in failing to fence can not and does not ordinarily exist in such a case. Where the company merely permits an article to be loaded on its cars and does not allow the loaded cars to stand for an unreasonable time after they are loaded, it will not be liable for injuries to animals which are attracted to the track by the article loaded in the cars. Thus, where it appeared that the injured animal had been attracted by hay loaded in a car, and that the car had not stood an unreasonable time, but had been moved on the same day on which the loading was completed, it was held that there was no liability.[1] But if the car had been allowed to stand for an unreasonable length of time the company, it was said, would have been liable.[2] Where the animal is attracted by an article which has been scattered over and about the track during the process of loading or unloading and is allowed to remain there, the company may sometimes be liable. Thus, where salt, in being unloaded, was scattered over the track and allowed to remain there, the company was held liable for injuries to an animal which had been attracted to the place by the salt.[3] And the company was held liable under similar circumstances where cotton-seed had been allowed to accumulate on the track.[4] But where the animals were attracted to

[1] Schooling *v.* St. Louis, etc., R. Co., 75 Mo. 518, s. c. 13 Am. & Eng. R. Cas. 536.

[2] Schooling *v.* St. Louis, etc., R. Co., 75 Mo. 518, s. c. 13 Am. & Eng. R. Cas. 536.

[3] Crafton *v.* Hannibal, etc., R. Co., 55 Mo. 580. But the company is not liable for injuries to an animal which was attracted to the tracks by salt placed about switches for the purpose of freeing them from snow and ice. Louisville, etc., R. Co. *v.* Phillips, (Miss.), 12 So. R. 825.

[4] Little Rock, etc., R. Co. *v.* Dick, 52 Ark. 402, 42 Am. & Eng. R. Cas.

the tracks by salt in a shed kept by a store-keeper who also acted as station agent, it was held that the company was not liable, it appearing that the keeping of the salt was not in any way connected with the duties of the station agent as an employe of the company.[1]

§ 1212. **Ownership of animals.**—A necessary part of a plaintiff's case in an action against a railway company for damages on account of injuries to animals is proof of ownership by the plaintiff. The plaintiff must show that he is the owner of the animal or has such a property interest in it as to entitle him to maintain an action for its injury or death.[2] Thus, where the plaintiff testified in an action against a railway company for the death of a mule, that he had purchased the mule and had possession of it at the time of the accident, that he had not paid for it but did pay for it after the injury, it was held that he had such an interest as to entitle him to recover its full value.[3] But where a suit was brought by the husband to recover for injuries to an animal which had been obtained in exchange for a similar animal belonging to the wife, the husband having contributed a sum of money himself in addition to the animal in order to consummate the exchange, it was held that he had no such property interest as to entitle him to maintain the action.[4] It has been held that a suit for an injury to an animal can not be brought by one person for the use of another. Such a suit is an action *ex delicto* and must be brought by the party for whose benefit the recovery is sought.[5] Proof of the possession of stock killed or injured is *prima facie* evidence of ownership.[6]

§ 1213. **Presumption of negligence.**—We have heretofore

591. See, also, Kansas City, etc., R. Co. *v.* Kirksey, 48 Ark. 366; Page *v.* North Carolina R. Co., 71 N. Car. 222.

[1] Burger *v.* St. Louis, etc., R. Co., 123 Mo. 679, 59 Am. & Eng. R. Cas. 637.

[2] Welsh *v.* Chicago, etc., R. Co., 53 Iowa 632; Turner *v.* St. Louis, etc., R. Co., 76 Mo. 261.

[3] Railway Co. *v.* Taylor, 57 Ark. 136, 20 S. W. R. 1083.

[4] Central R., etc., Co. *v.* Bryant, 89 Ga. 457, 15 S. E. R. 537.

[5] Kansas City, etc., R. Co. *v.* Cantrell, 70 Miss. 329, 12 So. R. 344.

[6] Toledo, etc., R. Co. *v.* Stevens, 63 Ind. 337.

seen that statutes attempting to impose an absolute liability upon railway companies for injuries to stock have uniformly been held unconstitutional. But in many of the states there are in force statutes which make proof of the existence of certain facts sufficient to constitute a *prima facie* case of liability in favor of the plaintiff. These statutes have been held valid.[1] They, however, are not statutes which affect the liability of the company but only the mode of procedure.[2] Proof of the existence of the facts specified in the statute raises a presumption of negligence against the railway company and this makes a *prima facie* case in favor of the plaintiff, which, if not rebutted or overcome by the defendant, is sufficient to warrant a recovery against it. Thus, statutes are in force which make mere proof of the killing of or injury to an animal by the cars or locomotives of a railway company sufficient to raise a presumption of negligence against it.[3] As soon as this presumption

[1] In Savannah, etc., R. Co. *v.* Geiger, 21 Fla. 669, s. c. 29 Am. & Eng. R. Cas. 274, it was said: "It is within the power of the legislature to provide that proof of the killing or of damage to live stock by railroad engines or trains shall be *prima facie* evidence of negligence on the part of the company or person operating them, as has been wisely done in some states, in view of the fact that the company always has witnessed the killing or injury."

[2] "The effect of the statute is merely to change the order of proof." Huber *v.* Chicago, etc., R. Co., 6 Dak. 392, 43 N. W. R. 819, 40 Am. & Eng. R. Cas. 188.

[3] Mobile, etc., R. Co. *v.* Williams, 53 Ala. 595; Pippen *v.* Wilmington, etc., R. Co., 75 N. Car. 54; Georgia, etc., R. Co. *v.* Monroe, 49 Ga. 373; East Tennessee, etc., R. Co. *v.* Bayliss, 74 Ala. 150; Western Maryland, etc., R. Co. *v.* Carter, 59 Md. 306; St. Louis, etc., R. Co. *v.* Vincent, 36 Ark. 451; Volkman *v.* Chicago, etc., R. Co., 5 Dak. 69, 35 Am. & Eng. R. Cas. 204; Huber *v.* Chicago, etc., R. Co., 6 Dak. 392, 43 N. W. R. 819, 40 Am. & Eng. R. Cas. 188; Kentucky Central R. Co. *v.* Talbot, 78 Ky. 621, 7 Am. & Eng. R. Cas. 585; Grundy *v.* Louisville, etc., R. Co., (Ky.) 2 S. W. R. 899; Spaulding *v.* Chicago, etc., R. Co., 33 Wis. 582; Jones *v.* Bond, 40 Fed. R. 281; Georgia, etc., R. Co. *v.* Hughes, 87 Ala. 610; South, etc., R. Co. *v.* Williams, 65 Ala. 74; Randall *v.* Richmond, etc., R. Co., 104 N. Car. 410; Kansas City, etc., R. Co. *v.* Doggett, 67 Miss. 250; Jacksonville, etc., R. Co. *v.* Wellman, 26 Fla. 344, 7 So. R. 845; State *v.* Divine, 98 N. Car. 778, s. c. 31 Am. & Eng. R. Cas. 574; Little Rock, etc., R. Co. *v.* Payne, 33 Ark. 816; Brentner *v.* Chicago, etc., R. Co., 68 Iowa 530; Small *v.* Chicago, etc., R. Co., 50 Iowa 338; Wilson *v.* Norfolk, etc., R. Co., 90 N. Car. 69. "It being shown that the animal, while on the railroad track, was killed by a train of the defendant, the burden was on the defendant to acquit itself of the charge of negligence made by the complaint;

arises the plaintiff has made out a *prima facie* case and will recover unless the defendant introduce evidence to show that it exercised due care and was not guilty of negligence.[1] This is true even though there be a local act in force requiring animals to be fenced in.[2] As a rule no presumption of negligence arises from proof of the killing or injuring an animal by the locomotives of a railway company unless there be a statute in force declaring that such proof shall make a *prima facie* case against the defendant or raise the presumption that it was guilty of negligence in killing or injuring the animal.[3] In

and the rulings of the court to this effect were free from error." Louisville, etc., R. Co. *v.* Kelsey, 89 Ala. 287, 42 Am. & Eng. R. Cas. 584. The presumption of negligence does not arise where the animal injured is a dog. Wilson *v.* Wilmington, etc., R. Co., 10 Rich. L. (S. Car.) 52. But it does where the animals injured were oxen hitched to a cart. Randall *v.* Richmond, etc., R. Co., 104 N. Car. 410. *Contra*, Annapolis, etc., R. Co. *v.* Pumphrey, 72 Md. 82, 42 Am. & Eng. R. Cas. 599.

[1] Wilson *v.* Norfolk, etc., R. Co., 90 N. Car. 69; Little Rock, etc., R. Co. *v.* Jones, 41 Ark. 157; Jones *v.* Bond, 40 Fed. R. 281, s. c. 40 Am & Eng. R. Cas. 191; Louisville, etc., R. Co. *v.* Kelsey, 89 Ala. 287, s. c. 42 Am. & Eng. R. Cas. 584; Louisville, etc., R. Co. *v.* Smith, 67 Miss. 15; Little Rock, etc., R. Co. *v.* Henson, 39 Ark. 413; St. Louis, etc., R. Co. *v.* Hagan, 42 Ark. 122. In Volkman *v.* Chicago, etc., R. Co., 5 Dak. 69, s. c. 35 Am. & Eng. R. Cas. 204, the court, in discussing a statute, which made the proof of killing or injuring sufficient to raise a presumption of negligence, said: "As this section is in derogation of the rule at common law and the general rule of practice prescribed by our code of civil procedure, it behooves us to consider the effect, scope and object of this provision, in order to properly construe it. It seems to us that this section was enacted for the purpose of overcoming the difficulty, generally supposed to exist, with plaintiffs in this kind of actions, in making proof of facts which are only known as a rule to the servants and agents of the defendant. Hence, when the railway placed their servants and employes, in whose breasts these facts are presumed to rest, on the witness stand, and purge their consciences by, testifying, under oath, touching all the facts and circumstances within their knowledge, concerning the killing or injury, the reason for the statute ceases. To hold otherwise would work great injustice and oppression, and would be to prescribe a different rule for the adjudication of rights of persons and property engaged in the railway business from that which obtains in reference to other persons and property engaged in the railway business from that which obtains in reference to other persons, whose rights of property are in no wise more sacred."

[2] Roberts *v.* Richmond, etc., R. Co., 88 N. Car. 560, s. c. 20 Am. & Eng. R. Cas. 473.

[3] Eddy *v.* Lafayette, 49 Fed. R. 798; Volkman *v.* Railway Co., 5 Dak. 69, 37

a few jurisdictions, however, such proof seems to raise a presumption of negligence although there exists no statute on the subject,[1] but even then the rule is that where the company shows by the uncontradicted testimony of its employes that the accident was unavoidable,[2] or that due care was used in the operation of the train,[3] the presumption of negligence is overcome.

§ 1214. **Burden of proof—Evidence.**—In actions for damages against railway companies on account of injuries to animals the burden of establishing negligence on the part of the defendant rests upon the plaintiff,[4] except in those cases where

N.W. R. 731; Burlington, etc., Railway Co. *v.* Wendt, 12 Neb. 76, 10 N. W. R. 456; Eaton *v.* Oregon, etc., Navigation Co., 19 Ore. 391, 24 Pac. R. 415; Savannah, etc., R Co. *v.* Geiger, 21 Fla. 669; Walsh *v.* Virginia, etc., R. Co., 8 Nev. 110; Railway Co. *v.* Heiskell, 38 Ohio St. 666, 13 Am. & Eng. R. Cas. 555; Denver, etc., R Co. *v.* Henderson, 10 Colo. 1, 13 Pac. R. 910; Milburn *v.* Kansas City, etc., R. Co., 86 Mo. 104; Kansas City, etc., R Co. *v.* Bolson, 36 Kan. 534, 14 Pac. R. 5; Atchison, etc., R. Co. *v.* Betts, 10 Colo. 431, 15 Pac. R. 821; Railroad Co. *v.* McMillan, 37 Ohio St. 554; Gulf, etc., R. Co. *v.* Washington, 49 Fed. R. 347.

[1] Smith *v.* Eastern, etc., R. Co., 35 N. H. 356; McCoy *v.* California, etc., R. Co., 40 Cal. 532; Murray *v.* South Carolina, etc., R. Co., 10 Rich. L. (S. Car.) 227; White *v.* Concord R., 30 N. H. 188; Galpin *v.* Chicago, etc., R. Co., 19 Wis. 604; Roof *v.* Railroad Co., 4 S. Car. 61.

[2] Alabama, etc., R. Co. *v.* Roebuck, 76 Ala. 277; Railway Co. *v.* Shoecraft, 53 Ark. 96.

[3] Little Rock, etc., R. Co. *v.* Payne, 33 Ark. 816; Mobile, etc., R. Co. *v.* Williams, 53 Ala. 595.

[4] Doggett *v.* Richmond, etc., R. Co., 81 N. Car. 459; Atchison, etc., R. Co. *v.* Betts, 10 Colo. 431; Savannah, etc., R. Co. *v.* Geiger, 21 Fla. 669; Fort Worth, etc., R. Co. *v.* Tomlinson, (Tex. App.) 16 S. W. R. 866; Cleveland, etc., R. Co. *v.* Crawford, 24 Ohio St. 631, 15 Am. R. 633; Burlington, etc., R. Co. *v.* Wendt, 12 Neb. 76; McKissock *v.* St. Louis, etc., R. Co., 73 Mo. 456; Lyndsay *v.* Connecticut, etc., R. Co., 27 Vt. 643; Locke *v.* First Div. St. Paul, etc., R. Co., 15 Minn. 350; Grand Rapids, etc., R. Co. *v.* Judson, 34 Mich. 506; Peoria, etc., R. Co. *v.* Barton, 80 Ill. 72; Lawrence *v.* Milwaukee, etc., R. Co., 42 Wis. 322; Bethje *v.* Houston, etc., R. Co., 26 Tex. 604; Indianapolis, etc., R. Co. *v.* Caudle, 60 Ind. 112; New Orleans, etc., R. Co. *v.* Enochs, 42 Miss. 603; Rockford, etc., R. Co. *v.* Connell, 67 Ill. 216; Schneir *v.* Chicago, etc., R. Co., 40 Iowa 337; Waldron *v.* Portland, etc., R. Co., 35 Me. 422; Walsh *v.* Virginia, etc., R. Co., 8 Nev. 110; Maynard *v.* Norfolk, etc., R. Co., 40 W. Va. 331, 21 S. E. R. 733; Hoge *v.* Ohio River, etc., R. Co., 35 W. Va. 562; Johnson *v.* Baltimore, etc., R. Co., 25 W. Va. 570. It is error to require the company to show absence of negligence. McGhee *v.* Gaines, (Ky.) 32 S. W. R. 602.

mere proof of killing by the company raises a presumption of negligence.[1] Even in those cases the burden of proving negligence may appropriately be said to rest on the plaintiff, for on him rests the burden of showing the existence of the necessary facts to raise the presumption of negligence. If those facts are not shown, the plaintiff has failed to raise a presumption of negligence and has not made out a *prima facie* case. Where a recovery is sought on the ground that the company failed to fence, the burden is upon the plaintiff to show that the animals came upon the track at a point where it was not securely fenced,[2] but if the defense is interposed that the company was excused from fencing at that point the burden rests upon the company to establish that defense.[3] Where it appears that the animals were injured on the track near a point where there was no fence or a defective fence the jury may infer that the animals came on the track at such point.[4] If the action is based on the negligence of the company in failing to fulfill its statutory duty to fence, or in failing to perform some other duty imposed by statute and it appears that the company was negligent in that respect, the plaintiff is not bound to show that he was free from contributory negligence. But if the action is not based on the alleged failure of the company to discharge

[1] *Ante*, § 1213.

[2] Evansville, etc., R. Co. *v.* Mosier, 101 Ind. 597, 22 Am. & Eng. R. Cas. 569; Morrison *v.* New York, etc., R. Co., 32 Barb. (N. Y.) 568; Lawrence *v.* Milwaukee, etc., R. Co., 42 Wis. 322; Rockford, etc., R. Co. *v.* Lynch, 67 Ill. 149; Small *v.* Chicago, etc., R. Co., 50 Iowa 338; Lantz *v.* St. Louis, etc., R. Co., 54 Mo. 228; Cecil *v.* Pacific R. Co., 47 Mo. 246.

[3] Terre Haute, etc., R. Co. *v.* Penn, 90 Ind. 284; Louisville, etc., R. Co. *v.* Kious, 82 Ind. 357; Indianapolis, etc., R. Co. *v.* Lindley, 75 Ind. 426; Cox *v.* Atchison, etc., R. Co., 128 Mo. 362, 31 S. W. R. 3.

[4] McCoy *v.* California, etc., R. Co., 40 Cal. 532; Bellefontaine, etc., R. Co. *v.* Suman, 29 Ind. 40; Small *v.* Chicago, etc., R. Co., 50 Iowa 338; Toledo, etc., R. Co. *v.* Pence, 68 Ill. 524; St. Louis, etc., R. Co. *v.* Casner, 72 Ill. 384; Fickle *v.* St. Louis, etc., R. Co., 54 Mo. 219; Walther *v.* Pacific R. Co., 55 Mo. 271; Bennett *v.* Chicago, etc., R. Co., 19 Wis. 145. Proof that the fence was generally insecure and defective has been held sufficient to sustain a verdict in favor of a plaintiff without proof that the particular point where the animals entered was defective. Louisville, etc., R. Co. *v.* Spain, 61 Ind. 460.

some statutory duty imposed upon it, freedom from contributory negligence is, in some jurisdictions, a necessary part of a plaintiff's case and the burden rests upon him to establish it.[1] In actions for injuries to animals proof of the injury and the negligence of the company may be established by either direct or circumstantial evidence. That direct evidence is admissible there can be no question and it is almost equally well settled that circumstantial evidence of the injury or negligence in inflicting it is admissible. A great many cases of this kind arise in such a way that it is impossible to get direct evidence and in such cases circumstantial evidence must necessarily be admissible or a substantial failure of justice would result. Thus, where it is necessary to prove a collision between the defendant's trains and the animal, it is not necessary that the plaintiff should produce actual eye witnesses to the collision.[2] The collision may be proved by circumstantial evidence,[3] as where the animal is found mutilated and dead near the track with blood and hair on one of the rails,[4] or where blood is found on the track and traced to an an adjoining field where the animal lay injured.[5] Proof that an animal was seen near the track and afterward found on or near the track in a bruised and mutilated condition may be sufficient to establish the fact of a collision.[6] When a recovery is claimed because of the alleged

[1] Jeffersonville, etc., R. Co. *v.* Huber, 42 Ind. 173; Indianapolis, etc., R. Co. *v.* Caudle, 60 Ind. 112.

[2] Indianapolis, etc., R. Co. *v.* Thomas, 84 Ind. 194. "It is not necessary, in such a case, to show, by direct evidence, that the stock was struck by the company's train; it is sufficient if there are circumstances from which that fact may be fairly and justly inferred." Whitewater R. Co. *v.* Bridgett, 94 Ind. 216.

[3] South, etc., R. Co. *v.* Small, 70 Ala. 499; Keltenbaugh *v.* St. Louis, etc., R. Co., 34 Mo. App. 147; St. Louis, etc., R. Co. *v.* Casner, 72 Ill. 384; Indianapolis, etc., R. Co. *v.* Thomas, 84 Ind. 194; Mayfield *v.* St. Louis, etc., R. Co., 91 Mo. 296; Vaughan *v.* Kansas City, etc., R. Co., 34 Mo. App. 141.

[4] Blewett *v.* Wyandotte, etc., R. Co., 72 Mo. 583.

[5] Mayfield *v.* St. Louis, etc., R. Co., 91 Mo. 296; Louisville, etc., R. Co. *v.* Montgomery, (Ky.) 32 S. W. R. 738.

[6] New Brunswick, etc., R. Co. *v.* Armstrong, 23 N. B. 193; Union Pac. R. Co. *v.* Harris, 28 Kan. 206; Jackson *v.* St. Louis, etc., R. Co., 36 Mo. App. 170; Boing *v.* Raleigh, etc., R. Co., 87 N. Car. 360; Morrow *v.* Hannibal, etc., R. Co., 29 Mo. App. 432.

negligence of the company in running its trains at a rate of speed in excess of that prescribed by a municipal ordinance, the ordinance limiting the speed and also the ordinance prohibiting stock from running at large are admissible in evidence on the question of negligence and contributory negligence.[1] Neither, however, even if violated, is conclusive proof of negligence or contributory negligence.[2] Mere proof of an unlawful rate of speed is not sufficient to justify a finding against the defendant. Such proof may be *prima facie* evidence of negligence, but, in addition, there must be some showing that such unlawful speed was the cause of the accident.[3]

§ 1215. **Pleading and practice.**—The general rules of pleading and practice apply to actions for damages on account of injuries to animals by railway companies. The plaintiff must allege and prove all the material facts necessary to constitute a cause of action in his favor.[4] What must be alleged in the declaration or complaint of course varies according to the nature of the alleged negligence on which the action is based and also according to the provisions of the statute in force in the jurisdiction in which the action is brought. In several states it is necessary to allege and prove that the animal was injured in the county in which the action was commenced.[5] It is not always necessary, however, to prove in express terms that the point where the injury occurred is in the county where the action is brought. Courts are bound to take judicial notice of the limits of the county in which they sit and also of the prominent and general geographical features of the county, and where it appears that an animal was killed at a certain town or at a cer-

[1] Chicago, etc., R. Co. *v.* Richardson, 28 Neb. 118, 44 N. W. R. 103, s. c. 42 Am. & Eng. R. Cas. 592; Union Pac. R. Co. *v.* Rasmussen, 25 Neb. 810.

[2] Chicago, etc., R. Co. *v.* Richardson, 28 Neb. 118, 44 N. W. R. 103, s. c. 42 Am. & Eng. R. Cas. 592.

[3] Toledo, etc., R. Co. *v.* Deacon, 63 Ill. 91; Chicago, etc., R. Co. *v.* Engle, 58 Ill. 381.

[4] See McGhee *v.* Gaines, (Ky.) 32 S. W. R. 602.

[5] Kansas City, etc., R. Co. *v.* Burge, 40 Kan. 734, s. c. 40 Am. & Eng. R. Cas. 181; Ellis *v.* Missouri Pac. R. Co., 83 Mo. 372; Mitchell *v.* Missouri Pac. R. Co., 82 Mo. 106; Backenstoe *v.* Wabash, etc., R. Co., 86 Mo. 492.

tain distance from a town, or between two towns, the proof will be sufficient if the court knows that such town is in the county or that the distance from the town or other well known point falls within the limits of the county.[1] It has been held that a complaint need not be more specific as to the place where the animal was killed than to name the county.[2] Where there is a material variance between the allegations and the proof the plaintiff can not recover. Thus where the plaintiff sued for a wilful and intentional injury he is not entitled to recover upon proof that the engineer of the train which struck the animals negligently failed to discover the animals or to stop the train after their discovery.[3] An immaterial variance, or slight variance between the allegations and the proof will not ordinarily be fatal to a plaintiff's case.[4] Amending a pleading so as to make it include a demand for damages for loss by fire in addition to a claim for injuries to stock has been held sufficient to constitute a misjoinder of causes of action and should not be allowed.[5] Under the codes of some of the states it is held that an action for damages on account of injuries to animals by a railway train may be assigned and suit maintained by the assignee.[6] In an action for injury to animals where there is no conflict in the evidence and it is to the effect that the company was not guilty of any actionable negligence the court may direct a verdict for the defendant.[7] But where there is any material conflict in the evidence, the case should go to the jury.[8] Questions as to

[1] Indianapolis, etc., R. Co. *v.* Case, 15 Ind. 42; Louisville, etc., R. Co. *v.* Hixon, 101 Ind. 337; Indianapolis, etc., R. Co. *v.* Moore, 16 Ind. 43; Indianapolis, etc., R. Co. *v.* Stephens, 28 Ind. 429; Terre Haute, etc., R. Co. *v.* Pierce, 95 Ind. 496, s. c. 19 Am. & Eng. R. Cas. 581.

[2] Jacksonville, etc., R. Co. *v.* Wellman, 26 Fla. 344, 7 So. R. 845. That is, as against a demurrer.

[3] Indiana, etc., R. Co. *v.* Overton, 117 Ind. 253.

[4] See St. Louis, etc., R. Co. *v.* Pickens, (Tex.) 14 S. W. R. 1071; St. Louis, etc., R. Co. *v.* Evans, 78 Tex. 369, 14 S. W. R. 798.

[5] Union Pac. R. Co. *v.* Sternberg, 13 Colo. 141.

[6] Snyder *v.* Wabash, etc., R. Co., 86 Mo. 613, s. c. 29 Am. &. Eng. R. Cas. 237; Louisville, etc., R. Co. *v.* Goodbar, 88 Ind. 213.

[7] Anderson *v.* Birmingham, etc., R. Co., (Ala.) 10 So. R. 519.

[8] Baird *v.* Georgia, etc., R. Co., 19 So. R. 661.

pleading and practice in cases involving injuries to animals are so different in the different states and so largely depend on local statutes that it is impossible to here discuss those questions in detail. In these cases one can not safely rely on any general work on the subject but must consult the decisions of the jurisdiction in which the action is pending.

§ 1216. **Notice and demand for damages.**—In some jurisdictions it is provided by statute that an owner whose animals are injured by the trains of a railway company shall within a specified time after the injury serve notice upon the railway company of the injury and claim therein such damages as may have been sustained. The object of these notices is to apprise the company of the injury and the claim for damages so as to give it an opportunity to settle the claim without suit. The railway company after the service of such notice is given a certain specified time to pay the claim, and if it fails to pay the claim within such time and suit is afterward brought and the plaintiff is adjudged entitled to recover, some penalty, such as the recovery of double damages or the like may be assessed against the company. Such notices and claims for damages are ordinarily required to be verified. The object of a verification is to avoid extravagant and excessive claims.[1] The affidavit of the loss or damage may be made by any one who is acquainted with the facts,[2] and the affidavit, claim and notice may be embodied in a single writing.[3] The affidavit and notice must be served on some agent of the company.[4] The service may be made by anyone,[5] and proof of service may be made by affidavit[6] or by the official return of an

[1] Mendell *v.* Chicago, etc., R. Co., 20 Iowa 9.

[2] Henderson *v.* St. Louis, etc., R. Co., 36 Iowa 387.

[3] Mendell *v.* Chicago, etc., R. Co., 20 Iowa 9.

[4] Welsh *v.* Chicago, etc., R. Co., 53 Iowa 632; Brandt *v.* Chicago, etc., R. Co., 26 Iowa 114; Alabama, etc., R. Co. *v.* Roebuck, 76 Ala. 277. Where the statute required that the notice be served on a "station or ticket agent" proof of service on "the agent" of the company is not sufficient. Chicago, etc., R. Co. *v.* Totten, (Kan. App.) 42 Pac. R. 269. See Alabama, etc., R. Co. *v.* Killian, 69 Ala. 277.

[5] Mundhenk *v.* Central Iowa, etc., R. Co., 57 Iowa 718.

[6] Macon, etc., R. Co. *v.* Baber, 42 Ga. 300; Brandt *v.* Chicago, etc., R. Co., 26 Iowa 114.

officer if the notice was served by an officer.[1] In Iowa a copy of the affidavit or notice may be served on the company,[2] and the proof of service may be made by correct copies without requiring the company to produce the originals.[3] Care must be taken to see that a proper amount is inserted in the affidavit and claim, for where double damages are allowed the recovery will be limited to double the amount stated in the affidavit.[4] Where a bill is made out in writing stating an account in favor of the plaintiff, giving the value of the animal and the date and place of the accident and is delivered to the company within thirty days of the accident it is held to be a sufficient demand.[5] Where notice and demand is necessary to complete a cause of action such notice and demand must be alleged and proved in order to complete plaintiff's cause of action.[6] A notice that attorney's fees will be claimed is not required to be served on the company; the existence of the statute providing that attorney's fees may be recovered is sufficient notice to the company.[7]

§ 1217. **Appraisement of damages.**—Statutes have been enacted and are in force in some of the states providing for an appraisement of the damages done to an animal before suit is brought. Although such a statute is in force it seems that the appraisement is not a necessary prerequisite to the right of a plaintiff to maintain the action.[8] The object in having ap-

[1] Liston *v.* Central Iowa, etc., R. Co., 70 Iowa 714, s. c. 29 N. W. R. 445.

[2] Mendell *v.* Chicago, etc., R. Co., 20 Iowa 9; Van Slyke *v.* Chicago, etc., R. Co., 80 Iowa 620.

[3] Smith *v.* Kansas City, etc., R. Co., 58 Iowa 622; Brentner *v.* Chicago, etc., R. Co., 58 Iowa 625.

[4] Manwell *v.* Burlington, etc., R. Co., 80 Iowa 662, s. c. 45 Am. & Eng. R. Cas. 501.

[5] Fort Scott, etc., R. Co. *v.* Holman, 45 Kan. 167, 25 Pac. R. 585.

[6] Missouri, etc., R. Co. *v.* Morrow, 36 Kan. 495, 31 Am. & Eng. R. Cas. 520; Keyser *v.* Kansas City, etc., R. Co., 56 Iowa 440, 9 N. W. R. 338. In Kansas, etc., Railway Co. *v.* Ball, 19 Kan. 535, it was said: "The statute is a stringent one, and imposes new burdens upon railroad corporations; and he who would avail himself of its benefits ought to bring himself clearly within its terms. See, also, Chicago, etc., R. Co. *v.* Totten, (Kan. App.) 42 Pac. R. 269.

[7] Peoria, etc., R. Co. *v.* Duggan, 109 Ill. 537, s. c. 20 Am. & Eng. R. Cas. 489.

[8] Volkman *v.* Chicago, etc., R. Co., 5 Dak. 69, s. c. 35 Am. & Eng. R. Cas.

praisements made is to procure evidence of the value of the animals or the extent of the injury sustained by them. Such an appraisement is not, however, conclusive of the amount of damage done and a statute which attempts to make such an appraisement conclusive is unconstitutional and void as being in conflict with the constitution of the United States because it denies the right of trial by jury.[1] But an act which makes the valuation fixed by the appraisers only *prima facie* evidence of the value of the stock killed may be constitutional since the report is open to contradiction.[2]

§ 1218. **Measure of damages.**—Where an animal is killed by a railway company and the company is liable the measure of damages is the value of the animal at the time it was killed.[3] The same rule applies where the animal is so badly injured

204. But see Atchison, etc., R. Co. *v.* Lujan, 6 Colo. 338, where it was held that the failure of an owner to have his stock appraised before bringing suit was proper subject-matter for a plea in abatement. It was also held that such a defense would be waived unless presented at the earliest opportunity.

[1] Graves *v.* Northern, etc., R. Co., 5 Mont. 556, 51 Am. R. 81, 19 Am. & Eng. R. Cas. 436; Oregon, etc., R. Co. *v.* Smalley, 1 Wash. 206, 23 Pac. R. 1008, 42 Am. & Eng. R. Cas. 550; Oregon, etc., R. Co. *v.* Dacres, 1 Wash. 195, 23 Pac. R. 415.

[2] Illinois, etc., R. Co. *v.* Crider, 91 Tenn. 489, 19 S. W. R. 618, 56 Am. & Eng. R. Cas. 157. See Maberry *v.* Missouri Pac. R. Co., 83 Mo. 664.

[3] Jacksonville, etc., R. Co. *v.* Wellman, 26 Fla. 344, 7 So. R. 845; Burlington *v.* Newport News, etc., R. Co., 32 W. Va. 436, 9 S. E. R. 876; Harris *v.* Panama, etc., R. Co., 58 N. Y. 660; Toledo, etc., R. Co. *v.* Arnold, 43 Ill. 418; Madison, etc., R. Co. *v.* Herod, 10 Ind. 2; Toledo, etc., R. Co. *v.* Johnston, 74 Ill. 83; Indianapolis, etc., R. Co. *v.* Mustard, 34 Ind. 50; Lapine *v.* New Orleans, etc., R. Co., 20 La. Ann. 158; Cincinnati, etc., R. Co. *v.* Jones, 111 Ind. 259; Houston, etc., R. Co. *v.* Muldrow, 54 Tex. 233; Alabama, etc., R. Co. *v.* McAlpine, 75 Ala. 113; Jeffersonville, etc., R. Co. *v.* Tull, 37 Ind. 341; Galveston, etc., R. Co. *v.* Turner, 1 Tex. App. Civ. Cas. 344; Texas, etc., R. Co. *v.* Lanham, 1 Tex. App. Civ. Cas. 99; Chicago, etc., R. Co. *v.* Barnes, 116 Ind. 126, 18 N. E. R. 459; Central Branch R. Co. *v.* Nichols, 24 Kan. 242. It is proper to ask a plaintiff who testifies as to the value of the animal injured, what the animal cost him. Railway Co. *v.* Sageley, 56 Ark. 549. The value must be proven or there can be no recovery. St. Louis, etc., R. Co. *v.* Pickens, 3 Tex. App. Civ. Cas. 471, 14 S. W. R. 1071. What an animal was worth in another state from that in which it was injured is not competent unless it be shown that there was no local market at the place of the injury. Jones *v.* Railway Co., 53 Ark. 27.

that it has to be killed.[1] The value may be shown by proving what the animal was worth on the market,[2] and it is competent for persons who are engaged in the stock business and are familiar with the value of animals to give their opinion as to the value of the animal for whose death a recovery is sought.[3] It is competent to prove the quality of breed of an animal as tending to show its value.[4] A judgment which is for a greater amount than the market value will be regarded as excessive and may be set aside.[5] A plaintiff should be given his choice between a remittitur or a new trial where excessive damages are awarded.[6] Where the animal killed has a value after its death, such as the value of a cow for beef or for her hide, and the owner keeps such animal or disposes of it the measure of damages is the market value less the value of the carcass of the animal.[7] Where the stock is only injured the measure of damages is the difference between the market value of the same at the time of the infliction of the injury and its value after

[1] Gulf, etc., R. Co. *v.* Keith, 74 Tex. 287, s. c. 11 S. W. R. 1117; Page *v.* Sumpter, 53 Wis. 652.

[2] Offers of compromise made by a plaintiff are not admissible to prove value. Georgia, etc., R. Co. *v.* Smith, 85 Ga. 530, 11 S. E. R. 859.

[3] Parker *v.* Lake Shore, etc., R. Co., 93 Mich. 607; Texas, etc., R. Co. *v.* Virginia, etc., R. Co., (Tex.) 7 S. W. R. 341, 35 Am. & Eng. R. Cas. 201; Atchison, etc., R. Co. *v.* Gabbert, 34 Kan. 132.

[4] Richmond, etc., R. Co. *v.* Chandler, (Miss.) 13 So. R. 267; Parker *v.* Lake Shore, etc., R. Co., 93 Mich. 607; East Tennessee, etc., R. Co. *v.* Watson, 90 Ala. 41, 7 So. R. 813; Central Branch, etc., R. Co. *v.* Nichols, 24 Kan. 242.

[5] Jacksonville, etc., R. Co. *v.* Garrison, 30 Fla. 431; Horton *v.* St. Louis, etc., R. Co., 83 Mo. 541; St. Louis, etc., R. Co. *v.* Pickens, 3 Tex. App. Civ. Cas. 471.

[6] St. Louis, etc., R. Co. *v.* Hagan, 42 Ark. 122; Indiana, etc., R. Co. *v.* Dooling, 42 Ill. App. 63; Georgia, etc., R. Co. *v.* Crawley, 87 Ga. 191, 13 S. E. R. 508. See Chicago, etc., R. Co. *v.* Jarrett, 59 Miss. 470.

[7] Roberts *v.* Richmond, etc., R. Co., 88 N. Car. 560, s. c. 20 Am. & Eng. R. Cas. 473; Illinois, etc., R. Co. *v.* Finnigan, 21 Ill. 646; Case *v.* St. Louis, etc., R. Co., 75 Mo. 668, s. c. 13 Am. & Eng. R. Cas. 564; Jackson *v.* St. Louis, etc., Railroad Co., 74 Mo. 526; Boing *v.* Raleigh, etc., R. Co., 91 N. Car. 199; Godwin *v.* Wilmington, etc., R. Co., 104 N. Car. 146, 10 S. E. R. 136; Memphis, etc., R. Co. *v.* Hembree, 84 Ala. 182; Georgia, etc., R. Co. *v.* Fullerton, 79 Ala. 298. The net profits only should be deducted. The owner should be paid for his time and trouble in caring for and disposing of the carcass. Dean *v.* Chicago, etc., R. Co., 43 Wis. 305.

the injury.[1] An owner may also recover as a part of the damages such sum as he may properly have expended in caring for and curing the injured animal,[2] including the value of his own services rendered. The owner is also entitled, in a proper case, to recover as a part of the damages the value of the services of the animal during the time of the injury and before a cure is effected.[3] If it appears that the injuries were wilfully or wantonly inflicted exemplary damages may sometimes be awarded in addition to the actual damages.[4] And in some jurisdictions by complying with certain statutory provisions the plaintiff may recover attorney's fees[5] or double damages.[6] The expenses incurred by the plaintiff because of the "litigious litigation" carried on by the defendant may be recovered, it seems in Georgia.[7] If the carcass of a dead animal is abandoned by the owner when he could have secured a profit from it and such profit is lost the loss must fall on the owner.[8] It is his duty to use every reasonable

[1] Fritts *v.* New York, etc., R. Co., 62 Conn. 503, s. c. 26 Atl. R. 347; Atlantic, etc., R. Co. *v.* Hudson, 62 Ga. 679; Keyes *v.* Minneapolis, etc., R. Co., 36 Minn. 290, s. c. 30 N. W. R. 888.

[2] Manwell *v.* Burlington, etc., R. Co., 80 Iowa 662, s. c. 45 Am. & Eng. R. Cas. 501; Central, etc., R. Co. *v.* Warren, 84 Ga. 329; International, etc., R. Co. *v.* Cocke, 64 Tex. 151, 23 Am. & Eng. R. Cas. 226; Gillett *v.* Western R. R., 8 Allen (Mass.) 560; Keyes *v.* Minneapolis, etc., R. Co., 36 Minn. 290; Finch *v.* Central, etc., R. Co., 42 Iowa 304; Gulf, etc., R. Co. *v.* Keith, 74 Tex. 287. But in no case can the whole damages be allowed to exceed the value of the horse. Gillett *v.* Western, etc., R. Co., 8 Allen (Mass.) 560; Keyes *v.* Minneapolis, etc., R. Co., 36 Minn. 290. The jury is to determine whether the expenditures were reasonable and made in good faith. Ellis *v.* Hilton, 78 Mich. 150, 6 L. R. A. 454.

[3] Streett *v.* Laumier, 34 Mo. 469; Missouri, etc., R. Co. *v.* Hannibal, etc., R. Co., 79 Mo. 478; Atlanta, etc., R. Co. *v.* Hudson, 62 Ga. 679.

[4] Vicksburg, etc., R. Co. *v.* Patton, 31 Miss. 156. In Cobb *v.* Columbia, etc., R. Co., 37 S. Car. 194, it was held that actual damages could not be awarded in an action for exemplary damages. Exemplary damages can not be assessed where the animals were killed or injured through ordinary negligence. Toledo, etc., R. Co. *v.* Arnold, 43 Ill. 418; Chicago, etc., R. Co. *v.* Jarrett, 59 Miss. 470.

[5] *Post*, § 1220.

[6] *Post*, § 1219.

[7] Selma, etc., R. Co. *v.* Fleming, 48 Ga. 514. Such a recovery depends, however, on special statutory enactments.

[8] Harrison *v.* Missouri Pac. R. Co., 88 Mo. 625; Illinois, etc., R. Co. *v.* Finnigan, 21 Ill. 646. "The cow, as the plaintiff testified, was worth from eighteen to twenty dollars as beef,

effort to render the loss as small as possible and where he negligently fails to avail himself of the value of a dead animal or fails to use reasonable effort to properly care for and cure an injured animal he must so far bear the loss.[1] Under some of the statutes interest may be included in estimating the amount of damages, the interest being calculated on the amount of the recovery from the date of the accident to the date of the judgment.[2] Interest, however, wherever allowed must be calculated only on the amount of the actual damages; it will not be allowed on the attorney's fee, on exemplary damages, nor in cases where double damages are allowed.[3]

§ 1219. **Double damages.**—In many jurisdictions in this country statutes are in force which permit a plaintiff, under

and was still his property. If she could have been sold for that sum or was worth it to the owner, he should have made reasonable use or disposition of the cow as would have proportionately diminished the damages." Roberts *v.* Richmond, etc., R. Co., 88 N. Car. 560.

[1] Memphis, etc., R. Co. *v.* Hembree, 84 Ala. 182; Georgia, etc., R. Co. *v.* Fullerton, 79 Ala. 298. The owner has a reasonable time in which to dispose of a dead animal. Toledo, etc., R. Co. *v.* Parker, 49 Ill. 385.

[2] Woodland *v.* Union Pac. R. Co., (Utah) 26 Pac. R. 298; Houston, etc., R. Co. *v.* Muldrow, 54 Tex. 233; Alabama, etc., R. Co. *v.* McAlpine, 75 Ala. 113; St. Louis, etc., R. Co. *v.* Biggs, 50 Ark. 169; Varco *v.* Chicago, etc., R. Co., 30 Minn. 18, 11 Am. & Eng. R. Cas. 419; Lackin *v.* Delaware, etc., R. Co., 22 Hun (N. Y.) 309; Baltimore, etc., R. Co. *v.* Schultz, 43 Ohio St. 270, 54 Am. R. 805, 1 N. E. R. 324. Interest, however, will not be allowed unless the statute under which the action is brought is broad enough to cover interest. Many of the authorities hold that an action for injuries to animals is a pure case of tort and interest should not be allowed. See Atchison, etc., R. Co. *v.* Gabbert, 34 Kan. 132; Houston, etc., R. Co. *v.* Muldrow, 50 Tex. 233; Meyer *v.* Atlantic, etc., R. Co., 64 Mo. 542; De Steiger *v.* Hannibal, etc., R. Co., 73 Mo. 33. Compare Mote *v.* Chicago, etc., R. Co., 27 Iowa 22; Dean *v.* Chicago, etc., R. Co., 43 Wis. 305. See, also, the following cases which hold that interest can not be allowed. Toledo, etc., R. Co. *v.* Johnston, 74 Ill. 83; Brentner *v.* Chicago, etc., R. Co., 68 Iowa 530, 23 N. W. R. 245, 19 Am. & Eng. R. Cas. 448; Atchison, etc., R. Co. *v.* Gabbert, 34 Kan. 132, 8 Pac. R. 218. While the jury may not allow interest *eo nomine*, they may consider the length of time elapsing since the accident and the length of time the plaintiff has been kept out of his money and increase the damages on that account. Western, etc., R. Co. *v.* McCauley, 68 Ga. 818.

[3] Brentner *v.* Chicago, etc., R. Co., 68 Iowa 530, s. c. 19 Am. & Eng. R. Cas. 448; Wade *v.* Missouri Pac. R. Co., 78 Mo. 362.

certain conditions prescribed by the statute, to recover double damages in an action against a railway company for damages to stock.[1] Certain conditions in the nature of conditions precedent to the right to recover double damages are usually imposed on a plaintiff. These conditions must be complied with before a recovery of double damages can be adjudged. Thus, by the terms of some of the statutes, the plaintiff must serve notice upon the defendant of his loss and claim before bringing suit and his failure to do so will prevent his securing a recovery of double damages.[2] In Arkansas the company is required to post up at certain places lists of animals killed or injured, and on failure so to do, double damages may be awarded.[3] Statutes providing for double damages are generally held constitutional,[4] and are applicable even though the road is in the hands of and being operated by a receiver.[5] Double damages are imposed upon railway companies in the nature of a penalty, because the companies fail or refuse to settle meritori-

[1] Henderson *v.* Wabash, etc., R. Co., 81 Mo. 605. Where, after notice of the loss and claim for damages, the defendant had sent a due bill to the plaintiff and the due bill was not paid within the time fixed by the statute, it was held that the acceptance of the due bill fixed the amount of damages and double damages could not be allowed. Shaw *v.* Chicago, etc., R. Co., 82 Iowa 199, 47 N. W. R. 1004.

[2] Manwell *v.* Burlington, etc., R. Co., 80 Iowa 662, s. c. 45 Am. & Eng. R. Cas. 501; Van Slyke *v.* Chicago, etc., R. Co., 80 Iowa 620. An assignee of a claim for injuries to stock may recover double damages upon making the same showing as would entitle the original owner to double damages. Everett *v.* Central Iowa R. Co., 73 Iowa 442.

[3] Memphis, etc., R. Co. *v.* Carlley, 39 Ark. 246. See, also, Jones *v.* Americus, etc., R. Co., 80 Ga. 803, 7 S. E. R. 117. Evidence that the company failed to post such notice is inadmissible unless the plaintiff make a claim for double damages in his declaration. St. Louis, etc., R. Co. *v.* Kimmons, (Ark.) 32 S. W. R. 505. See, however, Jolliffe *v.* Brown, (Wash.) 44 Pac. R. 149, where a statute somewhat similar to the Arkansas statute was held unconstitutional.

[4] Hines *v.* Missouri Pac. R. Co., 86 Mo. 629; Missouri Pac. R. Co. *v.* Terry, 115 U. S. 523; Missouri Pac. Co. *v.* Humes, 115 U. S. 512; Barnett *v.* Atlantic R. Co., 68 Mo. 56; Spealman *v.* Missouri Pac. R. Co., 71 Mo. 434; Humes *v.* Missouri Pac. R. Co., 82 Mo. 221; Phillips *v.* Missouri Pac. R. Co., 86 Mo. 540; Goodridge *v.* Union Pac. R. Co., 35 Fed. 35; Memphis, etc., R. Co. *v.* Horsfall, 36 Ark. 651; Mackie *v.* Central R. Co., 54 Iowa 540. But see *ante*, § 669.

[5] Central Trust Co. *v.* Wabash, etc., R. Co., 26 Fed. R. 12.

ous claims to which their attention has been called.[1] Where a plaintiff has a meritorious claim and he gives the company full and fair notice of his claim, and the company has opportunity to adjust the claim but fails to do so, it is but just that it should be made to suffer an additional penalty for compelling the plaintiff to resort to a court to collect his claim. The amount involved in such cases is usually small, and in many cases the expense of prosecuting a suit would be greater than the amount of actual damages which might be recovered, so that unless some penalty was imposed upon the company in favor of a plaintiff, meritorious rights would often go unredressed. Double damages are imposed in the nature of a penalty and it is held to be no objection to the validity of the law that they are given to the plaintiff. Not only the actual damages are doubled where such a recovery is adjudged, but the plaintiff is also entitled to recover double the amount of the expense to which he has been put in caring for and curing an injured animal.[2] In arriving at a judgment for double damages the usual practice, it seems, is to permit a jury to fix the amount of actual damages in their verdict, and the court to double this amount in rendering the judgment,[3] although in some states the jury may include double damages in their verdict.[4] Where

[1] Manz *v.* St. Louis, etc., R. Co., 2 West R. 472. In some of the cases it is intimated that double damages are allowed in the nature of compensation to the owner rather than as a penalty against the company. Koons *v.* Chicago, etc., R. Co., 23 Iowa 493.

[2] See Young *v.* Kansas City, etc., R. Co., 52 Mo. App. 530. In Manwell *v.* Burlington, etc., R. Co., 80 Iowa 662, it was said: "But the damages caused to the stock are physical, and the owner is entitled to recover double the financial damages which result therefrom. In this case, the plaintiff expended time and money in proper efforts to heal the injured animals. The evidence tends to show that without attention one of them would have died, and the other would have become worthless. Under the theory of the instruction, single damages only are recoverable for the time and money so spent; yet they were as much the direct result of the alleged wrong of defendant as was the depreciation in the value of the horses, and the reason for allowing double damages applies as strongly to them as to the loss in value. The same rule would apply to all damages which resulted directly from the injuries in question."

[3] Hollyman *v.* Hannibal, etc., R. Co., 58 Mo. 480; Wood *v.* St. Louis, etc., R. Co., 58 Mo. 109.

[4] See Memphis, etc., R. Co. *v.* Carley, 39 Ark. 246.

a plaintiff is required to serve notice on the defendant of his claim, and send a verified statement of the claim with such notice, in a subsequent suit the plaintiff will not be permitted to recover more than double the amount claimed in such notice and affidavit.[1]

§ 1220. **Attorney's fees.**—Statutes permitting an attorney's fee to be added to the actual damages in suits against railway companies for injuries to stock are in force in many of the states. There is some conflict in the decisions as to whether a statute providing for the allowance of an attorney's fee in such cases is constitutional. The weight of modern authority is to the effect that such statutes are constitutional,[2] but there are a few cases which hold them unconstitutional.[3] It is usually provided in these statutes that as a prerequisite to the right to recover an attorney's fee the plaintiff must serve notice of his loss on the railway company and give them an opportunity to settle the claim without suit.[4] In such cases it held to be but just that the validity of a statute allowing an attorney's fee

[1] Manwell *v.* Burlington, etc., R. Co., 80 Iowa 662, s. c. 45 Am. & Eng. R. Cas. 501.

[2] Gulf, etc., R. Co. *v.* Ellis, 87 Tex. 19, 61 Am. & Eng. R. Cas. 357; Jacksonville, etc., R. Co. *v.* Prior, 34 Fla. 271, 15 So. R. 760; Peoria, etc., R. Co. *v.* Duggan, 109 Ill. 537; Perkins *v.* St. Louis, etc., R. Co., 103 Mo. 52; Kansas Pac. R. Co. *v.* Mower, 16 Kan. 573; Missouri, etc., R. Co. *v.* Shirley, 20 Kan. 660; Missouri, etc., R. Co. *v.* Abney, 30 Kan. 41, 13 Am. & Eng. R. Cas. 650; Gulf, etc., R. Co. *v.* Ellis, (Tex.) 18 S. W. R. 723, 49 Am. & Eng. R. Cas. 509; Johnson *v.* Chicago, etc., R. Co., 29 Minn. 425; Atchison, etc., R. Co. *v.* Harper, 19 Kan. 529; Missouri Pac. R. Co. *v.* Humes, 115 U. S. 512, 22 Am & Eng. R. Cas. 557; Central Pacific etc., R. Co. *v.* Nichols, 24 Kan. 242; Kansas City, etc., R. Co. *v.* Burge, 40 Kan. 734.

[3] St. Louis, etc., Railway Co. *v.* Williams, 49 Ark. 492; Wilder *v.* Chicago, etc., R. Co., 70 Mich. 382. The Michigan case cited hold that such legislation is class legislation and void. In the case of Gulf, etc., R. Co. *v.* Ellis, 87 Tex. 19, 61 Am. & Eng. R. Cas. 357, the opposite view was taken. See, also, Lafferty *v.* Chicago, etc., R. Co., 71 Mich. 35, 38 N. W. R. 660; Schut *v.* Chicago, etc., R. Co., 70 Mich. 433; Rinear *v.* Grand Rapids, etc., R. Co., 70 Mich. 620; South, etc., R. Co. *v.* Morris, 65 Ala. 193; Denver, etc., R. Co. *v.* Outcalt, 2 Colo. App. 395, 31 Pac. R. 177; Rio Grande, etc., R. Co. *v.* Vaughn, 3 Colo. App. 465; Jolliffe *v.* Brown, (Wash.) 44 Pac. R. 149.

[4] Illinois Central R. Co. *v.* Crider, 91 Tenn. 489, 56 Am. & Eng. R. Cas. 157.

to the plaintiff should be upheld. The railway company by its refusal to settle the claim of which it has been notified virtually compels a plaintiff to resort to the courts and to incur a liability for attorney's fees and it is only fair that such fee or a reasonable fee should be paid by the company.[1] A statute providing for the allowance of an attorney's fee is held to be not unconstitutional as being class legislation.[2] Legislation of this kind is intended to compel railway companies to properly fence their tracks and is held to be a valid exercise of the police power of the state.[3]

[1] In Illinois Central R. Co. *v.* Crider, 91 Tenn. 489, it was said: "This additional penalty is not imposed except upon the contingency that the company shall refuse settlement upon the basis of the *prima facie* valuation, and upon the further condition that the owner of the live stock killed or injured shall establish both the liability of the company and that the appraised value was not excessive. What the state may impose as a penalty without condition it may impose subject to condition. The measure of the damages for failure to fence, as well as the disposition of any recovery in excess of actual compensation was wholly within the legislative discretion. The additional or increase of damages, in case the company unsuccessfully contests its liability for the full amount of the appraisement, is to be measured by the reasonable expense thrown upon the plaintiff in what is there established to have been unnecessary litigation."

[2] Gulf, etc., R. Co. *v.* Ellis, 87 Tex. 19, 61 Am. & Eng. R. Cas. 158; Illinois Central R. Co. *v.* Crider, 91 Tenn. 489, s. c. 56 Am. & Eng. R. Cas. 157.

[3] Perkins *v.* St. Louis, etc., R. Co., 103 Mo. 52. In Illinois Central R. Co. *v.* Crider, 91 Tenn. 489, it was said: "It is argued that this is the imposition of a burden upon one class of litigants in favor of another, and violates the constitutional rule which requires equality of right, privilege, and exemption. These objections overlook the fact that this legislation is intended to compel railroad companies to fence in their tracks; and that the liability imposed is a consequence of failure of the offending company to adopt so necessary a means toward the protection of the property of others, and as a precaution against accidents resulting from the presence of animals on the road, thus endangering the safety of those controlling, and then using, so dangerous a mode of conveyance. If the state may, in the exercise of its police power, compel all railroad companies to fence in their tracks, it may enforce such policy by making the offending company liable to all who sustain injury by neglecting such precaution. * * * * The view here taken of this act, its objects and scope, excludes the assumption that the statute is one merely imposing a burden upon one class of litigants not borne by all others. The subject of the legislation being within the police power of the state, it is not objectionable that additional or increased damages are imposed upon such terms and subject to such contingences as the public interest shall demand."

CHAPTER XLVIII.

FIRES SET BY RAILWAY COMPANIES.

§ 1221. Common law liability.
1222. Statutory liability.
1223. Constitutionality of statutes imposing liability.
1224. Equipment—Spark arresters, ash-pans—Fuel.
1225. Management of engines.
1226. Duty as to right of way—Combustible material.
1227. Fires set to burn off right of way.
1228. Extra precautions—Dry seasons — Wind — Exposed property.
1229. Fires started on right of way.
1230. Fires started off the right of way.
1231. Remote fires.
1232. Duty to extinguish fires.
1233. Ownership of property burned.
1234. Effect of insurance on property burned.
§ 1235. Property on right of way.
1236. Contracts limiting liability.
1237. Liability where road is operated under lease.
1238. Contributory negligence of owner.
1239. Measure of damages for property destroyed by fire.
1240. Pleading—Parties.
1241. Pleading—Sufficiency of complaint.
1242. Burden of proof—Presumption of negligence.
1243. Proof that company set out fire.
1244. Proof that company negligently set out fire.
1245. Evidence to rebut presumption of negligence.
1246. Attorney's fees.
1247. Personal and other injuries caused by fires.

§ 1221. **Common law liability.**—Fire is one of the most dangerous elements and has ever been the subject of control by law. The rule of the ancient common law governing the use of fire was very strict, going so far as to make the person setting out fires absolutely liable to a third person, whose property was injured thereby.[1] This strict rule of the com-

[1] The rule was thus stated in an ancient book of the common law: "If my fire, by misfortune, burns the goods of another man, he shall have his action on the case against me. If a fire breaks out suddenly in my house, I not knowing it, and it burns my goods, and also my neighbor's

mon law seems to have been enforced in England up to 1860, but in that year its harshness was modified, and the rule laid down in a railway fire case, in an opinion by Chief Justice Cockburn, that a railway company which has been authorized by legislative authority to operate a railway and incidentally to use fire in its locomotives, is not liable for damages caused by such fire unless the company has been guilty of negligence.[1] The strict and ancient rule of the common law has never been in force in this country, and the true rule of liability, independent of statutory enactments, is, that where the railway company is operating its railway by virtue of legislative authority and uses reasonable precaution in the selection and operation of its locomotives, it is not liable for fires resulting therefrom unless it be guilty of some act of negligence.[2] Neg-

house, he shall have his action on the case against me. So if the fire is caused by a servant or guest, or any person who entered the house with my consent; but otherwise if it is caused by a stranger who entered the house against my will." Rolle Abr., Action on the Case, B. title, Fire; Turberville *v.* Stampe, 1 Ld. Raym. 264; Pantam *v.* Isham, 1 Salk. 19.

[1] Vaughan *v.* Taff Vale R. Co., 5 H. & N. 679. In that case it was said: "Although it may be true that if a person keep an animal of known dangerous propensities, or a dangerous instrument, he will be responsible to those who are thereby injured, independently of any negligence in the mode of dealing with the animal or using the instrument; yet when the legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every precaution has been observed to prevent injury, the sanction of the legislature carries with it this consequence: that if damage results from the use of such thing, independently of negligence, the party using it is not responsible."

[2] Mississippi Home Ins. Co. *v.* Louisville, etc., R. Co., 70 Miss. 119, 12 So. R. 156; Atchison, etc., R. Co. *v.* Riggs, 31 Kan. 622, s. c. 15 Am. & Eng. R. Cas. 531; Kansas, etc. R. Co. *v.* Butts, 7 Kan. 308; Piggot *v.* Eastern, etc., R. Co., 54 Eng. Com. Law 228; McCready *v.* South etc., R. Co., 2 Strob. 356; Brown *v.* Atlanta, etc., R. Co., 19 S. Car. 39, 15 Am. & Eng. R. Cas. 479; McHugh *v.* Chicago, etc., R. Co., 41 Wis. 75; Woodson *v.* Milwaukee, etc., R. Co., 21 Minn. 60; Illinois, etc., R. Co. *v.* Mills, 42 Ill. 407; Frankford, etc., R. Co. *v.* Phila., etc., Co., 54 Pa. St. 345; Huyett *v.* Phila., etc., R. Co., 23 Pa. St. 373; Burroughs *v.* Housatonic, etc., R. Co., 15 Conn. 124; Leavenworth, etc., R. Co. *v.* Cook, 18 Kan. 261; Morris, etc., R. Co. *v.* State, 36 N. J. L. 553; Jackson *v.* Chicago, etc., R. Co., 31 Iowa 176; Indianapolis, etc., R. Co. *v.* Paramore, 31 Ind. 143; Sheldon *v.* Hudson River R. Co., 14 N. Y. 218; Flynn *v.* San Francisco, etc., R. Co., 40 Cal. 14; White *v.* Chicago, etc., R. Co.,

ligence is the gist of the action, and unless negligence be shown there can be no recovery.[1] The distinction must be borne in mind between those cases in which liability exists independent of negligence as a result of statutory enactments and those in which the burden of proof is upon the defendant to disprove negligence. In those cases where the burden of proof is upon the defendant the establishment of negligence is as essential to a right to recover as it is in those cases where the burden is upon the plaintiff, and the mere fact that the burden of proof is changed must not in any way be regarded

1 S. Dak. 326, 47 N.W.R. 146; Chapman *v.* Atlantic, etc., R. Co., 37 Me. 92; Louisville, etc., R. Co. *v.* Richardson, 66 Ind. 43; Toledo, etc., R. Co. *v.* Larmon, 67 Ill. 68; Kentucky, etc., R. Co., *v.* Barrow, 89 Ky. 638; Inman *v.* Elberton, etc., R. Co., 90 Ga. 663, s. c. 35 Am. St. R. 232; Webb *v.* Rome, etc., R. Co., 49 N. Y. 420; Henderson *v.* Philadelphia, etc., R. Co., 144 Pa. St. 461, s. c. 27 Am. St. R. 652; Philadelphia, etc., R. Co. *v.* Hendrickson, 80 Pa. St. 182; Meyer *v.* Vicksburg, etc., R. Co., 41 La. Ann. 639, s. c. 17 Am. St. R. 408; Louisville, etc., R. Co. *v.* Reese, 85 Ala. 497, s. c. 7 Am. St. R. 66; Gandy *v.* Chicago, etc., R. Co., 30 Iowa 420; McCaig *v.* Erie Ry. Co., 8 Hun 599; Bernard *v.* Richmond, etc., R. Co., 85 Va. 792; Norfolk, etc., R. Co. *v.* Ferguson, 79 Va. 241; Sheeler *v.* Chesapeake, etc., R. Co., 81 Va. 188; Savannah, etc., R. Co. *v.* Pelzer Co., 60 Fed. R. 39; Edrington *v.* Louisville, etc., R. Co., 41 La. Ann. 96. In the case of Atchison, etc., R. Co. *v.* Riggs, 31 Kan. 622, it was said: "As frequently decided in this court, railroad companies are not insurers against fire, but are liable only for negligence; and if they are guilty of no negligence, then no action can be maintained against them for any accidental fire caused by the escape of fire from their engines." Mr. Bishop, in his work on Non-Contract Law, § 1027, in speaking of the liability of a railway company for fires set by its locomotives, said: "Whatever be the danger of ignition from locomotives, the charter of a railroad justifies the use of them, and frees the road from liability to individuals necessarily, or of pure accident, subjected to loss or injury therefrom."

[1] Henderson *v.* Philadelphia, etc., R. Co., 144 Pa. St. 461, s. c. 27 Am. St. R. 652; Bernard *v.* Richmond, etc., R. Co., 85 Va. 792. "But for some reason, perhaps because the common law in reference to the liability for damages caused by accidental fires was not considered applicable to our condition as a new country, the uniform current of decisions in America has been, in the absence of statute, to the effect that negligence or misconduct is the gist of the liability of railroad companies for injuries caused by fire escaping from their engines; though the authorities are in hopeless conflict as to which party must assume the burden of proof in such cases." Union, etc., R. Co. *v.* De Busk, 12 Colo. 294, s. c. 3 L. R. A. 350.

as rendering the establishment of negligence less necessary.[1] The mere fact that a locomotive emits more sparks when ascending a grade does not in itself amount to negligence on the part of the company.[2] Where two fires, one of which was negligently set by the company, the other not, commingle and destroy property the company is liable.[3] What particular acts or omissions will amount to negligence on the part of the company will more fully appear in the sections following.

§ 1222. **Statutory liability.**—In a great many of the states the common law liability of railway companies for damages on account of fires set by them has been changed by statute. Some of these statutes do not change the liability imposed by the common law but change only the manner of enforcing the liability, such as casting the burden of proof upon the defendant to show that the fire was not negligently started, or making proof of fire *prima facie* evidence of negligence.[4] But in addition to changing the common law method of enforcing the remedy there are a number of states which have statutes imposing an absolute liability upon railway companies for fires set by sparks from their locomotives.[5] And it has been held that a fire caused by burning grass and weeds off the right of

[1] See Union, etc., R. Co. *v.* De Busk, 12 Colo. 294, s. c. 3 L. R. A. 350.

[2] Frier *v.* President, etc., Co, 86 Hun 464, 33 N. Y. S. 886.

[3] McClellan *v.* St. Paul, etc., R. Co., 58 Minn. 104, 59 N. W. R. 978. The court said: "If two fires have been set, the origin of one or both of which can be traced to the negligence of a party or parties, either or both of these parties can be held responsible for resulting damages in case the fires mingle. All the legal consequences of being joint wrong-doers must follow, one being that each is liable to the full extent of the damages growing out of the wrongful acts; or, as it is sometimes said, where the injury is the result of two concurring causes, one party is not exempt from full liability, although another party is equally culpable."

[4] The statutes to which we have just referred will be discussed in the section on burden of proof. See, § 1242, *post*.

[5] Union, etc., R. Co. *v.* De Busk, 12 Colo. 294, s. c. 3 L. R. A. 350; Rodemacher *v.* Milwaukee, etc., R. Co., 41 Iowa 297; Denver, etc., R. Co. *v.* Henderson, 10 Colo. 1; Ross *v.* Boston, etc., R. Co., 6 Allen 87; Thorpe *v.* Rutland, etc., R. Co., 27 Vt. 140; Pratt *v.* Atlantic, etc., R. Co., 42 Me. 579; Perley *v.* Eastern, etc., R. Co., 98 Mass. 414. See authorities cited in next section *infra*.

way is within the scope of a statute making a railway company liable for fires set out in the operation of its road.[1] A statute imposing an absolute liability upon a railway company for fires set out in the operation of its road applies to the destruction of personal property as well as to the destruction of or injury to real estate.[2]

§ 1223. **Constitutionality of statutes imposing liability.**— Statutes imposing absolute liability for damages, on account of fires set out by railway locomotives have been attacked in many of the states where they are in force on the ground that they are unconstitutional, but in all the decisions, where the question has directly arisen, so far as we have been able to discover, they have been held constitutional.[3] In Iowa such a

[1] Pratt *v.* Atlantic, etc., R. Co., 42 Me. 579; Hooksett *v.* Concord, etc., R. Co., 38 N. H. 242; Missouri Pacific Co. *v.* Cady, 44 Kan. 633; Hart *v.* Western, etc., R. Co., 13 Met. 99.

[2] Bassett *v.* Conn. River, etc., R. Co., 145 Mass. 129, s. c. 13 N. E. R. 370; Thatcher *v.* Maine Central R. Co., 8 Me. 502, 27 Atl. R. 519; Bean *v.* Atlantic, etc., R. Co., 63 Me. 293; Cleveland *v.* Grand Trunk, etc., R. Co., 42 Vt. 449; Hooksett *v.* Concord, etc., R. Co., 38 N. H. 244; Stearns *v.* Atlantic, etc,, R. Co., 46 Me. 95.

[3] Undoubtedly the weight of authority is that such statutes are constitutional, but, on principle, there is reason for doubting the soundness of the accepted doctrine. As, we have elsewhere said, the legislature, in authorizing the construction and operation of a railroad authorizes the use of fire and if there is a proper performance of the authorized act it is difficult to perceive how the proper performance of that act can be arbitrarily declared unlawful. *Ante*, § 1222, note. It is by no means easy to reconcile the doctrine of the cases which uphold the validity of such statutes with the long established principles affirmed in such cases as Clark *v.* Foot, 8 Johns. 421; Patridge *v.* Scott, 3 Mees. & W. 220; Acton *v.* Blundell, 12 Mees. & W. 324; Chadwick *v.* Tower, 6 Bing. (N. Cas.) 1; Radcliff's Ex. *v.* Mayor of Brooklyn, 4 N. Y. 195; Governor, etc., of Cast, etc., Manufacturers *v.* Meredith, 4 Term. R. 794; Macy *v.* City of Indianapolis, 17 Ind. 267; Vaughan *v.* Taff Vale, etc., R. Co., 5 Hurl. & N. 678. If a railroad company may be made absolutely liable for loss caused by fire, so may all corporations and all individuals that use fire, and certainly the common law of America forbids any such conclusion, for it is only for negligence in using fire that there is a liability. Bishop Non-Contract Law, § 833; 2 Sherman & R. on Neligence, (4th ed.) § 665; Wharton on Negligence, § 865. It seems to us a great stretch to hold that if injury results from a fire, although attributable to pure accident the corporation or person who uses the fire is liable. There is certainly good reason in the dissent of McIver, C. J., in McCandless *v.* Richmond, etc., R. Co., 38 S. Car. 103, s. c. 61 Am. & Eng. R. Cas. 524. Chief

statute was attacked on the ground that it violated the obligations of a contract, the statute having been passed after the railway company was chartered, but the court held that the railroad company took its charter subject to such changes as might be made in the laws.[1] In many cases the reasoning is that, although, it would seem to be a harsh rule to impose an absolute liability upon a railway company for damages on account of fires set out by its locomotives when the company was guilty of no negligence whatever and was engaged in a lawful business duly authorized by the laws of the land yet it would be much harsher to compel a property-owner along the line of the road to suffer loss of his property by reason of a dangerous agency set in motion by a third person when such property-owner was entirely free from fault. The constitutionality of statutes imposing absolute liability has been upheld in several cases on the ground that where loss must fall upon one of two innocent persons that person causing the loss should bear the burden of it.[2] In Colorado it was held that such a statute was but a re-

Justice McIver makes the distinction, which he have elsewhere noted, between the power to regulate the public duties of a corporation and the power to abridge its private rights. But as far as the decisions of the state courts can settle a question this question is settled against the opinion to which we incline, although the reasoning in many cases supports our view. New Orleans, etc., R. Co. *v.* Bourgeois, 66 Miss. 3, s. c. 14 Am. St. R. 534; Oregon, etc., R. Co. *v.* Smalley, 1 Wash. 206, s. c. 22 Am. St. R. 143; County of San Mateo *v.* Southern Pacific R. Co., 13 Fed. R. 722; Zeigler *v.* South, etc., R. Co., 58 Ala. 594.

[1] Rodemacher *v.* Milwaukee, etc., R. Co., 41 Iowa 297. See, also, Lyman *v.* Boston, etc., Corp., 4 Cush. 288; Matthews *v.* St. Louis, etc., R. Co., 121 Mo. 298, 25 L. R. A. 161.

[2] In Rodemacher *v.* Milwaukee, etc., R. Co., 41 Iowa 297, it was said: "The statute simply recognizes the doctrine that the use of a locomotive engine is the employment of a dangerous force; that sometimes, notwithstanding the exercise of the highest care and diligence, it will emit sparks and cause destructive conflagrations; that when this occurs, loss must fall upon one of two innocent parties; that heretofore that loss has been born by the owner of the property injured; hereafter it shall be born by the owner of the property causing the injury." To the same effect are the following cases: Matthews *v.* St. Louis, etc., R. Co., 121 Mo. 298, s. c. 25 L. R. A. 161. In Campbell *v.* Missouri, etc., R. Co., 121 Mo. 340, s. c. 42 Am. St. R. 530, the constitutionality of the Missouri statute was upheld, the court saying, *inter alia:* "It is unquestioned that the utmost diligence and care can not prevent the escape of fire from locomotive engines. We have then, this condi-

enactment of the ancient common law and did not violate any provisions of their constitution.[1] The first state to enact such a statute was Massachusetts, which passed it in the year 1840. That statute has been declared constitutional by the supreme court of Massachusetts in a number of cases,[2] and in the many states in which the same, or substantially the same, statute has been enacted it has also been held constitutional.[3] In many of the states where these statutes are in force, provision is made

tion of things. The corporation is given the right, by the statute, to run its engine by steam power, necessitating the use of fire. Fire necessarily escapes, and is scattered along the route. The citizen owns property along the line of the road, which is exposed to fire from those engines, regardless of the care and vigilance he may exercise. Both parties are faultless, but, nevertheless, the property of the owner is consumed by fire from an engine. The property-ower has the right to own the property, and to claim protection under the law, equal at least to the right of the corporation to use fire on its engines. The loss must necessarily fall upon one or the other of these parties, which one of them shall suffer the loss, the one through whose agency the damage was caused, though in the lawful use of its own property, or the one equally innocent of wrong, and who had no agency in causing the damage? Tested by the rule of natural right and equity, there could be but one answer to the inquiry. This answer is formulated into the maxim that every one should so use his own property as not to injure that of his neighbor."

[1] Union Pacific R. Co. *v.* De Busk,12 Colo. 294, s. c. 3 L. R. A. 350. In that case it was said: "Undoubtedly the enforcement of such acts will stimulate railroad companies to the greatest diligence to prevent fires from the operation of their roads. * * * A hundred years ago, when a man's house burned without any negligence on his part—a case of pure accident—and the fire caused the burning of his neighbor's house, it was deemed a harsh law that required him to make good his neighbor's loss as well as to bear his own; and so resort was had to act of parliament to remedy the supposed hardship. 14 Geo. III, chap. 78. The adoption of the statute in this and other states making railroad companies liable for damages by fire caused by the operation of their locomotive engines, is but the re-enactment *pro tanto* of the ancient common law for the better protection of property exposed to such unusual dangers." Denver, etc., R. Co. *v.* De Graff, 2 Colo. App. 42; Union Pac. R. Co. *v.* Arthur, 2 Colo. App. 159; Union Pacific R. Co. *v.* Tracy, 19 Colo. 331, 37 Pac. R. 537; Rowell *v.* Railroad, 57 N. H. 132, s. c. 24 Am. R. 59.

[2] Ross *v.* Boston, etc., R. Co., 6 Allen 87; Pierce *v.* Worcester, etc., R. Co., 105 Mass. 199; Hart *v.* Western, etc., R. Co., 13 Met. 99; Trask *v.* Hartford, etc., R. Co., 16 Gray 71; Bassett *v.* Connecticut, etc., R. Co., 145 Mass. 129; Sufford *v.* Boston, etc., R. Co., 103 Mass. 583; Ingersoll *v.* Stockbridge, etc., R. Co., 8 Allen 438; Perley *v.* Eastern, etc., R. Co., 98 Mass. 414.

[3] Pratt *v.* Atlantic, etc., R. Co., 42

whereby a railroad company has an insurable interest in property along its line which is likely to be burned and for which it would have to pay in case of destruction by fire.[1] A statute imposing absolute liability, however, will not be so construed as to confine the liability of the company to such property as it may obtain insurance upon.[2]

§ 1224. **Equipment—Spark arresters—Ash-pans—Fuel.**—The operation of the modern railway necessarily requires the use of steam power and that power is furnished by means of locomotives in which steam is generated. In the generation of steam it is necessary to use fire, and it is from the use of this fire that nearly all the losses occasioned by railway fires result. In the construction of locomotives it is almost impossible, or at least it has been so up to the present time, to entirely prevent the escape of fire.[3] Hundreds of different devices and

Me. 579; Denver, etc., R. Co. *v.* Henderson, 10 Colo. 1; Thorpe *v.* Rutland, etc., R. Co., 27 Vt. 140; Chapman *v.* Atlantic, etc., R. Co., 37 Me. 92; Hooksett *v.* Concord Railroad, 38 N. H. 242; Brady *v.* Des Moines, etc., R. Co., 57 Iowa 393; Gissell *v.* Housatonic, etc., R. Co., 54 Conn. 447; McCandless *v.* Richmond, etc., R. Co., 38 S. Car. 103, s. c. 18 L. R. A. 440; Thompson *v.* Richmond, etc., R. Co., 24 S. Car. 366; Hunter *v.* Columbia, etc., R. Co., 41 S. Car. 86, 19 S. E. R. 197; Lipfield *v.* Charlotte, etc., R. Co., 41 S. Car. 285, 19 S. E. R. 497; Martin *v.* New York, etc., R. Co., 62 Conn. 331; Rowell *v.* Railroad Co., 57 N. H. 132; Lowney *v.* New Brunswick, etc., R. Co., 78 Me. 479; Regan *v.* New York, etc., R. Co., 60 Conn. 124; Bean *v.* Atlantic, etc., R. Co., 63 Me. 293; Thatcher *v.* Maine Central R. Co., 85 Me. 502; Smith *v.* Boston, etc., R. Co., 63 N. H. 25; Adams *v.* St. Louis, etc., R. Co., (Mo.) 28 S. W. R. 496.

[1] Grissell *v.* Housatanic, etc., R. Co., 54 Conn. 447, 32 Am. & Eng. R. Cas. 349; Simmonds *v.* New York, etc., R. Co., 52 Conn. 264, s. c. 52 Am. R. 587; Rowell *v.* Railroad, 57 N. H. 132, s. c. 24 Am. R. 59; Perley *v.* Eastern, etc., R. Co., 98 Mass. 414, s. c. 96 Am. Dec. 645; Laird *v.* Railroad, 62 N. H. 254; Thatcher *v.* Maine, etc., R. Co., 85 Me. 502, s. c. 27 Atl. R. 519.

[2] Campbell *v.* Missouri, etc., R. Co., 121 Mo. 340, S. W. R. 591, 25 L. R. A. 175; Adams *v.* St. Louis, etc., R. Co., (Mo.) 28 S. W. R. 496.

[3] There are some authorities which indicate that with the present scientific appliances it is possible to altogether prevent the escape of sparks. If this were true then suffering the escape of sparks could seldom be otherwise than negligent and liability would be practically absolute. We do not believe that the doctrine indicated by the authorities referred to is warranted by the history of railway fire cases and mechanical appliances to prevent escape of sparks. See, Longabaugh *v.* Virginia, etc., R. Co., 9 Nev. 271; Small *v.* Chicago, etc , Co., 50

appliances have been invented and used but none has yet been invented which will completely render the use of fire harmless. In the selection and use of machinery and appliances to prevent the escape of fire, the duty resting upon railway companies is very clearly defined. In those states where there are statutes imposing an absolute liability on account of fires the use of a particular kind of appliance would seem to be immaterial,[1] but in those states where no such statutes are in force, it is the duty of railway companies to adopt and use on their locomotives approved appliances in general use to prevent the escape of sparks and fire, and an omission to perform such duty generally constitutes negligence.[2] But in such

Iowa 338, 6 Cent. L. J. 310; Case *v.* Northern, etc., R. Co., 59 Barb. 644.

[1] The statute fixes the liability independent of the kind of devices and appliances used. However, the use of the best appliances will prevent fires, and lessen the number of cases of absolute liability and it is the policy of companies to make use of such appliances as far as possible.

[2] Watt *v.* Nevada, etc., R. Co., (Nev.) 44 Pac. R. 423; Gulf, etc., R. Co. *v.* Reagan, (Tex.) 32 S. W. R. 846; Hoff *v.* West, Jersey, etc., R. Co., 45 N. J. L. 201, s. c. 13 Am. & Eng. R. R. Cas. 476; Jacksonville, etc., R. Co. *v.* Peninsular, etc., Co., 27 Fla. 1, s. c. 9 So. R. 661; Metzgar *v.* Chicago, etc., R. Co., 76 Iowa 387, 41 N. W. R. 49; Spaulding *v.* Chicago, etc., R. Co., 30 Wis. 110; Meyer *v.* Vicksburg, etc., R. Co., 41 La. Ann. 639, 6 So. R. 218; Burroughs *v.* Housatonic, etc., R. Co., 15 Conn. 124, s. c. 38 Am. Dec. 64; Texas, etc., Co. *v.* Levi, 59 Tex. 674; Pittsburgh, etc., R. Co. *v.* Nelson, 51 Ind. 150; Longabaugh *v.* Virginia City, etc., R. Co., 9 Nev. 271; Indianapolis, etc., R. Co. *v.* Clem, 51 Ind. 591; Gulf, etc., R. Co. *v.* Benson, 69 Tex. 407; Henderson *v.* Philadelphia, etc., R. Co., 144 Pa. St. 461; Diamond *v.* Northern, etc., R. Co., 6 Mont. 580, s. c. 29 Am. & Eng. R. Cas. 117; St. Louis, etc., R. Co. *v.* Gilham, 39 Ill. 455; Burlington, etc., R. Co. *v.* Westover, 4 Neb. 268; Eddy *v.* Lafayette, 49 Fed. R. 807; Missouri, etc., R. Co. *v.* Bartlett, 81 Tex. 42, 16 S. W. R. 638; Anderson *v.* Cape Fear, etc., Co., 64 N. Car. 399; Toledo, etc., R. Co. *v.* Pindar, 53 Ill. 447; Jackson *v.* Chicago, etc., R. Co., 31 Iowa 176; Brighthope *v.* Rogers, 76 Va. 443, s. c. 8 Am. & Eng. R. Cas. 710; Fitch *v.* Pacific, etc., R. Co., 45 Mo. 322; Erie, etc., R. Co. *v.* Decker, 78 Pa. St. 293; Smith *v.* Old Colony, etc., R. Co., 10 R. I. 22; Kenney *v.* Hannibal, etc., R. Co., 63 Mo. 99; Indiana, etc., R. Co. *v.* Paramore, 31 Ind. 143; Bass *v.* Chicago, etc., R. Co., 28 Ill. 9; Toledo, etc., R. Co. *v.* Corn, 71 Ill. 493; Pittsburgh, etc., R. Co. *v.* Noel, 77 Ind. 110; Rost *v.* Missouri, etc., R. Co., 76 Tex. 168; Snyder *v.* Pittsburgh, etc., R. Co., 11 W. Va. 14; Hannaker *v.* St. Paul, etc., R. Co., 5 Dak. 1; White *v.* Chicago, etc., R. Co., 1 S. Dak. 326, 47 N. W. R. 146, 45 Am. & Eng. R. Cas. 565. See Paris, etc., R. Co. *v.* Nesbitt, (Tex.) 33 S. W. R. 280.

cases if it appear that the company had in use on the locomotive which set the fire appliances and machinery then in general use for the prevention of the escape of sparks and coals of fire, and it is not shown to have been negligent in other particulars, there is no liability.[1] A railway company is not bound to adopt any particular kind of appliances or machinery for the prevention of fires, and it can not be held guilty of negligence for failing to adopt a different kind or pattern of appliances than that which it has adopted,[2] if the latter is ap-

[1] Union Pac. R. Co. *v.* Motzner, (Kan.) 43 Pac. R. 785; New York, etc., R. Co. *v.* Baltz, 141 Ind. 661, 36 N. E. R. 414, 38 N. E. R. 402; Brown *v.* Atlanta, etc., R. Co., 19 S. Car. 39, 13 Am. & Eng. R. Cas. 479; Inman *v.* Elberton, etc., R. Co., 90 Ga. 663, s. c. 35 Am. St. R. 232; Missouri, etc., R. Co. *v.* Platzer, 73 Tex. 117, s. c. 15 Am. St. R. 771; Chicago, etc., R. Co. *v.* Smith, 11 Bradw. (Ill. App.) 348; Bevier *v.* Delaware, etc., R. Co., 13 Hun 254; Vaughan *v.* Taff Vale, etc., R. Co., 5 H. & N. 679; Greenfield *v.* Chicago, etc., R. Co., (Iowa), 49 N. W. R. 95; Burlington, etc., R. Co. *v.* Westover, 4 Neb. 268; Frace *v.* New York, etc., R. Co., 143 N. Y. 182, 38 N. E. R. 102; St. Louis, etc., R. Co. *v.* Lindley, (Tex. C. A.) 29 S. W. R. 1101. In a case in Pennsylvania it was held that where a railway company had used every precaution in the selection and use of the best appliances for the prevention of fires, it would not be liable, though it fire "every rod of country through which it run." Philadelphia, etc., R. Co. *v.* Schultz, 93 Pa. St. 341. In the case of Texas, etc., R. Co. *v.* Levi, 59 Tex. 674, s. c. 13 Am. & Eng. R. Cas. 464, it was said: "The evidence tends to show that, by the use of the most improved spark-arresters, it is impracticable to prevent entirely the escape of sparks from locomotives, unless the draught is so closed by the spark arrester as to prevent the generation of steam. If such be the case, a railway company is authorized to operate its engines with such protection against injury to others by fire as can be given by the use of a high degree of care in the selection and use of such appliances as are approved by prudent and skillful persons, generally engaged in such business, and are found to be best adapted to prevent the escape of fire by which others may be injured, even though as thus operated there may be danger of injury to others from fire escaping from locomotives. The business being authorized by law, no liability can be incurred from its exercise, unless there be a want of care in its prosecution, even though it be attended with some risk of injury to others."

[2] The rule is thus stated in the case of Menomonie, etc., Co. *v.* Milwaukee, etc., R. Co., (Wis.) 65 N. W. R. 176: "Considerable evidence was directed at the trial to the relative merits of short front engines, as the one in question, and extension front engines, in respect to their ability to prevent the escape of sparks and cinders. The evidence does not tend to show any decided superiority of one over the other, but that both kinds were of approved construction, and in very general use, with others; and the court ruled that, unless it was a

proved and in general use. This seems to us to be the true rule, for if the company has taken every precaution and secured approved machinery in general use, it has done all that lies in its power to do consistent with the operation of its road, and there ought, on principle, to be no liability for a purely accidental fire.[1] Even where such machinery and appliances as are in general use are adopted, it is still incumbent upon the company to use care to see that they are kept in proper repair and working order and if it is negligent in that respect and loss occurs on account thereof the company will be liable.[2] Some of the authorities hold that it is the duty of the company to make regular and careful inspections of its locomotives to see that the spark arresters and ash-pans are in proper repair.[3]

well-established fact that a certain plan or device was superior to all others, no company could be held negligent in not using that device, although the court or jury might be convinced that it was the best device, and that it could not be found that the defendant was guilty of negligence in using a short instead of an extension front engine. As applied to the evidence the ruling was clearly correct. Frace *v.* Railroad Co., 143 N. Y. 182, 38 N. E. R. 102; Flinn *v.* N. Y. Railroad Co., 142 N. Y. 11, 36 N. E. R. 1046."

[1] Louisville, etc., R. Co. *v.* Reese, 85 Ala. 497, s. c. 7 Am. St. R. 66. In the course of the opinion in the case just cited the court said: "Railroad companies, being authorized to employ the powerful and dangerous agency of steam, are required by law to use due and reasonable care to prevent injury to the property of others; as has often been said, a high degree of care. Reasonable care, however, does not require the adoption of every new invention or contrivance which science may or can suggest, as to the utility of which men equally skilled may differ. They fulfill the measure of their duty in this respect by adopting such appliances and contrivances as are in practical use by well-regulated railroad companies, and which have been proved by experience to be adapted to the purpose. When they have discharged this duty, they are not liable for accidental injuries caused by the escape of fire from their engines." See, Jennings *v.* Penna. Co., 93 Pa. St. 337. In the recent case of St. Louis, etc., R. Co. *v.* Hoover, (Kan.) 43 Pac. R. 854, the court said: "A railway company, in the operation of its railway, with locomotive engines, propelled by steam, generated by fire, and drawing its trains over its road in the usual and ordinary manner, is not liable for damages done by the mere unavoidable accidental escape of fire from the engine."

[2] Johnson *v.* Chicago, etc., R. Co., 77 Iowa 666, s. c. 42 N.W.R. 512; Chicago, etc., R. Co. *v.* Quaintance, 58 Ill. 389; Toledo, etc., R. Co. *v.* Larmon, 67 Ill. 68; Pittsburgh, etc., R. Co. *v.* Campbell, 86 Ill. 443. See § 1225, *infra*.

[3] See Menomonie, etc., Co. *v.* Milwaukee, etc., R. Co., (Wis.) 65 N. W. R. 176.

In the selection and adoption of appliances and machinery railway companies are only bound to use care to select such as have stood practical tests and are in general use. They are not required to adopt every new invention even though it has the highest scientific approval,[1] nor are they bound at once to discard all their machinery and appliances and adopt new and better ones which are coming into general use.[2] And it has been held in a recent case that it is not a question for a jury to determine whether or not a railway company was guilty of negligence in adopting a particular kind of spark arrester on its locomotives.[3] Railway companies are not bound to use any particular kind of fuel in their locomotives or to select a kind which is least likely to emit sparks or scatter fire,[4] but it has been held that a company was guilty of negligence in using wood for fuel in a locomotive constructed for burning coal.[5]

[1] Flinn *v.* New York, etc., R. Co., 142 N.Y. 11, 36 N. E. R. 1046; Hoff *v.* West Jersey, etc., R. Co., 45 N. J. L. 201; Steinweg *v.* Erie R. Co., 43 N. Y. 123; Frankford, etc., R. Co. *v.* Philadelphia, etc., R. Co., 54 Pa. St. 345; Jefferis *v.* Phila., etc., R. Co., 3 Houst. 447; Louisville, etc., R. Co. *v.* Reese, 85 Ala. 497, s. c. 7 Am. St. R. 66; Hagan *v.* Chicago, etc., R. Co., 86 Mich. 615; Lackawanna, etc., R. Co. *v.* Doak, 52 Pa. St. 379; Crist *v.* Erie, etc., R. Co., 58 N. Y. 638.

[2] Flinn *v.* New York, etc., R. Co., 142 N. Y. 11, 36 N. E. R. 1046. In that case it was said: "A railroad company is not bound to at once introduce every new appliance which is claimed to make its engines safer or more useful. It must have time for trial and experiment. It can not arrest all of its engines at once to make changes, but must have the time requisite, taking into consideration expense, convenience, the operation of its road, and all the problems connected with such a change."

[3] Frace *v.* New York, etc., R. Co., 143 N. Y. 182, 38 N. E. R. 102.

[4] Collins *v.* New York, etc., R. Co., 5 Hun (N. Y.) 499; New Brunswick, etc., R. Co. *v.* Robinson, 11 Sup. Ct. of Can. 689, s. c. 29 Am. & Eng. R. Cas. 132; Lackawanna, etc., R. Co. *v.* Doak, 52 Pa. St. 379; Baltimore, etc., R. Co. *v.* Woodruff, 4 Md. 242. "While any ordinary fuel may be used in a locomotive engine for the generation of steam, the exercise of this right is subject to the restriction that the latest improvement in its management in general use shall be applied to it." Henderson *v.* Philadelphia, etc., R. Co., 144 Pa. St. 461, 48 Am. & Eng. R. Cas. 16.

[5] Chicago, etc., R. Co. *v.* Quaintance, 58 Ill. 389; Chicago, etc., R. Co., *v.* Ostrander, 116 Ind. 266, 38 Am. & Eng. R. Cas. 346; St. Joseph, etc., R. Co. *v.* Chase, 11 Kan. 47. In an action against a railway company for damages on account of fire alleged to have been negligently set by the company's locomotives it is improper to

§ 1225. **Management of engines.**—In the preceding section we discussed the duty of railway companies in regard to the adoption of machinery and appliances for the prevention of the escape of fires from locomotives. Here we propose to discuss the management of such locomotives after proper appliances have been adopted. While it is true that a railway company may generally escape liability in those states where an absolute liability is not imposed by statute, by showing that it had equipped its locomotives with the appliances and contrivances in general use, that rule is to be taken with some qualification, for there are cases in which the companies will be liable notwithstanding the use of proper machinery and where no question is made as to the kind of machinery used. In addition to exercising care and precaution in selecting and keeping in repair the machinery and appliances the company must not be guilty of negligence in operating that machinery, for if it so negligently operates machinery that fires result, it will be liable. Such liability has been declared and enforced in a number of cases. Thus it has been held to be negligence to use a greater amount of steam than was reasonably necessary, so as to cause an unusually large number of sparks to be emitted;[1] in attempting to draw too heavy a load up a grade with a single engine, so that as a consequence a heavy shower of sparks was emitted;[2] to overload a locomotive;[3] or to run at an unlawful speed;[4] in running with the dampers of the fire box open so that coals of fire may escape;[5] to switch off a burning car from a train and leave it in such a position that plaintiff's property was fired and destroyed;[6] and

permit a witness to state as an inference that he knew that wood must have been used in the engines. Ireland *v.* Cincinnati, etc., R. Co., 79 Mich. 163, 44 N. W. R. 426.

[1] Great Western, etc., R. Co. *v.* Haworth, 39 Ill. 346.

[2] North Shore, etc., R. Co. *v.* McWillie, 17 Can. Sup. Ct. R. 511.

[3] Toledo, etc., R. Co. *v.* Pindar, 53 Ill. 447.

[4] Martin *v.* Western, etc., R. Co., 23 Wis. 437. It must appear, however, that the unlawful speed was the proximate cause of the injury. Bennett *v.* Missouri, etc., R. Co., (Texas) 32 S. W. R. 834.

[5] Cantlon *v.* Eastern, etc., R. Co., 45 Minn. 481, 48 N. W. R. 22.

[6] St. Louis, etc., R. Co. *v.* Hecht, 38 Ark. 357, s. c. 9 Am. & Eng. R. Cas. 222.

in burning wood in a coal burning engine.[1] But it has been held not to be negligence to run a train up a grade without breaking it into sections contrary to the usual custom, where it appears that the engine was properly and carefully managed and operated.[2] And a company is not bound to shut off the steam and allow a locomotive to roll slowly by buildings which may be set on fire.[3] And it is not negligence *per se* to run an ordinary freight train at the rate of forty miles per hour.[4] Nor is it negligence to put on steam when the locomotive is standing near the plaintiff's property. Putting an unusual large amount of coal in the fire-box of a locomotive is not negligence.[5] The question as to whether or not a company was guilty of negligence in managing and operating its locomotives is, as a rule, but not always, a question of fact to be determined by a jury.[6]

§ 1226. **Duty as to right of way—Combustible material.**—As it is impossible to entirely prevent the escape of sparks and coals of fire from railway locomotives, and as the sparks and coals that do escape usually fall on the right of way, it is held that it is the duty of a railway company to keep its track and right of way free from dry grass, weeds and other combustible material which are liable to be ignited by sparks and coals of fire and thus communicate fire to the premises of others, and if it fails to discharge this duty and permits the fire to escape to adjoining premises, it may be found guilty of negligence.[7] The removal of dry and combustible material being quite as effectual in preventing fires as the adoption of improved machinery and appliances it would seem that companies should be held equally responsible for a negligent failure to perform one

[1] See next section, *supra*.

[2] Abbott *v.* Gore, 74 Wis. 509, 40 Am. & Eng. R. Cas. 244.

[3] Mississippi, etc., Co. *v.* Louisville, etc., R. Co., 70 Miss. 119, 54 Am. & Eng. R. Cas. 512.

[4] Hagen *v.* Chicago, etc., R. Co., 86 Mich. 615, s. c. 49 Am. & Eng. R. Cas. 670; Michigan, etc., R Co. *v.* Anderson, 20 Mich. 244.

[5] McGibbon *v.* Northern Pacific R. Co., 11 Ont. Rep. 307, 25 Am. & Eng. R. Cas. 486.

[6] Philadelphia, etc., R. Co. *v.* Yerger, 73 Pa. St. 121.

[7] Toledo, etc., R. Co. *v.* Wand, 48 Ind. 476.

of these duties as the other.[1] In some cases it is held that permitting an accumulation of dry and combustible material to remain on the track is negligence *per se*,[2] but the decided

[1] Black *v.* Aberdeen, etc., R. Co., 115 N. Car. 667, 20 S. E. R. 713, 20 S. E. R. 909; Kellogg *v.* Chicago, etc., R. Co., 26 Wis. 223; Jones *v.* Michigan, etc., R. Co., 59 Mich. 437, s. c. 25 Am. & Eng. R. Cas. 482; Smith *v.* London, etc., R. Co., L. R. 5 C. P. 98; Indiana, etc., R. Co. *v.* Overman, 110 Ind. 538, s. c. 29 Am. & Eng. R. Cas. 161; Gibbon *v.* Wisconsin, etc., R. Co., 66 Wis. 161; Delaware, etc., R. Co. *v.* Salmon, 39 N. J. L. 299; Henry *v.* Southern, etc., R. Co., 50 Cal. 176; Kesee *v.* Chicago, etc., R. Co., 30 Iowa 78; Troxler *v.* Richmond, etc., R. Co., 74 N. Car. 377; Brighthope, etc., R. Co. *v.* Rogers, 76 Va. 443, s. c. 8 Am. & Eng. R. Cas. 710; Longabaugh *v.* Virginia City, etc., R. Co., 9 Nev. 271; Chicago, etc., R. Co. *v.* Goyette, 133 Ill. 21; Moore *v.* Chicago, etc., R. Co., 78 Wis. 120; Martin *v.* New York, etc., R. Co., 62 Hun 181; Gram *v.* Northern Pacific R. Co., 1 N. Dak. 252, s. c. 46 N. W. R. 972; Cleveland, etc., R. Co. *v.* Crawford, 24 Ohio St. 631; Atchison, etc., R. Co. *v.* Stanford, 12 Kan. 354; Flannigan *v.* Canadian Pacific R. Co., 17 Ont. R. 6, s. c. 38 Am. & Eng. R. Cas. 362; Steele *v.* Pacific, etc., R. Co., 74 Cal. 323, 32 Am. & Eng. R. Cas. 333; West *v.* Chicago, etc., R. Co., 77 Iowa 654, 32 Am. & Eng. R. Cas. 339; Bowen *v.* St. Paul, etc., R. Co., 36 Minn. 522, 32 Am. & Eng. R. Cas. 370; O'Neill *v.* New York, etc., Co., 115 N. Y. 579, 40 Am. & Eng. R. Cas. 240; Webb *v.* Rome, etc., R. Co., 49 N. Y. 420; Abbott *v.* Gore, 74 Wis. 509, 40 Am. & Eng. R. Cas. 244; Rost *v.* Missouri, etc., R. Co., 76 Tex. 168; Terre Haute, etc., R. Co. *v.* Walsh, 11 Ind. App. 13, 38 N. E. R. 534; Texas, etc., R. Co. *v.* Gains, (Tex. C. App.) 26 S. W. R. 433; Gulf, etc., R. Co. *v.* Rowland, (Tex. C. App.) 23 S. W. R. 421; St. Johns, etc., R. Co. *v.* Ransom, 33 Fla. 406, s. c. 14 So. R. 892; Gulf, etc., R. Co. *v.* Reagan, (Tex. Civ. App.) 32 S. W. R. 846; Watt *v.* Nevada, etc., R. Co., (Nev.) 44 Pac. R. 423. The fact that a railway runs through a prairie country where only wild grass grows on the right of way and the lands adjacent thereto does not excuse the company from clearing its right of way of inflammable material. Sibilrud *v.* Minneapolis, etc., R. Co., 29 Minn. 58, s. c. 7 Am. & Eng. R. Cas. 99.

[2] Diamond *v.* Northern Pac. R. Co., 6 Mont. 580, 29 Am. & Eng. R. Cas. 117. In the case of Richmond, etc., R. Co. *v.* Medley, 75 Va. 499, s. c. 7 Am. & Eng. R. Cas. 493, the court said: "A railway company may be supplied with the best engines and most approved apparatus for preventing the emission of sparks, operated by the most skillful engineers. It may do all that science and skill can suggest in the management of its locomotives, and still it may be guilty of gross negligence in allowing the accumulation of dangerous combustible matter along its track, easily to be ignited by its furnaces, and thence communicated to the property of adjacent proprietors. Conceding that a railroad company is relieved of all responsibility for fires unavoidably caused by its locomotives, it does not follow it is exempt from liability for such as are the result of its negligence or mismanagement. The removal of inflammable matter from the line of the railroad track is quite as much a means of preventing fires to adjoining lands as the employment of the

weight of authority is that it is a circumstance only from which negligence may be found.[1] The latter rule is, we think, the true one. In a number of the states statutes are in force requiring railway companies to clear their right of way of combustible material at certain stated periods.[2] A mere failure to comply with such a statute would seem to be negligence in itself.[3] In cases where fires start in combustible material permitted to accumulate on the track and right of way, the question of negligence in setting the fire is immaterial as affecting the liability, for the right to recover is based on negligence in permitting the dry and combustible materials to accumulate and the fire to escape and the establishment of negligence in that respect is sufficient to justify a recovery.[4] And evidence as to the kind of a spark arrester or ash pans in use would seem to be incompetent where the action is based on negligence in permitting an accumulation of dry and combustible material,[5] but such evidence may be competent where the

most approved and best constructed machinery. Many of the authorities hold that to allow the accumulation of such matter is *per se* negligence, which will render the company responsible if loss ensues. Others hold, and perhaps with better reason, that it is a question for the jury to determine upon all the circumstances of the case."

[1] Eddy *v.* Lafayette, 49 Fed. R. 807; Louisville, etc., R. Co. *v.* Stevens, 87 Ind. 198; Burlington, etc., R. Co. *v.* Westover, 4 Neb. 268; St. Louis, etc., R. Co. *v.* Richardson, 47 Kan. 517; Cantlon *v.* Eastern, etc., R. Co., 45 Minn. 481; Gulf, etc., R. Co. *v.* Benson, 69 Tex. 407, 32 Am. & Eng. R. Cas. 330; Union, etc., R. Co. *v.* Gilland, (Wyo.) 34 Pac. R. 953. In the case of San Antonio, etc., R. Co. *v.* Long, (Tex. C. App.) 23 S. W. R. 499, it was held that it was not negligence, as matter of law, to permit weeds and grass to grow on a railroad right of way.

[2] Diamond *v.* Northern Pacific R. Co., 6 Mont. 580, 29 Am. & Eng. R. Cas. 117; Spencer *v.* Montana, etc., R. Co., 11 Mont. 164, 27 Pac. R. 681; Lake Erie, etc., R. Co. *v.* Middlecoff, 150 Ill. 27, 37 N. E. R. 660; Union, etc., R. Co. *v.* Gilland, (Wyo.) 34 Pac. R. 953.

[3] Diamond *v.* Northern Pacific R. Co., 6 Mont. 580, 29 Am. & Eng. R. Cas. 117. Compare Chicago, etc., R. Co. *v.* Goyette, 133 Ill. 21, 43 Am. & Eng. R. Cas. 36.

[4] Indiana, etc., R. Co. *v.* Overman, 110 Ind. 538, s. c. 29 Am. & Eng. R. Cas. 161; Pittsburgh, etc., R Co. *v.* Hixon, 79 Ind. 111; Brinkman *v.* Bender, 92 Ind. 234; Wabash, etc., R. Co. *v.* Johnson, 96 Ind. 40; Louisville, etc., R. Co. *v.* Nitsche, 126 Ind. 229, s. c. 26 N. E. R. 51; Terre Haute, etc., R. Co. *v.* Walsh, 11 Ind. App. 13, 38 N. E. R. 534.

[5] Indiana, etc., R. Co. *v.* Overman, 110 Ind. 538.

question is whether the locomotive caused the fire. The company is liable if it negligently permits combustibles to accumulate and the fire to escape no matter how perfect its spark arresters may be,[1] and ordinarily it is its duty in clearing off the right of way to do so for the entire width.[2] It has been held that it is not sufficient for a company to cut grass or weeds on its right of way, and that they must be removed or destroyed.[3] Whether or not a company is guilty of negligence in suffering combustible material to accumulate on its right of way is usually a question of fact for the jury.[4]

§ 1227. **Fires set to burn off right of way.**—It frequently becomes necessary for a railway company, in order to effectively remove rubbish and inflammable material from its right of way, to resort to the use of fire. In such cases where the fire is set by voluntary act of the company, for a lawful purpose, there can ordinarily be no negligence in starting the fire. But after such a fire has once been started it is incumbent upon the company to guard the fire and see that it does not escape and do damage to others and if the company negligently allows such fire to escape and the property of third persons is destroyed it will be liable to such persons for damages.[5] The action is predicated on negligence in setting the fire or permitting it to escape, not in permitting combustibles to accumulate.[6] And there may be cases, owing to the dangerous nature of the places and surroundings where such a fire is set out, in

[1] Galveston, etc., R. Co. *v.* Polk, (Tex.) 28 S. W. R. 353.

[2] Blue *v.* Aberdeen, etc., R. Co., (N. Car.) 23 S. E. R. 275.

[3] Smith *v.* London, etc., R. Co., L. R. 5 C. P. 98.

[4] Rockford, etc., R. Co. *v.* Rogers, 62 Ill. 346; Gibbons *v.* Wisconsin, etc., R. Co., 58 Wis. 335; Bass *v.* Chicago, etc., R. Co., 28 Ill. 9; Texas, etc., R. Co. *v.* Medaris, 64 Tex. 92; Illinois, etc., R. Co. *v.* Frazier, 47 Ill. 505; White *v.* Missouri Pacific R. Co., 31 Kan. 280; Jones *v.* Michigan, etc., R. Co., 59 Mich. 437; Perry *v.* Southern Pac. R. Co., 50 Cal. 578; Van Ostrand *v.* Wallkill, etc., R Co., 19 N.Y. Supp. 621; Wines *v.* Rio Grande, etc., R. Co., 9 Utah 228, 33 Pac R. 1042; Richmond, etc., R. Co. *v.* Medley, 75 Va. 499.

[5] Indiana, etc., R. Co. *v.* Overman, 110 Ind. 538, s. c. 29 Am. & Eng. R. Cas. 161.

[6] Gulf, etc., R. Co. *v.* Cusenberry, 86 Tex. 525, s. c. 26 S. W. R. 43.

which the action of the company will be regarded as a direct and positive wrong.[1] Evidence is admissible, as tending to show negligence in setting a fire at an improper time, that the plaintiff cautioned defendant's section foreman at the time he set the fires and objected to his setting them because everything was dry and likely to be destroyed.[2] Cases in which fires have been set to consume inflammable material and rubbish stand on a different basis from those which are started because of defective apparatus and appliances, negligent operation or the presence of combustible material on the right of way. In those cases the ground of liability is usually the failure of the company to perform some antecedent duty imposed upon it to prevent the starting of fires, while in the cases mentioned here the recovery is based upon the failure of the company to properly guard a fire lawfully started. Thus it has been held that a company is not liable under a statute impos-

[1] Gordon *v.* Grand Rapids, etc., R. Co., 103 Mich. 379, 61 N. W. R. 549; Cole *v.* Lake Shore, etc., R. Co., (Mich.) 63 N. W. R. 647; Louisville, etc., R. Co. *v.* Nitsche, 126 Ind. 229, s. c. 45 Am. & Eng. R. Cas. 532. In the last case the company, in a very dry time, started a fire on a bed of peat over which its right of way extended for the purpose of clearing off rubbish and combustible material. The fire caught in the peat and spread to and destroyed the property of adjacent owners. The court, in discussing the liability of the company for starting a fire under such circumstances, said: "An essential and ruling element of this case is this: It was a tortious act to set out the fire which caused the plaintiff's injury. It was something more than culpable negligence to start a fire on a bed of turf or peat, in a season of great drought, when for weeks no rain had fallen, and the ground was parched and dry. The act of the defendant in setting out a fire at such a place and under such conditions was a positive wrong, for the law forbids that one person should put the property of another in jeopardy by such an act. In degree only is there difference between such a case as this and one in which a person kindles a fire near a train of gunpowder, leading to a magazine filled with explosive substances. In essence the case is the same as that of one who builds a fire upon materials that will ignite and continue burning in a place where all surrounding materials are of the same combustible character. * * * A railroad company has a right to remove combustible material from its right of way, and, ordinarily, it may not be negligence to employ fire for that purpose; but, where the conditions are such as to put in great peril adjacent property, fire can not be rightfully used for such a purpose."

[2] Gordon *v.* Grand Rapids, etc., R. Co., (Mich.) 61 N. W. R. 549.

ing absolute liability on account of railway fires for damages caused by a fire lawfully started to burn off a right of way.[1] And where a fire set out to destroy rubbish escapes through pure accident the company is not liable.[2] The burden is on the plaintiff to show negligence and of this the fire itself may be no proof.[3] But where a fire was negligently set on the right of way and escaped and did damage, the company is liable although its employes did all in their power to check its spread.[4] Where a fire which has been set on the right of way by the employes of the company escapes therefrom and destroys the property of a third person the railway company will not be liable unless the act of the employes in setting the fire was within the scope of their duties as such employes.[5]

§ 1228. **Extra precautions—Dry seasons—Wind—Exposed property.**—It is a well settled principle of law that care in doing any particular act must be exercised in proportion to the danger attending the act. Where the doing of any particular act is attended with unusual hazards unusual care must be exercised, but where the performance of the act is attended with only ordinary hazards a less degree of care is required.[6] These principles have frequently been applied in railway fire cases for the circumstances under which fires are likely to occur and do occur are so varied that different degrees of care must necessarily be employed. In proportion as the hazards increase there should be a corresponding increase in the care exercised. Thus it has been held that it is the duty of a railway company

[1] Atchison, etc., R. Co. *v.* Dennis, 38 Kan. 424, 32 Am. & Eng. R. Cas. 318.

[2] Atchison, etc., R. Co. *v.* Dennis, 38 Kan. 424, 32 Am. & Eng. R. Cas. 318.

[3] Mattoon *v.* Fremont, etc., R. Co., (S. Dak.) 60 N. W. R. 69.

[4] Chicago, etc., R. Co. *v.* Luddington, 10 Ind. App. 636, 38 N. E. R. 342.

[5] Where the employes built a fire on the right of way for the purpose of warming their dinners and the fire escaped the company was not liable. Morier *v.* St. Paul, etc., R. Co., 31 Minn. 351, s. c. 47 Am. R. 793.

[6] Frankford, etc., R. Co. *v.* Philadelphia, etc., R. Co., 54 Pa. St. 345; Chicago, etc., R. Co. *v.* Quaintance, 58 Ill. 389; Smith *v.* Old Colony, etc., R. Co., 10 R. I. 22; Pierce *v.* Worcester, etc., R. Co., 105 Mass. 199; Salmon *v.* Delaware, etc., R. Co., 38 N. J. Law 5; Jones *v.* Festiniog, etc., R. Co., L. R. 3 Q. B. 733.

in an unusually dry season, where all inflammable material is like tinder and liable to be set on fire from the smallest spark, to exercise greater precaution and care than in wet or damp seasons.[1] So, where the wind is blowing directly from an engine toward wooden buildings or combustible materials greater precautions may be required,[2] and when a train is running through a densely populated country or village where there are a great number of buildings exposed to the hazards of fire greater precaution must generally be exercised than is necessary when running through the country where there are no buildings.[3] Unusual precautions are not required, such as the purchase and use of tarpaulins or other similar means to protect against fires.[4]

§ 1229. **Fires started on right of way.**—A different rule of liability prevails in reference to fires started on the right of way from that which prevails where fires are started off the right of way. Where a fire is started on the right of way, whether negligently or otherwise, no right of action can, ordinarily, accrue to any

[1] Chicago, etc., R. Co. *v.* Smith, 6 Ind. App. 262; Marvin *v.* Chicago, etc., R. Co., 79 Wis. 140, 45 Am. & Eng. R. Cas. 540; Pittsburgh, etc., R. Co. *v.* Noel, 77 Ind. 110, s. c. 7 Am. & Eng. R. Cas. 524. In the last case cited the court said: "If a locomotive were running under a fall of drenching rain, it would hardly be deemed negligent if trackmen were not employed to extinguish emitted sparks or coals, however large and numerous; but if, on the contrary, every thing was dry, and combustible material was accumulated upon or along the track, extra precautions would be required, which it would be negligence to omit; and the fact that the company used machinery properly constructed and kept in repair with a view to prevent the spread of fire, and the engines were operated with care and skill to the same end would not, in the case supposed in the instruction, necessarily constitute the proper precaution and care, unless, indeed, as demonstrated by experience, the machinery was so far perfect as that further safe-guards or watchfulness were unnecessary. * * * Due care is a relative term, to be measured according to the circumstances of each case, and extra dangers call for extra precautions."

[2] Kellogg *v.* Milwaukee, etc., R. Co., 5 Dill. 537, s. c. Fed. Cases, No. 7664, 1 Cent. L. Jr. 278, 94 U. S. 469; Fero *v.* Buffalo, etc., R. Co., 22 N. Y. 209; Johnson *v.* Chicago, etc., R. Co., 31 Minn. 57, 13 Am. & Eng. R. Cas. 460.

[3] Fero *v.* Buffalo, etc., R. Co., 22 N. Y. 209; Kendrick *v.* Towle, 60 Mich. 363, 25 Am. & Eng. R. Cas. 473.

[4] Tribette *v.* Illinois Central R. Co., 71 Miss. 212, 13 So. R. 899.

one so long as that fire does not escape and do damage to the property of others. Since no liability can arise unless the fire escapes from the right of way it necessarily follows that a right of recovery must be founded on the negligence in suffering the fire to escape.[1] And a company may be found negligent in suffering a fire to escape whether it stands by and allows fire to escape without making any effort to check it or whether it negligently allows the conditions to become and remain such as that any fire which may be ignited may readily escape, for, as we have heretofore said, a company may be guilty of negligence in allowing combustibles to accumulate by means of which the spread of fires is easily caused.[2] In cases of fires started on the right of way there is some conflict in the authorities as to whether it is material whether or not the fire was negligently started. Some of the authorities seem to hold that it must be shown that the fire was negligently started, but we do not regard these authorities as stating the correct rule. The correct rule, and that held and declared by the weight of authority, is that if the company negligently suffers the fire to escape it is liable independently of how the fire was started, whether negligently or otherwise. And under this rule it is immaterial what kind of locomotives and appliances were used or the manner in which they were operated.

§ 1230. **Fires started off the right of way.**—Where fires are started off the right of way a recovery is based on some wrong of the company in failing to adopt and use proper machinery

[1] Mattoon *v.* Fremont, etc., R. Co., (S. Dak.) 60 N. W. R. 69; Pittsburgh, etc., R. Co. *v.* Hixon, 110 Ind. 225; Indianapolis, etc., R. Co. *v.* Paramore, 31 Ind. 143; Pittsburgh, etc., R. Co. *v.* Hixon, 79 Ind. 111; Pittsburgh, etc., R. Co. *v.* Jones, 86 Ind. 496; Louisville, etc., R. Co. *v.* Ehlert 87 Ind. 339; Brinkman *v.* Bender, 92 Ind. 234; Indiana, etc., R. Co. *v.* McBroom, 91 Ind. 111; Indiana, etc., R. Co. *v.* Adamson, 90 Ind. 60. Mere proof that the fire started on the right of way is not sufficient to render the company liable. Taylor *v.* Pennsylvania, etc., R. Co., (Pa. St.) 34 Atl. R. 457. "The railroad corporation is bound at all hazards to prevent the fire from spreading, and is liable inevitably unless there is contributory negligence on the part of the landowner." Simmonds *v.* New York, etc., R. Co., 52 Conn. 264, s. c. 23 Am. & Eng. R. Cas. 369.

[2] *Ante*, § 1226.

and appliances or in unskillfully and negligently managing the same. The gist of the action is negligence in some one of the respects which we have just mentioned. In these cases the condition of the right of way is immaterial for it is in no way connected with the fire. It is well to bear in mind the different theories on which a recovery is based dependent upon the point where the fire started, for, as we shall hereafter show, different pleadings are required and different proof must be made.[1]

§ 1231. **Remote fires.**—By remote fires is meant those fires which do not catch directly from sparks from an engine or from a fire spreading from the right of way to the property of an owner, but those fires which are originally set by the company and after spreading to the land of one owner spread from his land to the land of others. It is somewhat difficult to give an accurate definition of a remote fire, but for the purposes of this discussion we shall consider remote fires to be those fires which are communicated to the lands of second and subsequent owners after having passed over the lands of the first owner to whose lands they were directly communicated by the railway company. This is hardly a just distinction, for where a fire starts and continues to burn, it is one fire, no matter how long it burns or how far it extends, and it can only be said to be remote because it extends over the lands of owners remote from the point where the fire started. The material question in the case of remote fires is whether or not the injury was proximately caused by the negligence of the company.[2] If the company was guilty of negligence in the first instance in starting the fire and it burns in one continuous fire without the intervention of any independent agency and destroys the property of a land-owner, no matter how remote or how great a number of various land-owners' lands the fire may have passed over before reaching the particular land-owner's property, the company will be liable for the resulting dam-

[1] *Infra*, §§ 1240, 1241.

[2] Milwaukee, etc., R. Co. *v.* Kellogg, 94 U. S. 469; Clemens *v.* Hannibal, etc., R. Co., 53 Mo. 366, s. c. 14 Am. R. 460.

ages.[1] This doctrine is founded on the theory that he who sets a dangerous agency in motion must be responsible for all the damages which proximately result from his act. It is as old as the famous "squib case," and has been enforced in the courts of this country time and time again.[2] If, however, some independent cause intervenes, so as to break the line of causation between the defendant's original act and the property destroyed, there is no liability.[3] Where a heavy wind arose after the starting of a fire and wafted a brand of fire across an interven-

[1] Louisville, etc., R. Co. *v.* Nitsche, 126 Ind. 229; Milwaukee, etc., R. Co. *v.* Kellogg, 94 U. S. 469; Webb *v.* Rome, etc., R. Co., 49 N. Y. 420; Pollett *v.* Long, 56 N. Y. 200; O'Neill *v.* New York, etc., R. Co., 115 N. Y. 579, 40 Am. & Eng. R. Cas. 240; Burlington, etc., R. Co. *v.* Westover, 4 Neb. 268; Butcher *v.* Vaca, etc., R. Co., 67 Cal. 518, s. c. 23 Am. & Eng. R. Cas. 356; Annapolis, etc., R. Co. *v.* Gantt, 39 Md. 115; Atchison, etc., R. Co. *v.* Stanford, 12 Kan. 354; Poeppers *v.* Missouri, etc., R. Co., 67 Mo. 715; Atchison, etc., R. Co. *v.* Bales, 16 Kan. 252; Toledo, etc., R Co. *v.* Maxfield, 72 Ill. 95 Pennsylvania, etc., R. Co. *v.* Hope, 80 Pa. St. 373; Troxler *v.* Richmond, etc., R. Co., 74 N. Car. 377; Hoyt *v.* Jeffers, 30 Mich. 181; Kuhn *v.* Jewett, 32 N. J. Eq. 647; Baltimore, etc., R. Co. *v.* Shipley, 39 Md. 251; Smith *v.* London, etc., R. Co., L. R. 5 C. P. 98; St. Joseph, etc., R. Co. *v.* Chase, 11 Kan. 47; Doggett *v.* Richmond, etc., R. Co., 78 N. Car. 305; Fent *v.* Toledo, etc., R. Co., 59 Ill. 349; Perley *v.* Eastern, etc., R. Co., 98 Mass. 414; Delaware, etc., R. Co. *v.* Salmon, 39 N. J. L. 299; Hooksett *v.* Concord, etc., R. Co., 38 N. H. 242; Louisville, etc., R. Co. *v.* Krinning, 87 Ind. 351; Chicago, etc., R. Co. *v.* Pennell, 110 Ill. 435; Chicago, etc., R. Co. *v.* McBride, 54 Kan. 172, 37 Pac. R. 978; Yankton Fire Ins. Co. *v.* Freemont, etc., R. Co., (S. Dak.) 64 N. W. R. 514. In the case of Kellogg *v.* Chicago, etc., R. Co., 26 Wis. 223, the court said: "It would be strange, indeed, if the liability of a party for the negligent destruction of property by fire were to depend upon the fact whether he set fire at once to the property or whether he set fire to some other combustible material at some distance from it, but communicating with it and which it was apparent at the time would inevitably lead to its destruction."

[2] Louisville, etc., R. Co., *v.* Nitsche, 126 Ind. 229; Billman *v.* Indianapolis, etc., R. Co., 76 Ind. 166; Lake Shore, etc., R. Co. *v.* Rosenzweig, 113 Pa. St. 519; Terre Haute, etc., R. Co. *v.* Buck, 96 Ind. 346, s. c. 49 Am. R. 168; Denver, etc., R. Co. *v.* Harris, 122 U. S. 597; Louisville, etc., R. Co. *v.* Falvey, 104 Ind. 409; Louisville, etc , R. Co. *v.* Snyder, 117 Ind. 435; Ohio, etc., R. Co. *v.* Hecht, 115 Ind. 443.

[3] Doggett *v.* Richmond, etc., R. Co., 78 N. Car. 305. Where fire was communicated to the property of A and from that of A to that of B, it was held that the negligence of A in leaving combustible material on his premises which caused the spread of the fire was not an independent cause. Johnson *v.* Chicago, etc., R. Co., 31 Minn. 57, 13 Am. & Eng. R. Cas. 460.

ing ridge of land and set fire to and destroyed the plaintiff's property, it was held that such wind was an independent intervening cause and there could be no recovery.[1] But, ordinarily, the wind can not be regarded as an independent intervening cause, for it is a natural cause reasonably to be expected, and a defendant who wrongfully sets out a fire should be charged with knowledge that such a natural cause is likely to intervene and be held responsible for damages done thereby.[2] It matters not how far a fire may spread, for, if the line of causation remains unbroken the defendant will be liable.[3] The time intervening between the starting of the fire and the destruction of the property sued for is immaterial so long as the line of causation is unbroken.[4] Whether a fire, however remote, occurs as a proximate result of the defendant's original wrong is usually a question to be determined by the jury.[5] And where there was an agreement between a land-

[1] Marvin *v.* Chicago, etc., R. Co., 79 Wis. 140, 47 N. W. R. 1123, 45 Am. & Eng. R. Cas. 540. See, also, Toledo, etc., R. Co. *v.* Muthersbaugh, 71 Ill. 572; Pennsylvania R. Co. *v.* Whitlock, 99 Ind. 16. (See Louisville, etc., R. Co. *v.* Nitsche, 126 Ind. 229, where this case is limited).

[2] Tyler *v.* Ricamore, 87 Va. 466, 12 S. E. R. 799; Poeppers *v.* Missouri, etc., R. Co., 67 Mo. 715; Safford *v.* Boston, etc., R. Co., 103 Mass. 583; Kenney *v.* Hannibal, etc., R. Co., 70 Mo. 252; Hightower *v.* Missouri, etc., R. Co., 67 Mo. 726; Northern Pacific R. Co. *v.* Lewis, 51 Fed. R. 658.

[3] Poeppers *v.* Missouri, etc., R. Co., 67 Mo. 715, (a fire spreading eight miles); Smith *v.* London, etc., R. Co., L. R. 5 C. P. 98, (200 yards); Perley *v.* Eastern, etc., R. Co., 98 Mass. 414; Safford *v.* Boston, etc., R Co., 103 Mass. 583; Burlington, etc., R. Co. *v.* Westover, 4 Neb. 268, (one-half mile); Atchison, etc., R. Co. *v.* Stanford, 12 Kan. 354; Atchison, etc., R. Co. *v.* Bales, 16 Kan. 252, (three or four miles); Hightower *v.* Missouri, etc., R. Co., 67 Mo. 726; Chicago, etc., R. Co. *v.* McBride, 54 Kan. 172, 37 Pac. R. 978, (ten miles.)

[4] Louisville, etc., R. Co. *v.* Nitsche, 126 Ind. 229; Missouri, etc., R. Co. *v.* Cullers, 81 Tex. 382, s. c. 13 L. R. A. 542.

[5] Henry *v.* Southern Pacific R. Co., 50 Cal. 176; Clemens *v.* Hannibal, etc., R. Co., 53 Mo. 366; Louisville, etc., R. Co. *v.* Krinning, 87 Ind. 351; Pennsylvania, etc., R. Co. *v.* Hope, 80 Pa. St. 373; Lehigh, etc., R. Co. *v.* McKeen, 90 Pa. St. 122; Perry *v.* Southern Pacific R. Co., 50 Cal. 578; Atchison, etc., R. Co. *v.* Bales, 16 Kan. 252; Gram *v.* Northern, etc., R. Co., 1 N. Dak. 252, s. c. 46 N. W. R. 972; Kellogg *v.* Milwaukee, etc., R. Co., 5 Dill. (U. S. C. C.) 537; Perry *v.* Southern Pacific R. Co., 50 Cal. 578; Frace *v.* New York, etc., R. Co., 143 N. Y. 182, 38 N. E. R. 102. And where a fire was supposed to be extinguished but afterward broke out and destroyed property it was held to be a question for

owner to whose lands fire had been communicated and the railway company setting out the fire to let the fire burn and consume rubbish on the land-owner's property and the fire was afterwards communicated to a bed of peat under a third owner's land and damage was done, it was held that the company was liable to such third owner and that it was proper for the jury to determine whether or not the original fire was the proximate cause of the injury.[1]

§ 1232. **Duty to extinguish fires.**—Where it is possible for a company to easily extinguish a fire negligently started it would be to the best interests of the company to do so, for it could thus lessen the amount of damages for which it would be liable. Most of the authorities, however, in defining the duty of a company to extinguish a fire do not make any distinction between fires negligently started and those not negligently started. Some of the authorities hold that where there was no negligence in starting a fire no duty rests upon the employes of the company as servants of the company to extinguish the fire, and that the company is not liable for a failure to extinguish such a fire.[2] But the weight of authority seems

the jury as to whether the original fire was the proximate cause of the second fire. Green Ridge, etc., R. Co. *v.* Brinkman, 64 Md. 52, s. c. 20 Atl. R. 1024.

[1] Simmonds *v.* New York, etc., R. Co., 52 Conn. 264, 23 Am. & Eng. R. Cas. 369.

[2] Kenney *v.* Hannibal, etc., R. Co., 70 Mo. 252. The court in this case held that the only duty resting on the servants of the company was the mere social duty one citizen owes to another to prevent the destruction of his property if reasonably within his power. The court, in the course of its opinion, said: "We hold that the company is not liable because its servants neglected to extinguish the fire when they discovered it on the track. It was their duty, as citizens, to prevent the spread of the fire, and by their conduct on the occasion, as testified to by one of their number, they manifested a cruel and brutal indisposition to the destruction of a neighbor's property, but it was not in the line of their employment, and was no more their duty to extinguish the fire than that of any other person who saw it. If not liable for the origin of the fire, he, (the master), can not be held so on account of the neglect of the social duty by persons in his employment, in a business not connected with the origin of the fire, or imposing any duty to extinguish it in addition to that which every citizen owes to society." See, also, Baltimore, etc., R. Co. *v.* Shipley, 39 Md. 251.

rather opposed to the doctrine just stated and it is held that where a fire has been set by sparks from locomotives of the company and the company's servants discover the fire in time to extinguish it and to prevent it from doing damages to others and negligently fail to do so, the company will be liable.[1] Where a fire is discovered by the employes operating a train the duty of such employes to the passengers would seem to be superior to their duty to stop and extinguish the fire and thus delay the train, but where a fire is discovered by trackmen walking or traveling along the track they should use care to extinguish it. There is no obligation resting upon a company to employ men to patrol its track to extinguish fires which may be started by passing trains.[2]

§ 1233. **Ownership of property burned.**—The question of the ownership of property destroyed by a railway fire is very material in an action brought to recover its value. The general rule is that a plaintiff must show a general or special property right in himself or there can be no recovery.[3] Where a plaintiff is the absolute owner of the property there can ordinarily be no question as to his right to maintain the action, and where his right to the property is of a special or qualified nature, proof of that right is generally sufficient to entitle him to recover, at least to the extent of his interest in the property.[4]

[1] Missouri, etc., R. Co. *v.* Platzer, 73 Tex. 117, 38 Am. & Eng. R. Cas. 366; Erd *v.* Chicago, etc., R. Co., 41 Wis. 65; Rolke *v.* Chicago, etc., R. Co., 26 Wis. 537; Bass *v.* Chicago, etc., R. Co., 28 Ill. 1; Eighme *v.* Rome, etc., R. Co., 10 N. Y. Supp. 600; Kenney *v.* Hannibal, etc., R. Co., 63 Mo. 99; Moore *v.* Chicago, etc., R. Co., 78 Wis. 120, 47 N. W. R. 273. "Without entering into any discussion as to the degree of care a railway company should use to extinguish a fire caused by the escape of fire from its engine, we feel constrained to hold that the duty does exist, however careful such companies may be to prevent the escape of fire from their engines, and that the failure to exercise such care as the circumstances of a given case would indicate to a prudent man was proper will give a cause of action for an injury resulting." Missouri, etc., R. Co. *v.* Platzer, 73 Tex. 117.

[2] Baltimore, etc., R. Co. *v.* Shipley, 38 Md. 251; Indianapolis, etc., R. Co. *v.* Paramore, 31 Ind. 143.

[3] St. Louis, etc., R. Co. *v.* Hecht, 38 Ark. 357, s. c. 9 Am. & Eng. R. Cas. 222; Reed *v.* Chicago, etc., R. Co., 71 Wis. 399, 32 Am. & Eng. R. Cas. 320; McNarra *v.* Chicago, etc., Railway Co., 41 Wis. 69.

[4] Possession has been held to be

Where a person entered upon lands of a third person under a parol license from one who claimed to be the agent of the owner, and cut and put up hay which was afterward destroyed by a railway company, it was held that such person had a right of action against the company where there was evidence tending to show that the owner ratified the act of his alleged agent, although there was no proof that such agent had authority to act for the land-owner.[1] And where buildings are erected on the land of another with a right of removal such buildings are personal property and the owner may maintain an action for their destruction by fire.[2] A lessee is entitled to recover for buildings burned, where, by the terms of his lease, he is bound to replace the buildings if they are destroyed,[3] and the railway company can not question the lessee's title merely because he failed to have his lease recorded as required by statute.[4] Where it was shown that a widow had resided for eighteen years with her husband and for four years after his death on the land where the property was destroyed, and that the possession had been undisturbed during all of that time and that she claimed the property as a homestead, it was held that she was entitled to maintain an action for her benefit for the destruction by a railway fire of grass, rails and logs on the land.[5] It has also been held that where a plaintiff is in possession of lands under claim of title, he can recover for hay destroyed without proving title to the land.[6] If the property

prima facie proof of title. Spurlock *v.* Port Townsend, etc., R. Co., 13 Wash. 29, 42 Pa. R. 520.

[1] Bulliss *v.* Chicago, etc., R. Co., 76 Iowa 680, 39 N. W. R. 245. See Northern, etc, R. Co. *v.* Lewis, 51 Fed. R. 658. Where a plaintiff owned grass which was burned, under a verbal lease from the owner of the land, the defendant can not set up the invalidity of such lease. International, etc., R. Co. *v.* Searight, (Tex. C. App.) 28 S. W. R. 39.

[2] Laird *v.* Connecticut, etc., R. Co., 62 N. H. 254, s. c. 43 Am. & Eng. R. Cas. 63.

[3] Anthony *v.* New York, etc., R. Co., 162 Mass. 60, 37 N. E. R. 780. And for nursery stock planted with an understanding that it may be removed. Adams *v.* St. Louis, etc., R. Co., (Mo.) 28 S. W. R. 496, 29 S. W. R. 836.

[4] Anthony *v.* New York, etc., R. Co., 160 Mass. 60.

[5] International, etc., R. Co. *v.* Timmermann, 61 Tex. 660.

[6] McClellan *v.* St. Paul, etc., R. Co., 58 Minn. 104, 59 N. W. R. 978. Adverse possession of real estate for the statutory period is sufficient title to enable a holder to maintain an action

destroyed is covered by an insurance policy, with a right of subrogation to the rights of the insured against a wrong doer in favor of the insurance company on payment of the policy, it is held that the owner may bring an action for his benefit and that of the insurance company,[1] or that the insurance company may maintain an action itself on being subrogated,[2] or that both may maintain a joint action.[3]

§ 1234. **Effect of insurance on property burned.**—In a great many cases where property is destroyed by fires set out by railway companies the owner carries insurance policies and is thus enabled to collect the amount of his damage from the insurance company independent of any right of action or recovery against the railway company. In cases of this kind, where the owner has received the amount of his loss from the insurance company, it would seem at first blush that he ought not to be allowed to recover again for the same loss from the railway company, and railway companies in a number of cases have set up this defense. But as the right of action against the railway is based on a wrong done by the company, it is held that it is liable for that wrong, and the mere fact that the owner has collected insurance money from an insurance company will not excuse the railway company, and is a matter in which it has no concern.[4] And the railway company is not entitled

for injury thereto by a railway fire. Busby *v.* Florida, etc., R. Co., (S. Car.) 23 S. E. R. 50.

[1] Regan *v.* New York, etc., R. Co., 60 Conn. 124, s. c. 25 Am. St. R. 306; Hart *v.* Western, etc., R. Co., 13 Met. 99, s. c. 46 Am. Dec. 719; Swarthout *v.* Chicago, etc., R. Co., 49 Wis. 625.

[2] Phenix Ins. Co. *v.* Pennsylvania R. Co., 134 Ind. 215, 20 L. R. A. 405; Connecticut, etc., R. Co. *v.* Erie, etc.,Co., 73 N. Y. 399; Hart *v.* Western, etc., R. Co., 13 Met. 99; Peoria Ins. Co. *v.* Frost, 37 Ill. 333; Connecticut, etc., R. Co. *v.* New York, etc., R. Co., 25 Conn. 265; Rockingham, etc., Co. *v.* Bosher, 39 Me. 253.

[3] Home, etc., Co. *v.* Oregon, etc., R. Co., 20 Ore. 569, s. c. 23 Am. St. R. 151; Swarthout *v.* Chicago, etc., R. Co., 49 Wis. 625.

[4] Hagen *v.* Chicago, etc., R. Co., 86 Mich. 615, s. c. 49 Am. & Eng. R. Cas. 670; Cunningham *v.* Evansville, etc., R. Co., 102 Ind. 478, s. c. 23 Am. & Eng. R. Cas. 347; Carpenter *v.* Eastern, etc., R. Co., 71 N. Y. 574; Weber *v.* Morris, etc., R. Co., 35 N. J. L. 409, s. c. 10 Am. R. 253; Rockingham, etc., Co. *v.* Bosher, 39 Me. 253; Connecticut, etc., R. Co. *v.* New York, etc., R. Co., 25 Conn. 265; Ohio, etc., R. Co. *v.* Dickerson, 59 Ind. 317.

to a reduction of damages against it to an amount equal to the amount which the plaintiff has recovered from an insurance company.[1] Where an insurance company has been compelled to pay for property which has been tortiously destroyed by a railroad company, it is usually subrogated to the rights which the owner has against such wrong doer, and may thus make good its loss.[2] In this way the owner is prevented from securing to himself a double recovery, the insurance company may recover money which it was compelled to pay through the wrong of the railway company, and the railway company is made to answer for the consequences of its negligence. Where there has been a subrogation the suit may be brought by the owner for himself and as trustee for the insurance company, by the insurance company, or by both.[3] Under a code which provides that a suit shall be brought by "the real party in interest," it has been held that an insurance company which has

[1] Regan *v.* New York, etc., R. Co., 60 Conn. 124, s. c. 25 Am. St. R. 306.

[2] Rockingham, etc., Co. *v.* Bosher, 39 Me. 253; First, etc., Society *v.* Goodrich Transportation Co., 7 Fed. R. 257; Ætna, etc., Co. *v.* Hannibal, etc., R. Co., 3 Dill. 1; Railway Co. *v.* Fire Association, 55 Ark. 163, 18 S. W. R. 43. Where there is a subrogation, however, the insurance company can take no greater rights against the wrong doer than were possessed by the party to whose rights it is subrogated. Thus, where the insured erected property on a railway company's ground and executed a contract that the railway company should not be liable for fires unless negligently set, although there was a statute in force in the state where the property was situated and where the contract was made, imposing absolute liability for fires independent of negligence, and the property was afterward burned and an insurance company paid the loss, taking a subrogation to the rights of the insured against the wrong doer, it was held that the insurance company was bound by the stipulation of the insured that the company should be liable only in case of negligence. Savannah, etc., R. Co. *v.* Pelzer, etc., Co., 60 Fed. R. 39. The doctrine is thus stated in the case of Phœnix Ins. Co. *v.* Penn. R. Co., 134 Ind. 215, 20 L. R. A. 405: "Where property is injured or destroyed by the negligent act or omission of one, under such circumstances as that the owner of the property may maintain an action for such injury or destruction, it seems to be well settled, both upon principle and authority, that if such property is insured, such insurer, if compelled by reason of the policy to make good the loss to the owner, may be subrogated to the rights of the owner, and recover from the wrong doer a sufficient sum to reimburse him for such outlay, provided the damages are sufficient to equal the sum paid."

[3] *Ante*, § 1233.

paid a loss and been subrogated to the rights of the insured against a wrong doer causing the loss, may maintain suit in its own name.[1] And it seems that where an insurance company has paid the insured the amount of the policy and the insured brings a suit against the railway company and recovers, the amount of the recovery will be held in trust for the benefit of the insurance company to the extent of the amount it paid the insured.[2] If a railroad company, with knowledge that an insurance company has paid the owner of property destroyed the amount of his loss, settles with such owner and takes a release in full from him, it has been held that the insurance company may nevertheless maintain an action against it in the name of the insured, without his consent, to compel it to repay the amount paid under the policy, and the release of the insured to the railway company is no defense to such an action.[3] The insurance company, on account of its contract, being compelled to pay the money because the property was destroyed by the act of a wrong doer, can not, it is held, by any act of the insured be deprived of its right to a reimbursement. As we have heretofore said, in those states where statutes are in force imposing an absolute liability upon railway companies for fires set out by them, provision is usually made by which a railway company has an insurable interest in property along its line and may thus protect itself by securing policies on property which is exposed to hazards and likely to be destroyed.[4]

§ 1235. **Property on right of way.**—It frequently happens that property of third persons located on the railway right of

[1] Connecticut, etc., Ins. Co. *v.* Erie, etc., R. Co., 73 N. Y. 399, s. c. 29 Am. R. 171. See Phœnix Ins. Co. *v.* Penn. R. Co., 134 Ind. 215, 20 L. R. A. 405; Home, etc., Co. *v.* Oregon, etc., R. Co., 20 Ore. 569, s. c. 23 Am. St. R. 151. Even where the objection might be made that there is a defect of parties plaintiff because the insured was not joined the objection will be waived after the insurance company has denied that plaintiff has any claim against it. Chicago, etc., R. Co. *v.* German Ins. Co., (Kan.) 42 Pac. R. 594.

[2] Home, etc., Co. *v.* Oregon, etc., R. Co., 20 Ore. 569, s. c. 23 Am. St. R. 151.

[3] Monmouth, etc., Ins. Co. *v.* Hutchinson, etc., R. Co., 21 N. J. Eq. 108.

[4] *Ante*, § 1223.

way is destroyed by fire communicated by locomotives of the company using the right of way. In cases of this kind the railway company is sometimes liable and sometimes not. The test of liability is generally whether or not the property situated on the right of way was rightfully there. If the owner of the property is a mere trespasser and placed his property upon the right of way without the consent of the railway company he can not recover for its negligent destruction by fire. Thus, where a person intruded upon the right of way of a railway company and without the consent of the company erected a building which was afterwards destroyed by fire it was held that there could be no recovery.[1] But where a company expressly licenses third persons to erect buildings within the limits of its right of way it will be liable if it negligently destroys such buildings by fire,[2] unless it has contracted with the person erecting such buildings that it shall not be liable if the buildings are destroyed by fire.[3] And where property is placed on the right of way of a railway company by agreement, either express or implied, and such property is negligently destroyed by fire, the company will be liable.[4] The complaint in an ac-

[1] Philadelphia, etc., R. Co. *v.* Yeiser, 8 Pa. St. 366.

[2] Ingersoll *v.* Stockbridge, etc., R. Co., 8 Allen 438; Grand Trunk, etc., Co. *v.* Richardson, 91 U. S. 454; Sherman *v.* Maine Central, etc., R. Co., 86 Me. 422, s. c. 30 Atl. R. 69.

[3] Griswold *v.* Illinois Central R. Co., 90 Iowa 265, 9 Am. R. & Corp. R. (Lewis) 697. Where there is a statute in force making a company liable for fires set by its engines independent of negligence, the company may contract with a party who places buildings on its land that it shall be liable only for fires negligently set, and such contract will be upheld notwithstanding the statute. Savannah, etc., R. Co. *v.* Pelzer, etc., Co., 60 Fed. R. 39. Where a railway company by contract permits buildings to be erected upon its right of way it is not against public policy to provide in such contract that the company shall not be liable if the property on its right of way is destroyed by fire. Such a contract does not relieve the company of liability for failure to perform any duty resting upon it, for no duty rests upon a company to allow buildings to be erected upon its right of way unless that duty be imposed by contract. Hartford Fire Ins. Co. *v.* Chicago, etc., R. Co., 70 Fed. Rep. 201, 30 L. R. A. 193.

[4] Pittsburgh, etc., R. Co. *v.* Nelson, 51 Ind. 150; Indianapolis, etc., R. Co. *v.* Paramore, 31 Ind. 143; Pennsylvania, etc., R. Co. *v.* Gallentine, 77 Ind. 322, s. c. 7 Am. & Eng. R. Cas. 517; Pittsburgh, etc., R. Co. *v.* Noel, 77 Ind. 110; Texas, etc., R. Co. *v.*

tion to recover damages for property burned on the right of way, must show that the property was rightfully there.[1]

§ 1236. **Contracts limiting liability.**—As a general rule contracts which seek to confer upon a person immunity from the consequences of his negligent acts to be performed in the future are held void as being contrary to public policy. But there is some conflict among the authorities and decisions may be found which support a contrary doctrine. Contracts by which railway companies attempt to excuse themselves from liability on account of negligence in the carriage of freight are almost, if not quite universally held void. And in the case of the carriage of gratuitous passengers a provision in the pass on which the person rides that there shall be no liability on account of negligence of the company is generally held void although there are cases maintaining a different rule. So far as we have been able to discover there are few cases in the books involving the validity of a contract exempting a railway from liability for negligently firing and burning property. We think that, ordinarily, a contract exempting the company from liability for negligently burning property not on the right of way or premises of the company would be held void.[2] But where property is placed on a railway right of

Ross, (Tex. C. App.) 27 S.W. R. 728. A case in Pennsylvania seems to declare a contrary doctrine. In that case, Post *v.* Buffalo, etc., R. Co., 108 Pa. St. 585, a railway company built a side track near one of its stations to facilitate the shipment of freight. A lumberman who was in the habit of using this side track placed a large quantity of lumber near it, partly on the right of way and partly on ground hired for the purpose, in order that the lumber would be ready for shipment as required and as cars were furnished by the railway company, and also for storing and seasoning the lumber. The lumber caught fire in an extremely dry season from sparks from a locomotive running on the road and was destroyed. In a suit by the owner against the company for damages, a non-suit was entered in the court below, and on appeal it was held that, conceding the loss to have been caused by the negligence of the railway company, the plaintiff having placed his lumber in a dangerous place with full knowledge of the danger, was guilty of contributory negligence, and the non-suit was properly entered.

[1] Pennsylvania R. Co. *v.* Gallentine, 77 Ind. 322, s. c. 7 Am. & Eng. R. Cas. 517.

[2] Griswold *v.* Illinois Cent. R. Co., 90 Iowa 265, 9 Am. R. & Corp. R. (Lewis) 697.

way by virtue of a contract in which the owner releases the railroad company from any and all liability on account of fire, and the property is afterwards destroyed by fire negligently set by the railway company the contract is not void and the company can not be held liable.[1] Where, however, a railway

[1] Griswold *v.* Illinois Cent. R. Co., 90 Iowa 265, 9 Am. R. & Corp. R. (Lewis) 697. In this case the plaintiff by contract erected on the railway company's right of way the buildings which were destroyed by fire. In the contract was a clause in which the plaintiff as lessee agreed "to protect and save harmless said lessor from all liability for damage by fire, which in the operation of the lessor's railroad, or from cars or engines lawfully on its tracks, may accidentally or negligently be communicated to any property or structure on said described premises." The property having been burned by the negligence of the railway company suit was brought to recover its value. The court in disposing of the objection that the contract was against public policy and in upholding its validity said: "The defendant owed no duty to the public to exercise care with respect to its own buildings situate on its right of way, and incurred no liability for their negligent burning, unless the fire spread beyond its own premises. The operation of a railway increases the danger from fire to the property of the people situated on their own premises, where they have the right to have it, and hence, the provision of section 1289, making the corporation operating the railway absolutely liable for all damages by fire that is negligently set out or caused by the operation of the railway. As to such property the railway company owes to the public the duty of care, and the public has an interest in the performance of that duty. Therefore, a contract that exempts from that duty to the public would be injurious to the public interests, and against public policy. The plaintiff Griswold's buildings were not on his own premises, nor where he had a right to have them, independent of the defendant; they were upon the right of way, where they could only be by its permission. In granting the permission, and in placing the buildings there both parties knew of the increased hazard of the location from fire communicated either through accident or negligence in the operation of the road. * * * The plaintiff had an insurable interest, and could, as he did, protect himself, in part, at least, against loss by either accident or negligence. The defendant had no insurable interest, and could only protect itself from the hazard by refusing consent, or by contracting for indemnity, as it did. * * * It seems to us now quite clear that as these buildings could only be placed upon the defendant's right of way by its consent, and were so placed upon the premises, and on the conditions expressed in the lease, the public had no interest therein, under said section 1289, or otherwise, that would be injured by giving effect to the agreement in question. Much as the public may have been interested in the convenience of such a place of business, it had no interest as to who should carry the hazard incident to that property being located as it was. The fact

company leased its property and there was a provision in the lease that the company would not be liable to the lessee for property of his destroyed by fire, it was held that the company was liable to an employe of the lessee who had property which was stored on the leased premises destroyed by fire through the negligence of the railway company.[1]

§ 1237. **Liability where road is operated under lease.**—Some of the cases hold that where a railway company leases its line and the same is operated by a lessee the lessor is liable for all the torts of the lessee unless there be a special statutory enactment making the lessee liable and exempting the lessor from liability.[2] But, in most of such cases, the lessee may also be held responsible for any injuries caused by its wrong.[3] Where fires are set by a railway company operating a line of railway under a lease from the company owning the line the lessee is liable for such loss and it can not set up as a defense that the road is owned by its lessor,[4] or that the lease is invalid. And,

that the defendant acquired this right of way, in the exercise of the right of eminent domain, did not preclude it from granting or withholding permission to the plaintiff to build thereon, nor the parties from contracting as to which should bear the hazard incident to the location." See, also, Savannah, etc., Co. *v.* Pelzer, etc., Co., 60 Fed. 39. To the same effect are, Hartford Fire Ins. Co. *v.* Chicago, etc., R. Co., 70 Fed. R. 201, s. c. 30 L. R. A. 193, and Stephens *v.* Southern Pac. Co. (Cal.) 41 Pac. R. 783.

[1] King *v.* Southern Pac. R. Co., 109 Cal. 96, 41 Pac. R. 786.

[2] Thomas *v.* Railroad Co., 101 U. S. 71; Railroad Co. *v.* Brown, 17 Wall. 445; New York, etc., R. Co. *v.* Winans, 17 How. 30; Ohio, etc., R. Co. *v.* Dunbar, 20 Ill. 623; Clary *v.* Iowa, etc., R. Co., 37 Iowa 344; McCluer *v.* Manchester, etc., R. Co., 13 Gray 124; Pittsburgh, etc., R. Co. *v.* Campbell, 86 Ill. 443; Wasmer *v.* Delaware, etc., R. Co., 80 N. Y. 212. But see *ante*, §§ 467, 471.

[3] Jacksonville, etc., R. Co. *v.* Peninsular, etc., Co., 27 Fla. 1, s. c. 17 L. R. A. 33; Pierce on Railroads, 224; Texas, etc., R. Co. *v.* Ross, (Tex.) 27 S. W. R. 728.

[4] Cantlon *v.* Eastern, etc., R. Co., 45 Minn. 481, 48 N. W. R. 22; Slossen *v.* Burlington, etc., R. Co., 60 Iowa 215, 7 Am. & Eng. R. Cas. 509, s. c. 11 Am. & Eng. R. Cas. 67; Jacksonville, etc., R. Co. *v.* Peninsular, etc., Co., 27 Fla. 1, s. c. 17 L. R. A. 33. In the last case cited the court said: "If one railroad company operates a railroad under a lease from another, it is responsible for its negligence to persons injured thereby; and the invalidity in law of the lease is no defense to the lessee company against liability to persons suffering by its negligence. If its possession or operation of the road is, in law, unauthorized, it is no less the author of the injuries its want

according to some of the authorities, unless there be special statutory enactments exempting the lessor from liability and placing it upon the lessee alone, it seems that the lessor is also liable.[1] So, where a company permits another company to run trains over its tracks, knowing that such company's engines are equipped with defective spark arresters, it has been held that it will be liable for fires set by the engines of that company.[2] Where a railway company does not own the ground, but has a mere license to maintain its track over certain premises, it is its duty to keep such track free from combustible material, and if it negligently fails to do so and the property of third persons is destroyed because of its negligence, it will be liable.[3]

of care may proximately inflict upon them; and it can not use one wrong as an excuse for or bar to liability for another which it could not have inflicted but for the first."

[1] Balsley *v.* St. Louis, etc., R. Co., 119 Ill. 68, 25 Am. & Eng. R. Cas. 497; Bean *v.* Atlantic, etc., R. Co., 63 Me. 293; Stearns *v.* Atlantic, etc., R. Co., 46 Me. 95. But it seems to us that where, as is generally true in such cases, the injury is caused in the operation of the road, over which the lessor has no control, the lessee alone should be held liable. Where a statute was in force making a railway company liable for fires communicated by "its locomotive engines" it can not be held liable where the fires were communicated by the engines of its lessee. Lipfeld *v.* Charlotte, etc., R. Co., 41 S. Car. 285, 19 S. E. R. 497; Hunter *v.* Columbia, etc., R. Co., 41 S. Car. 86, 19 S. E. R. 197.

[2] Delaware, etc., R. Co. *v.* Salmon, 39 N. J. L. 299; Pierce *v.* Concord, etc., R. Co., 51 N. H. 590.

[3] Kurz, etc., Co. *v.* Milwaukee, etc., R. Co., 84 Wis. 171, s. c. 56 Am. & Eng. R. Cas. 94. In the course of the opinion the court said: "In this case, however, it is insisted that because the railway company had only a naked license to lay its track, and had no interest in the land, it had no control over the premises covered by its rails and ties, and owed no duty to any one to remove combustible material. We have been referred to no case which lays down this principle, and, if there be any, we shall decline to follow it. In our opinion, the duty of the defendant company to take reasonable care of the track to prevent the starting of fires is not lifted from its shoulders by the fact that it did not own the right of way, but was simply a licensee. It built this track, and was using it for its own gain in the freights and tolls which it expected and was entitled to charge the ice companies. The track was rightfully laid. The company had a right to operate it and collect freights so long, at least, as its license was unrevoked. It would be strange to hold that the railroad company possessed all the substantial rights in the way of using the track and collecting its freights, which it would have if it owned the right of way, with none of the duties or liabilities which

§ 1238. **Contributory negligence of owner.**—The decisions as to the effect of the contributory negligence of a property-owner whose property is destroyed by fire negligently set by a railway company on his right to recover are not altogether harmonious. While this lack of harmony is due, in a great measure, to statutory enactments, still, different rules are laid down and enforced independent of any statutes whatever. Where there are statutes in force imposing an absolute liability upon a railway company for fires set by its locomotives, the question of the owner's contributory negligence is immaterial and has no effect on his right to recover.[1] We do not believe, however, that such a strict rule, even where there is an absolute statutory liability, is entirely just. There may be cases, where, after the property is set on fire by a railway company the owner could by slight effort save that property from destruction, and in such cases, it seems to us that it would be unjust to compel a railway company to pay an owner damages notwithstanding an absolute statutory liability.[2] Where there is a statute changing the burden of proof the defense of contributory negligence on the part of the

ordinarily result from such use. * * * With the right which it enjoyed and was exercising for its own gain and profit goes hand in hand a correlative duty to use reasonable care to keep its tracks clear from inflammable material."

[1] Laird *v.* Connecticut, etc., R. Co., 62 N. H. 254, s. c. 43 Am. & Eng. R. Cas. 63; West *v.* Chicago, etc., R. Co., 77 Iowa 654, 38 Am. & Eng. R. Cas. 340.

[2] In the case of Union, etc., R. Co. *v.* Williams, 3 Colo. App. 526, s. c. 34 Pac. R. 731, it was said: "Of course, if a party should knowingly or purposely place his property in a situation where sparks from a passing engine would be likely to ignite and burn it, he could not recover in case of its destruction; but such an act would scarcely come within the definition of contributory negligence. It would be a fraud from which its author would not be permitted to derive an advantage. Nothing of this kind is, however, claimed here. The appellant introduced no evidence. The testimony for appellee discloses no negligence on his part, and as the liability of the appellant is fixed by the statute, irrespective of any negligence of its own, and as any negligence of the owner of the property is not to be considered, unless it comes within the doctrine announced in Denver, etc., Railroad Co. *v.* Morton, 3 Colo. App. 155, 32 Pac. R. 345, where it was shown that the owner, being present, suffered his property to remain in dangerous proximity to a fire in actual progress, without any effort to remove or protect it."

owner is not defeated.[1] The acts on the part of the property-owner which determine whether or not he is guilty of contributory negligence naturally divide themselves into two classes; first, those things which he does or omits to do antecedent to the setting of the fire, and, second, those things which he does or omits to do after the setting of the fire. In reference to the first class the measure of duty resting upon the property owner is very slight. Where a person owns lands adjoining the right of way of a railway company, he has a right to presume that the railway company will not be guilty of negligence and he is not bound to remove dry and combustible material from his land in anticipation of probable negligence on the part of the company.[2] He has a right to use his property in the ordinary and usual way, and so long as he does so he will not be deemed guilty of contributory negligence.[3] And a property-owner is

[1] Ford *v.* Chicago, etc., R. Co., 91 Iowa 179, 24 L. R. A. 657, s. c. 59 N. W. R. 5.

[2] St. Louis, etc., R. Co. *v.* Stevens, (Kan. App.) 43 Pac. R. 434; Lindsay *v.* Winona, etc., R. Co., 29 Minn. 411, 7 Am. & Eng. R. Cas. 488; Fitch *v.* Pacific R. Co., 45 Mo. 322; Fort Scott, etc., R. Co. *v.* Tubbs, 47 Kan. 630, 49 Am. & Eng. R. Cas. 685; Chicago, etc., R. Co. *v.* Kern, 9 Ind. App. 505, 36 N. E. R. 381; Pittsburgh, etc., Railroad Co. *v.* Jones, 86 Ind. 496; Delaware, etc., R. Co. *v.* Salmon, 39 N. J. L. 299; Union Pacific R. Co. *v.* Arthur, 2 Colo. App. 159, 29 Pac. R. 1031; Mississippi, etc., R. Co. *v.* Louisville, etc., R. Co., 70 Miss. 119, 54 Am. & Eng. R. Cas. 512; Richmond, etc., Railroad Co. *v.* Medley, 75 Va. 499; Vaughan *v.* Taff Vale Railroad Co., 3 H. & N. 747; Kellogg *v.* Chicago, etc., R. Co., 26 Wis. 223; Flynn *v.* San Francisco, etc., R. Co., 40 Cal. 14; Erd *v.* Chicago, etc., R. Co., 41 Wis. 65; Snyder *v.* Pittsburgh, etc., R. Co., 11 W. Va. 14. In Philadelphia, etc., R. Co. *v.* Hendrickson, 80 Pa. St. 182, it was said: "The conclusion from the case is very clear that a plaintiff is not responsible for the mere condition of his premises lying along a railroad, but in order to be held for contributory negligence, must have done some act or omitted some duty which is the proximate cause of his injury, concurring with the negligence of the company. Farmers may cultivate, use, and possess their farms and improvements in the manner customary among farmers, and are not bound to use unusual means to guard against the negligence of the railroad company, indeed are not bound to expect that the company will be guilty of negligence." An adjoining property-owner is under no obligation to provide himself with apparatus to extinguish such fires as may be set by the negligence of a railway company. McLaren *v.* Canada, etc., R. Co., 32 U. C. C. P. 324.

[3] Philadelphia, etc., R. Co. *v.* Schultz, 93 Pa. St. 341, 2 Am. & Eng. R. Cas. 271; Kalbfleisch *v.* Long Island, etc., R. Co., 102 N. Y. 520,

under no obligation to keep guard over his property or to watch for fires which may be set out by a railway company.[1] As a property-owner has the right to use his property in the ordinary and usual way, he is not guilty of negligence in erecting buildings on his own land near a railway right of way,[2] nor, ordinarily, in stacking his grain or hay near the right of way of a railroad company.[3] So, where buildings are erected near the right of way the owner is not necessarily guilty of contributory negligence in permitting such buildings to remain in the condition caused by the natural deterioration and the usual effect of the elements on them, such as allowing a roof to become old

29 Am. & Eng. R. Cas. 179; Toledo, etc., R. Co. *v.* Maxfield, 72 Ill. 95; Caswell *v.* Chicago, etc., R. Co., 42 Wis. 193; Rowell *v.* Railroad Co., 57 N. H. 132; Burke *v.* Louisville, etc., R. Co., 7 Heisk. 451. "It is very well settled that it is not contributory negligence for the occupant of land adjoining a railroad to leave it in its natural state; and a farmer using his premises in the ordinary and customary manner is not guilty of contributory negligence for failing to resort to special or extraordinary precautions to prevent the destruction of his property from fire happening through the negligence of a railroad company." Gulf, etc., R Co. *v.* Johnson, 54 Fed. R. 474.

[1] Jacksonville, etc., R. Co. *v.* Peninsular, etc., Co., 27 Fla. 1, s. c. 17 L. R. A. 33, s. c. 49 Am. & Eng. R. Cas. 603. In that case it was said: "That the plaintiff was not bound to keep guard against the negligence of the defendant, but has the right to enjoy his property in the ordinary manner, and that, while he is charged with the duty of saving his property from destruction, if it can be saved, he is under no obligation to stand guard over it, continuously watching it, to protect it from the negligence of the defendant, is a proposition of law too clearly correct to admit of any controversy, and nothing in the authorities cited by the appellant question it; and the same is true of the charge that the fact that the plaintiff's property was exposed to the reach of sparks of a locomotive engine is no defense to an action of this kind, and the plaintiff has the right to construct his buildings on any part of his property, and to enjoy the same without rendering himself liable to the negligence of the defendant."

[2] Burke *v.* Louisville, etc., R. Co., 7 Heisk. (Tenn.) 451; Toledo, etc., R. Co. *v.* Maxfield, 72 Ill. 95; Grand Trunk, etc., R. Co. *v.* Richardson, 91 U. S. 454; Cincinnati, etc., R. Co. *v.* Barker, 94 Ky. 71, 21 S. W. R. 347. It is not negligence *per se* to build a wooden building near a railway track. Briant *v.* Detroit, etc., R. Co., 104 Mich. 307, 62 N. W. R. 365.

[3] St. Joseph, etc., R. Co. *v.* Chase, 11 Kan. 47; Cook *v.* Champlain, etc., Co., 1 Denio. 91; Patton *v.* St. Louis, etc., R. Co., 87 Mo. 117, 23 Am. & Eng. R. Cas. 364; Reed *v.* Missouri Pacific R. Co., 50 Mo. App. 504.

and dry,[1] or a barn to become old and decayed.[2] Where hay or grain is stacked by an owner on his land near a railway right of way, he is ordinarily under no obligation to place out fire breaks and is not to be deemed guilty of contributory negligence in failing to do so;[3] but where it is the usual and ordinary custom among farmers to place fire breaks around their stacks of hay and grain to guard against fires, as they do in prairie or open countries, it may be negligence in an owner to fail to put out fire breaks,[4] and it is, at least, a question which should be submitted to the jury.[5] So, where a person places a building or other property in a position exposing it to hazards from railway fires he is bound to take notice of the unusual and increased risk and to exercise a higher degree of care than if the property were placed in an unexposed position.[6] Thus, where a plaintiff owning a stable which stood two feet from the right of way of the defendant had permitted a large accumulation of straw and inflammable material to collect in a hot and dry season so that when it was set on fire the stable was also destroyed,

[1] Philadelphia, etc., R. Co. *v.* Hendrickson, 80 Pa. St. 182.

[2] Jefferis *v.* Philadelphia, etc., R. Co., 3 Houst. (Del.) 447.

[3] Gulf, etc., R. Co. *v.* Johnson, 54 Fed. R. 474; Hoffman *v.* Chicago, etc., R. Co., 40 Minn. 60, 41 N. W. R. 301; Louisville, etc., R. Co. *v.* Hart, 119 Ind. 273; Burlington, etc., R. Co. *v.* Westover, 4 Neb. 268.

[4] Keese *v.* Chicago, etc., R. Co., 30 Iowa 78. In this case it was said: "While the owner of land has the right to stack his grain or hay on his premises adjoining to a railway, and thereby only takes the risk of accident by fire not occasioned by the company's negligence; yet, if he is guilty of negligence himself, in not ploughing around the stacks or in omitting to do such acts as would have protected his property and prevented the loss, then it would be a case of contributory negligence." See West *v.* Chicago, etc., R. Co., 77 Iowa 654, 35 N. W. R. 479, s. c. 42 N. W. R. 512, 32 Am. & Eng. R. Cas. 339.

[5] Kellogg *v.* Chicago, etc., R. Co., 26 Wis. 223; Kansas, etc., R. Co. *v.* Brady, 17 Kan. 380; Karsen *v.* Milwaukee, etc., R. Co., 29 Minn. 12; Gram *v.* Northern Pacific R. Co., 1 N. Dak. 252, 46 N W. R. 972, 45 Am. & Eng. R. Cas. 544; Karsen *v.* Milwaukee, etc., R. Co., 29 Minn. 12; Ross *v.* Boston, etc., R. Co., 6 Allen 87; Ohio, etc., R. Co. *v.* Shanefelt, 47 Ill. 497; Erie, etc., R. Co. *v.* Dicker, 78 Pa. St. 293; Brown *v.* Hannibal, etc., R. Co., 37 Mo. 298; Missouri, etc., R. Co. *v.* Kincaid, 29 Kan. 654, 11 Am. & Eng. R. Cas. 83.

[6] Kansas City, etc., R. Co. *v.* Owen, 25 Kan. 419; Chicago, etc., R. Co. *v.* Pennell, 94 Ill. 448; Briant *v.* Detroit, etc., R. Co., 104 Mich. 307, 62 N. W. R. 365.

it was held that the question of his contributory negligence was properly submitted to the jury.[1] And where the owner of property allowed shavings and hay to accumulate near his building and fire caught in the shavings and hay and destroyed the building, it was held that the question of contributory negligence was one of fact for the jury.[2] Carelessly allowing the windows or doors of buildings near the track, in which are stored inflammable and dry materials, to remain open, thus exposing the buildings and their contents to sparks has been held to constitute contributory negligence,[3] although there are some cases which hold that such acts do not amount to negligence on the part of a property-owner.[4] Placing property along the line of a railway right of way for the purpose of shipment, with consent of the company, either express or implied, does not of itself constitute contributory negligence.[5] Even if it be conceded that in no case is a plaintiff bound to take any steps or precautions in anticipation of a fire set by a railway company, yet after a fire is once started and discovered by him the duty resting upon a plaintiff to try to save his property is an imperative one, and if he fail to make reasonable effort to discharge that duty he must bear the loss. He can not stand by and see his property destroyed, when by a reasonable effort on his part the property could be saved, and then place the loss on another. That there can be no recovery in such cases has been declared again and again.[6] It has been held that if

[1] Collins *v.* New York, etc., R. Co., 5 Hun 499; Omaha Fair Association *v.* Missouri Pacific R. Co., 42 Neb. 105, 60 N. W. R. 330.

[2] Murphy *v.* Chicago, etc., R. Co., 45 Wis. 222; Coates *v.* Missouri, etc., R. Co., 61 Mo. 38.

[3] Great Western, etc., R. Co. *v.* Haworth, 39 Ill. 346.

[4] Fero *v.* Buffalo, etc., R. Co., 22 N. Y. 209.

[5] Pittsburgh, etc., R. Co. *v.* Noel, 77 Ind. 110; Pittsburgh, etc., R. Co. *v.* Nelson, 51 Ind. 150; Gulf, etc., R. Co. *v.* McLean, 74 Tex. 646. Compare Missouri, etc., R. Co. *v.* Bartlett, 69 Tex. 79, 32 Am. & Eng. R. Cas. 343.

[6] Illinois, etc., R. Co. *v.* McClelland, 42 Ill. 355; Collins *v.* New York, etc., R. Co., 5 Hun 499; Murphy *v.* Chicago, etc., R. Co., 45 Wis. 222; Haverly *v.* State Line, etc., R. Co., 135 Pa. St. 50; Denver, etc., R. Co. *v.* Morton, 3 Colo. App. 155, 32 Pac. 345; St. Louis, etc., R. Co. *v.* Hecht, 38 Ark. 357; Caton *v.* Oregon, etc., R. Co., 19 Ore. 391; Toledo, etc., R. Co., *v.* Pindar, 53 Ill. 447, s. c. 5 Am. R. 57; Chicago, etc., R. Co. *v.* Pennell, 94 Ill. 448; Tilley *v.* St. Louis, etc., R. Co., 49 Ark.

the fire was originally set by the wrong of a railway company and part of the property was destroyed before the contributory negligence of the owner intervened he may recover for the damage done up to the time when his negligence intervened, but not for that part of the property afterwards destroyed.[1] But where a fire was started by the negligence of a railway company, it was held erroneous to instruct the jury that a plaintiff could not recover if he made no attempt to extinguish the fire, entirely ignoring the question of the plaintiff's ability to cope with the fire.[2] Where a property owner licensed the use of an engine on his premises and acquiesced in the use of such engine long after he became aware of its defective condition in the matter of its spark arresting apparatus it was held that he was guilty of such negligence as to preclude a recovery for damages on account of his property destroyed by fire set by such engine.[3] If such a property-owner makes reasonable complaint he will not be held guilty of negligence.[4] The question as to whether a property-owner has been guilty of contributory negligence in suffering his property to be destroyed by fire is usually one to be submitted to the jury under all the circumstances of the case.[5]

535; Illinois, etc., R. Co. *v.* McKay, 69 Miss. 139; Coates *v.* Missouri, etc., R. Co., 61 Mo. 38; Post *v.* Buffalo, etc., R. Co., 108 Pa. St. 585; Doggett *v.* Richmond, etc., R. Co. 78 N. Car. 305; McNarra *v.* Chicago, etc., R. Co., 41 Wis. 69. The owner is bound to make only ordinary and reasonable efforts to extinguish a fire; extraordinary means or efforts are not required. Bevier *v.* Delaware, etc., R. Co., 13 Hun 254.

[1] Stebbins *v.* Central Vermont, etc., R. Co., 54 Vt. 464.

[2] Tilley *v.* St. Louis, etc., R. Co., 49 Ark. 535, s. c. 6 S. W. R. 8. Where sparks from a railway set fire to plaintiff's awning and she became frightened and ran away without making any attempt to extinguish the fire and the house was destroyed, it was held that she was not guilty of contributory negligence, it not appearing that she could have extinguished the fire even if she had not run away. Sugarman *v.* Manhattan, etc., R. Co., 16 N. Y. Supp. 533.

[3] Marquette, etc., R. Co. *v.* Spear, 44 Mich. 169, s. c. 38 Am. R. 242.

[4] Kendrick *v.* Towle, 60 Mich. 363, s. c. 27 N. W. R. 567.

[5] Haverly *v.* State Line, etc. R. Co., 135 Pa. St. 50, 43 Am. & Eng. R. Cas. 31; Mills *v.* Chicago, etc., R. Co., 76 Wis. 422; Gibbons *v.* Wisconsin, etc., R. Co., 66 Wis. 161, 25 Am. & Eng. R. Cas. 479; Coates *v.* Missouri, etc., R. Co., 61 Mo. 38; Great Western, etc., R. Co. *v.* Haworth, 39 Ill. 346; Macon, etc., R. Co. *v.* McConnell, 27

§ 1239. **Measure of damages for property destroyed by fire.** —In determining the measure of damages which a person whose property is negligently burned by a railway company is entitled to recover the difficult question is not so much the measure of that damage as the method of arriving at the proper measure. Stated abstractly the rule is that an owner is entitled to recover just compensation for the property destroyed or such an amount as will restore him to the same property status as he occupied before his property was burned.[1] How to arrive at such compensation is the question to be determined, and the method adopted for determining such compensation will depend on the nature of the property destroyed, its location and other attendant circumstances. There are two kinds of property which may be destroyed or injured, personal and real, and where real property is destroyed or injured the property may be such a part of the real estate as to have a separate and independent value of itself,[2] or it may be such that its value can only be determined by taking into consideration the entire value of the real estate of which it forms a part. Where the thing destroyed is personal property or such a part of realty that it has a value separate and apart from the soil on which it stands or with which it is connected the rule for determining the measure of damages

Ga. 481; Missouri, etc., R. Co. *v.* Cornell, 30 Kan. 35, s. c. 11 Am. & Eng. R. Cas. 56; Illinois Central R. Co. *v.* Nunn, 51 Ill. 78.

[1] Jacksonville, etc., R. Co. *v.* Peninsular, etc., R. Co., 27 Fla. 1, s. c. 17 L. R. A. 33, s. c. 9 So. R. 661, s. c. 49 Am. & Eng. R. Cas. 603, 644. Where timber land was burned over it is proper to consider in estimating the damages and the increased cost of cutting the timber owing to timber blown down because the roots of the trees had been burned away. Gordon *v.* Grand Rapids, etc., R. Co., 103 Mich. 379, 61 N. W. R. 540.

[2] "For the purpose of actions for injuries through negligence, many things which are attached to the realty, and a part of it, such as fruit trees, houses, timber, etc., are considered separate and distinct from it because they have a value which is distinct from the value of the land. Therefore, where buildings, trees, crops, etc., are destroyed or injured, the proper measure of damages is not the difference in the value of the land before and after injury, but of the buildings, trees, etc., themselves; and where buildings are destroyed by fire, the proper measure of damages is the value of the buildings when destroyed." 2 Thompson Neg. 1262. See, also, Atchison, etc., R. Co. *v.* Huitt, 1 Kan. App. 781, 41 Pac. R. 1049.

is generally the same. In such cases if the property is totally destroyed the measure of damages is its market value at the time and place of its destruction,[1] and if only partially destroyed the measure of damages is the difference between the market value and its value after the injury.[2] The cost of replacing the property is not the correct measure of damages for its destruction.[3] Where property of the kind destroyed has a market value at the time and place of the destruction the measure of damages is very easily determined for mere proof of the market value is all that is required. But it often happens that the kind of property destroyed has no market value and it would be impossible to prove a market value. In such cases instead of taking the market value as a standard for determining the measure of damages the real and ordinary value is taken,[4] and to enable a jury to determine such real or ordinary value and to arrive at a fair valuation, all facts connected with such property, such as its cost, the uses to which it has been put,

[1] Donald *v.* St. Louis, etc., R. Co., 44 Iowa 157; Burke *v.* Louisville, etc., R. Co., 7 Heisk. 451; Parrott *v.* Housatonic, etc., R. Co., 47 Conn. 575; Chapman *v.* Chicago, etc., R. Co., 26 Wis. 295; Delaware, etc., R. Co. *v.* Salmon, 39 N. J. L. 299; White *v.* Chicago, etc., R. Co., 1 S. Dak. 326, 47 N. W. R. 146, 45 Am. & Eng. R. Cas. 565; Ward *v.* Carson River, etc., Co., 13 Nev. 44; Galveston, etc., R. Co. *v.* Horne, 69 Tex. 643, 35 Am. & Eng. R. Cas. 238; Galveston, etc., R. Co. *v.* Rheiner, (Tex. C. App.) 25 S. W. R. 441 and 971; Gulf, etc., R. Co. *v.* Reagan, (Tex. Civ. App.) 32 S. W. R. 846. This is the true rule as to fruit trees whose value can be determined independently of the realty on which they are grown. Whitback *v.* New York, etc., Co., 36 Barb. 644; Norfolk, etc., R. Co. *v.* Bohannan, 85 Va. 293, 7 S. E. R. 236. But ordinarily fruit trees have not a value separate and apart from the real estate on which they stand. Dwight *v.* Elmira, etc., Co., 132 N. Y. 199, 30 N. E. R. 398. Where forest or matured trees are injured the measure of damages is the difference in value before and after the fire. Atkinson *v.* Atlantic, etc., Co., 63 Mo. 367.

[2] Atchison *v.* Atlantic, etc., R. Co., 63 Mo. 367; Bevier *v.* Delaware, etc., R. Co., 13 Hun 254; Texas, etc., R. Co. *v.* Levi, 59 Tex. 674, 13 Am. & Eng. R. Cas. 464.

[3] Pacific, etc., R. Co. *v.* Lasker Real Estate Assn., 81 Tex. 81, 16 S. W. R. 792; Pacific, etc., R. Co. *v.* Smith, (Tex.) 16 S. W. R. 998; Burke *v.* Louisville, etc., R. Co., 7 Heisk. 451; Watt *v.* Nevada, etc., R. Co., (Nev.) 44 Pac. R. 423; Jacksonville, etc., R. Co. Peninsular, etc., R. Co., 27 Fla. 1, s. c. 9 So. R. 661.

[4] Fremont, etc., R. Co. *v.* Crum, 30 Neb. 70, 46 N. W. R. 217; International, etc., R. Co. *v.* Searight, 8 Tex. Civ. App. 593, 28 S. W. R. 39.

its age, its condition, location and the like are admissible.[1] The opinions of witnesses acquainted with the standard value of such property are also competent.[2] So where buildings are destroyed and they have a separate and independent value apart from the soil on which they stand, but no market value, it has been held proper to admit evidence of the cost of their construction as an element in determining the measure of damages.[3] Where the property destroyed or injured is so closely connected with the real estate on which it stands or to which it is attached, that it has no value separate and independent of the real estate, or the injury is to the soil itself, the measure of damages is the difference in value between the real estate before the injury and after it.[4] While there are some authorities which deny

[1] Atchison, etc., R. Co. *v.* Stanford, 12 Kan. 354; Pittsburgh, etc., R. Co. *v.* Hixon, 110 Ind. 225. Where the property was so badly damaged by the fire as to have no market value at the place where the injury occurred, it is proper to take into account, in estimating the measure of damages, the cost of preparing it for a market and shipping it thereto. Texas, etc., R. Co. *v.* Levi, 59 Tex. 675, 13 Am. & Eng. R. Cas. 464. As affecting the measure of damages for the destruction it is competent to show the age of the meadow and to prove also that as the meadow became older the quantity and quality of the hay increased. Terre Haute, etc., R. Co. *v.* Walsh, 11 Ind. App. 13, 38 N. E. R 534. Evidence is also admissible in an action for injuries to grass lands that they were burned over the two years previous. Gulf, etc., R. Co. *v.* Saddler, 8 Tex.C. App. 300, 27 S.W. R.904. Where land is injured by fire evidence is admissible to show the capacity of the land to produce crops before and after the fire. Chicago, etc., R. Co. *v.* Burden, (Ind. App.) 43 N. E. R. 155.

[2] Pennsylvania, etc., R. Co. *v.* Bunnell, 81 Pa. St. 414; Lafayette, etc., R. Co. *v.* Winslow, 66 Ill. 219; Fremont, etc., R. Co. *v.* Marley, 25 Neb. 138; Stertz *v.* Stewart, 74 Wis. 160.

[3] Cleland *v.* Thornton, 43 Cal. 437; Jacksonville, etc., R. Co. *v.* Peninsular, etc., Co., 27 Fla. 1.

[4] Fort Worth, etc., R. Co. *v.* Wallace, 74 Tex. 581, 40 Am. & Eng. R. Cas. 248; Galveston, etc., R. Co. *v.* Horne, 69 Tex. 643, 35 Am. & Eng. R. Cas. 238; Fort Worth, etc., R. Co. *v.* Hogsett, 67 Tex. 685; Missouri, etc., R. Co. *v.* Ayers, (Tex.) 8 S. W. R. 538; Hayes *v.* Chicago, etc., R. Co., 45 Minn. 17, 47 N. W. R. 260; Carner *v.* Chicago, etc., R. Co., 43 Minn. 375; Easterbrook *v.* Erie R. Co., 51 Barb. 94; Missouri, etc., R. Co. *v.* Fulmore, (Tex.) 29 S. W. R. 688; Missouri, etc., R. Co. *v.* Goode, 7 Tex. C. App. 245; 26 S.W. R. 441; Louisville, etc., R. Co. *v.* Spencer, 149 Ill. 97, 36 N. E. R. 91. Where plaintiff's cranberry marsh was destroyed by fire it was held that he had a right, as affecting the measure of damages, to introduce evidence showing the natural advantages of the marsh as to the accumulation of water from adjoining lands, thereby making the marsh more valuable and productive. Moore *v.* Chicago, etc., R.

the right of an owner to interest on the amount of his recovery,[1]

Co., 78 Wis. 120, 47 N. W. R. 273. In Dwight *v.* Elmira, etc., R. Co., 132 N. Y. 199, 30 N. E. R. 398, the court said: "It is apparent from the authorities already cited, as well as those following, that in cases of injury to real estate the courts recognize two elements of damage: (1) The value of the tree or other thing taken after separation from the free-hold, if it have any; (2) the damage to the realty, if any, occasioned by the removal. Ensley *v.* Mayor, 2 Baxt. 144; Striegel *v.* Moore, 55 Iowa 88, 7 N. W. R. 413; Longfellow *v.* Quimby, 33 Me. 457; Foote *v.* Merrill, 54 N. H. 490. * * * In this case the plaintiff was not satisfied with a recovery based on the value of the trees destroyed, after separation from the realty, of which they formed a part, as indeed he should not have been, as such value was little or nothing, so he sought to obtain the loss occasioned to the land by reason of the destruction of an orchard of fruit-bearing trees, which added largely to its productive value. This was his right, but the measure of damages in such a case is, as we have observed, the difference in value of the land before and after the injury; and as this rule was not followed, but rejected, on the trial, and a method of proving damages adopted not recognized nor permitted by the courts, the judgment should be reversed." In Vermilya *v.* Chicago, etc., Co., 66 Iowa 606, 23 Am. & Eng. R. Cas. 108, where a meadow was destroyed by the negligent setting out of fire by a railway company it was held that the measure of damages was the cost of restoring the meadow. See St. Louis, etc., R. Co. *v.* Jones, 59 Ark. 105, 26 S. W. R. 595. And where plaintiff's fencing was injured and destroyed it was held that he was entitled to recover the cost of restoring to as good a condition as before the fire. Central, etc., R. Co. *v.* Murray, 93 Ga. 256, 20 S. E. R. 129. In the case of Ward *v.* Chicago, etc., R. Co., (Minn.) 63 N. W. R. 1104, the court said: "An action to recover damages for a partial loss or a complete destruction of growing crops, whether annual or perennial, is practically an action to recover for an injury to real property. In principle such an action can not be distinguished from one brought to recover for an injury to growing trees, nor is the measure of damages at all different, although stated differently. The proof in an action to recover for trees destroyed is all directed to an ascertainment of the difference in the market value of the real property immediately before the injury and immediately after its infliction, this difference being the measure of damages. The proof in a case to recover for injuries to a growing crop is, or should be, confined to estimating the value of the crop when destroyed; such being the measure of damages. * * * The measure of damages in this case must be ascertained by inquiring into the difference in the market value of the real property immediately before the injury and its value immediately after its infliction, and in ascertaining this difference, evidence that another crop of some character and value may be grown on the land the same growing period, of the average yield of like crops, of the average market price, the ordinary expense of harvesting and marketing such crops, the condition of that particular crop before the injury, and any other fact existing at the time of the loss tending to show how and to what extent the injury decreased and diminished the value of the farm, may be considered."

[1] Atkinson *v.* Atlantic, etc., R. Co., 63 Mo. 367; DeSteiger *v.* Hannibal,

the general rule is that interest may be allowed on the amount of damage done from the date of the injury to the date of the recovery.[1] Where after a fire had been negligently set by a railway company the owner could have saved part of the property from destruction but failed to do so, the defendant may prove the value of the property so negligently failed to be saved by the owner.[2] In some states there are statutory enactments which allow a plaintiff to recover, in addition to his actual damages, attorney's fees.[3]

§ 1240. **Pleading—Parties.**—A suit brought to recover damages on account of property destroyed by fire should be brought, as a general rule, by the owner of that property.[4] But where property which has been destroyed was insured and the insurance company has paid the insurance and been subrogated to the rights, if any, of the insured against a wrongdoer causing the loss, it has been held that a suit may be brought in either the name of the insured, the insurer, or both.[5]

etc., R. Co., 73 Mo. 33, 7 Am. & Eng. R. Cas. 492.

[1] Galveston, etc., R. Co. *v.* Horne, 69 Tex. 643, 35 Am. & Eng. R. Cas. 238; Parrott *v.* Housatonic, etc., R. Co., 47 Conn. 575; Chapman *v.* Chicago, etc., R. Co., 26 Wis. 295; Wilson *v.* Atlanta, etc., R. Co., 16 S. Car. 587; Norfolk, etc., R. Co. *v.* Bohannan, 85 Va. 293, 7 S. E. R. 236; Texas, etc., R. Co. *v.* Levi, 59 Tex. 674; Texas, etc., R. Co. *v.* Tankersley, 63 Tex. 57; Union Pac. R. Co. *v.* Ray, 46 Neb. 750, 65 N. W. R. 773. It has been sometimes said that interest is not to be allowed on unliquidated demands. There are actions, such, for instance, as assault and battery or slander, to which the rule is applicable. But where the demand is for property that has a market value susceptible of easy proof, there is no propriety in such a rule. A loss of property having a definite money value is practically the same as the loss of so much money; the loss of the use of the property is practically the same as the loss of the use (or interest) of so much money. We think, therefore, a just indemnity to the plaintiff required the addition to the value of the goods, at the time of their destruction, of the interest from that time to the date of the judgment." Regan *v.* New York, etc., R. Co., 60 Conn. 124, 49 Am. & Eng. R. Cas. 590.

[2] St. Louis, etc., R. Co. *v.* Hecht, 38 Ark. 357, s. c. 9 Am. & Eng R. Cas. 222.

[3] § 1246, *infra*.

[4] See Fort Worth, etc., R. Co. *v.* Wallace, 74 Tex. 581, 40 Am. & Eng. R. Cas. 248. Buildings situated on the land of another with the right of removal are personal property and the owner is the proper person to sue for their destruction. Laird *v.* Connecticut, etc., R. Co., 62 N. H. 254, s. c. 43 Am. & Eng. R. Cas. 63.

[5] *Ante*, § 1234.

And where the injury was caused by a company operating the line under a lease the action may, according to some of the authorities, be brought against either lessee or lessor unless there is a statute expressly exempting the lessor from liability.[1]

§ 1241. **Pleading—Sufficiency of complaint.**—What will be sufficient to constitute a good complaint against a railway company for negligently burning property depends on what it is necessary to show to constitute a good cause of action. And as the facts which a plaintiff is bound to show vary in different jurisdictions it necessarily follows that there will be a corresponding difference in the pleadings. Ownership of the property destroyed must generally be averred in an action to recover its loss.[2] Where there are statutes in force imposing an absolute liability it need not be alleged that the fire was negligently set out,[3] but where no such statute exists and a recovery can only be had on proof of negligence of the company, facts constituting negligence must be alleged and the particular kind of negligence on which the recovery is based should be shown.[4] Thus, where the action is based on the use of defective appliances negligence in that respect must be shown and where the action is based on negligence in suffering a fire to escape from the right of way it must be alleged that the fire was negligently suffered to escape.[5] Where property which had been placed on the right of way of a railway company was destroyed by fire, it was held in an action to recover its value

[1] *Ante*, § 1237.

[2] St. Louis, etc., R. Co. *v.* Hecht, 38 Ark. 357, s. c. 9 Am. & Eng. R. Cas. 222. Where it appears that land damaged by fire was owned by plaintiff and his children and it is not shown how many children there are or the extent of plaintiff injury a non-suit is proper. Comer *v.* Newman, 95 Ga. 434, 22 S. E. R. 634.

[3] Campbell *v.* Missouri, etc., R. Co., 121 Mo. 340, 25 S.W. R. 936; Martin *v.* New York, etc., R. Co., 62 Conn. 331, 25 Atl. R. 239.

[4] Where a statute provided that no formal pleadings should be required in a justice's court, but only a "statement of the facts constituting the cause of action upon which the suit is founded," a statement in a suit for damages caused by a railway fire which did not allege that the fire was negligently set was held sufficient on objection raised after verdict. Polhans *v.* Atchison, etc., R. Co., 115 Mo. 535, 22 S. W. R. 478.

[5] Lake Erie, etc., Railroad Co. *v.* Miller, 9 Ind. App. 192; Louisville,

that a complaint which did not allege that the property was rightfully on the right of way was not sufficient to withstand a demurrer.[1] Where a complaint contained no allegation as to the unskillfulness of the engineer or fireman but charged the company with negligence in permitting the engine to be out of "repair and carelessly and negligently used," it was held that the allegation was not sufficient to justify a charge submitting to the jury the question of the skillfulness of the engineer and fireman.[2] Where a complaint is based on the negligence of the company in setting fire directly from an engine the complaint should describe, as definitely as possible, the locomotive setting the fire so that the defendant may have an opportunity to identify the engine and examine into its condition at the time of the fire as well as the conduct of its agents and servants at that time.[3] As a general rule the complaint must allege the particular negligence which it is intended to prove for an allegation of negligence in one particular is not sufficient to admit evidence of negligence in another particular.[4] Thus, where it was alleged that a company was guilty of negligence in operating its locomotives evidence tending to show negligence in permitting combustibles to accumulate is inadmissible.[5] But where it was alleged that an engine was operated with a defective flue proof that it had no flue at all was held not to be a fatal variance.[6] A complaint which alleged that

etc., R. Co. *v.* Roberts, 13 Ind. App. 692; 42 N. E. R. 247; Pittsburgh, etc., R. Co. *v.* Hixon, 79 Ind. 111; Louisville, etc., R. Co. *v.* Ehlert, 87 Ind. 339; Louisville, etc., R. Co. *v.* Palmer, 13 Ind. App. 161, 39 N. E. R. 881; Indiana, etc., R. Co. *v.* Adamson, 114 Ind. 282, 34 Am. & Eng. R. Cas. 127; Lake Erie, etc., R. Co. *v.* Miller, 9 Ind. App. 192, 36 N. E. R 428; Chicago, etc., R. Co. *v.* Burden, (Ind. App.), 43 N. E. R. 155.

[1] Pennsylvania R. Co. *v.* Gallentine, 77 Ind. 322, 7 Am. & Eng. R. Cas. 517; Pittsburgh, etc., R. Co. *v.* Noel, 77 Ind. 110, 7 Am. & Eng. R. Cas. 524.

[2] Babcock *v.* Chicago, etc., R. Co., 72 Iowa 197, 33 N. W. R. 628. Compare Bullis *v.* Chicago, etc. R. Co., 76 Iowa 680, 39 N. W. R. 245.

[3] Koontz *v.* Oregon, etc., R. Co., 20 Ore. 3, 23 Pac. R. 820, 43 Am. & Eng. R. Cas. 11; Missouri Pacific R. Co. *v.* Merrill, 40 Kan. 404.

[4] Miller *v.* Chicago, etc., R. Co., 76 Iowa 318, 41 N. W. R. 28.

[5] Carter *v.* Kansas City, etc., R. Co., 65 Iowa 287, 21 N. W. R. 607; Miller *v.* Chicago, etc., R. Co., 66 Iowa 364, 23 N. W. R. 756.

[6] Denver, etc., R. Co. *v.* Conway, 8 Colo. 1, 5 Pac. R. 142.

the railway company "negligently allowed its engine to scatter fire" has been held broad enough to admit evidence as to the condition of the engine and the manner of its operation.[1]

§ 1242. **Burden of proof.—Presumption of negligence.**— Where a fire is caused by inflammable material on the right of way or by fire spreading from the right of way the authorities are pretty well agreed that the burden of proving negligence rests upon the plaintiff. In such cases it is but just that the burden should rest upon the plaintiff for the means of proof are as equally available to the plaintiff as to the defendant. The gist of the action in such cases is negligence in suffering the fire to escape and the burden of showing negligence in that respect rests upon the plaintiff. But where a fire is set directly by sparks from a locomotive and the action is predicated on negligence of the company in using a locomotive with defective apparatus or equipments or in negligently and unskillfully managing a locomotive, the authorities are in direct conflict as to who has the burden of proof. The plaintiff must, of course, assume the burden of proving that there was a fire and that it was set by a locomotive.[2] But after it has been shown that there was a fire and that it was set by a locomotive before there can be a recovery, in the absence of absolute statutory liability, it still remains to be shown that the company was guilty of some act of negligence. Here the authorities are in decided conflict. There are a great many authorities which maintain and enforce the rule that when it has once been proved that a fire was set by the locomotive a presumption of negligence at once arises and the burden is on the defendant to overcome that presumption before it can escape liability.[3]

[1] Weber *v.* Winona, etc., R. Co., (Minn.) 65 N. W. R. 93.

[2] Inman *v.* Elberton, etc., R. Co., 90 Ga. 663, s. c. 35 Am. St. R. 232; Union, etc., R. Co. *v.* Keller, 36 Neb. 189, 54 N. W. R. 420; Niskern *v.* Chicago, etc., R. Co., 22 Fed. R. 811.

[3] Edwards *v.* Campbell, (Tex. C. App.) 33 S. W. R. 761; Reed *v.* Missouri, etc., R. Co., 50 Mo. App. 504; Rose *v.* Chicago, etc., R. Co., 72 Iowa 625; Louisville, etc., R. Co. *v.* Reese, 85 Ala. 497, s. c. 7 Am. St. R. 66; Karsen *v.* Milwaukee, etc., R. Co., 29 Minn. 12; Coates *v.* Missouri, etc., R. Co., 61 Mo. 38; Case *v.* Northern Central,

In some states this rule prevails as a result of statutory enact-

etc., R. Co., 59 Barb. 644; Burroughs *v.* Housatonic, etc., R. Co., 15 Conn. 124, 38 Am. Dec. 64; Burlington, etc., R. Co. *v.* Westover, 4 Neb. 268; Illinois Central R. Co. *v.* Mills, 42 Ill. 407; Burke *v.* Louisville, etc., R. Co., 7 Heisk. 451; Spaulding *v.* Chicago, etc., R. Co., 30 Wis. 110; Cronk *v.* Chicago, etc., R. Co., 3 S. Dak. 93, 54 Am. & Eng. R. Cas. 525; East Tennessee, etc., R. Co. *v.* Hesters, 90 Ga. 11, 15 S. E. R. 828; Smith *v.* Northern, etc., R. Co., 3 N. Dak. 17, 53 N. W. R. 173; Fitch *v.* Pacific, etc., R. Co., 45 Mo. 322; Tilley *v.* St. Louis, etc., R. Co., 49 Ark. 535, 32 Am. & Eng. R. Cas. 324; Jones *v.* Michigan, etc., R. Co., 59 Mich. 437; Green Ridge, etc., R. Co. *v.* Brinkman, 64 Md. 52; Johnson *v.* Chicago, etc., R. Co., 31 Minn. 57; Wise *v.* Joplin, etc., R. Co., 85 Mo. 178; Brown *v.* Atlanta, etc., R. Co., 19 S. Car. 39; Longabaugh *v.* Virginia City, etc., R. Co., 9 Nev. 271; Gulf, etc., R. Co. *v.* Benson, 69 Tex. 407, 5 S. W. R. 822; Railway Co. *v.* Timmermann, 61 Tex. 660; International, etc., R. Co. *v.* Hogsett, 67 Tex. 685; Ellis *v.* Portsmouth, etc., R. Co., 2 Ired. (N. Car.) L. 138; Cleveland *v.* Grand Trunk, etc., R. Co., 42 Vt. 449; Eddy *v.* Lafayette, 49 Fed. R. 807; Kinney *v.* Hannibal, etc., R. Co., 70 Mo. 243; Woodson *v.* Milwaukee, etc., R. Co., 21 Minn. 60; Johnson *v.* Northern, etc., R. Co., 1 N. Dak. 354, 48 N. W. R. 227, 45 Am. & Eng. R. Cas. 554; Piggot *v.* Eastern, etc., R. Co., 3 C. B. 229; Gibson *v.* South Eastern, etc., R. Co., 1 F. & F. 23; Aldridge *v.* Great Western, etc., R. Co., 15 C. B. (N. S.) 582; Smith *v.* London, etc., R. Co., L. R. 6 C. P. 14; Moxley *v.* Canada, etc., R. Co., 14 Ont. App. 309, s. c. 32 Am. & Eng. R. Cas. 304; Seska *v.* Chicago, etc., R. Co., 77 Iowa 137; Anderson *v.* Cape Fear, etc., Co., 64 N. Car. 399; Koontz *v.* Oregon, etc., R. Co., 20 Ore. 3, 23 Pac. R. 820, 43 Am. & Eng. R. Cas. 11; Anderson *v.* Wasatch, etc., R. Co., 2 Utah 518; Columbia, etc., R. Co. *v.* Farrington, 1 Wash. 202, 23 Pac. R. 413; Galveston, etc., R. Co. *v.* Dolores, etc., Co., (Tex. C. App) 26 S. W. R. 79. "But there are cases where negligence will be presumed from proof of the accident and the injury, and fires caused by steam engines seem to come within this class. This is a presumption arising from necessity, and that justice may not be defeated. Fire escapes from an engine and destroys property. The owner only knows that his property is gone, and that the fire causing its destruction came from the engine. He might not know, or be able to prove, from what particular engine on the line of a railroad the fire escaped, or who at the time was in charge of it, or whether it was properly constructed, and so not be able to prove negligence, when, in fact, it did exist. All this proof is in possession of the railroad company, and it has the power of rebutting the charge of negligence, if none, in fact, existed." Diamond *v.* Northern, etc., R. Co., 6 Mont. 580, 29 Am. & Eng. R. Cas. 117. In the case of Galveston, etc., R. Co. *v.* Horne, 69 Tex. 643, 35 Am. & Eng. R. Cas. 238, the court said: "There is a conflict in the decisions of England and America, as to whether the escape of sparks from a passing engine is *prima facie* evidence of negligence on the part of the company running the engine. * * * The employes know the condition of the engine, and of the appliances used to prevent the escape of fire, and they should be informed as to whether

ment.[1] But in a great many states, it is held that no presumption of negligence arises from a mere setting of a fire, and that something further must be shown by the plaintiff before he can recover.[2] Those authorities which hold that the burden of proof should rest upon the plaintiff justify the rule on the ground that the company, being engaged in a lawful business, should not be made to respond in damages without being shown to have been guilty of negligence.[3] Those authorities

these were sufficient for that purpose. The injured party would not, as a general thing, be possessed of any such information, and he could not ordinarily obtain it. To require him to make the proof would in most instances be a denial of justice, and would allow the party doing the wrong to escape by concealing the facts which brought it about. Hence, the courts have adopted the salutary rule of presuming the existence of negligence against the party who has the means of disproving it, and fails to make use of them."

[1] East Tennessee, etc., R. Co. *v.* Hesters, 90 Ga. 11, 15 S. E. R. 828; Garrett *v.* Chicago, etc., R. Co., 36 Iowa 121; Babcock *v.* Chicago, etc., R. Co., 62 Iowa 593, s. c. 11 Am. & Eng. R. Cas. 64, 13 Am. & Eng. R. Cas. 477; Chicago, etc., R. Co. *v.* Pennell, 110 Ill. 435; Small *v.* Chicago, etc., R. Co., 50 Iowa 338; Baltimore, etc., R. Co. *v.* Dorsey, 37 Md. 19; Cleveland *v.* Grand Trunk, etc., R. Co., 42 Vt. 449; Chicago, etc., R. Co. *v.* Clampit, 63 Ill. 95; Annapolis, etc., R. Co. *v.* Gantt, 39 Md. 115; Missouri, etc., R. Co. *v.* Merrill, 40 Kan. 404; Atchison, etc., R. Co. *v.* Gibson, 42 Kan. 34; Louisville, etc., R. Co. *v.* Natchez, etc., Co., 67 Miss. 399.

[2] Philadelphia, etc., R. Co. *v.* Yerger, 73 Pa. St. 121; Indianapolis, etc., R. Co. *v.* Paramore, 31 Ind. 143; Ruffner *v.* Cincinnati, etc., R. Co., 34 Ohio St. 96; Lowney *v.* New Brunswick, etc., R. Co., 78 Me. 479; Henry *v.* Southern, etc., R. Co., 50 Cal. 176; Pittsburgh, etc., R. Co. *v.* Noel, 77 Ind. 110; Jefferis *v.* Philadelphia, etc., R. Co., 3 Houst. 447; Burroughs *v.* Housatonic, etc., R. Co., 15 Conn. 124; Pittsburgh, etc., R. Co. *v.* Hixon, 110 Ind. 225, s. c. 32 Am. & Eng. R. Cas. 150; Chicago, etc., R. Co. *v.* Ostrander, 116 Ind. 259; Meyer *v.* Vicksburg, etc., R. Co., 41 La. Ann. 639; Henderson *v.* Philadelphia, etc., R. Co., 144 Pa. St. 461, s. c. 27 Am. St. R. 652; Bernard *v.* Richmond, etc., R. Co., 85 Va. 792, s. c. 17 Am. St. R. 103.

[3] "The most cogent reasons given for the support of this rule are, that a railroad company which is authorized by law to operate its trains by steam is not an insurer against accidents by fire, and is not liable for injuries caused by the use of fire in generating steam, if the right is exercised in a lawful manner and with reasonable care and skill; and the owner of adjacent property assumes all risks incident to a lawful and proper use of the road; that negligence is the gist of the liability, without proof of which an action can not be maintained, and by the general rule in actions founded on negligence, the plaintiff must aver it, and the burden of proof rests upon him, and in no case does the mere fact of injury prove negligence."

which hold that the burden of disproving negligence should rest upon the defendant proceed upon the theory that the mere fact that a fire is set out indicates negligence and that the evidence necessary to show negligence is peculiarly within the reach of the defendant and often not available to the plaintiff, and that no hardship is imposed upon the defendant in requiring it to produce that evidence.[1] The tendency of modern judicial decision and authority is, probably, in favor of casting the burden of disproving negligence on the company, but, as experience has demonstrated that it is almost, if not quite, impossible to operate an engine without the emission of sparks and as negligence may be proved by circumstantial evidence equally accessible to the plaintiff we are inclined to think that, upon principle, this should not constitute an exception to the general rule that the burden is upon the plaintiff.

§ 1243. **Proof that company set out fire.**—While in a great number of cases the plaintiff is not required to prove that the defendant was guilty of negligence in setting out a fire it is always incumbent on the plaintiff, where his property is directly set on fire, to show that the fire was set by the locomotives of the defendant.[2] As there are few, if any, cases where persons see the fire directly communicated, proof of the com-

Louisville, etc., R. Co. *v.* Reese, 85 Ala. 497, s. c. 7 Am. St. R. 66.

[1] The reason of the rule is thus stated in the case of Spaulding *v.* Chicago, etc., R. Co., 30 Wis. 110: "The reasons given for requiring the companies to show that this duty has been performed on their path are, that agents and employes of the road know, or are at least bound to know, that the engine is properly equipped to prevent fire from escaping, and that they know whether any mechanical contrivances were employed for that purpose, and if so, what was their character; whilst, on the other hand, persons not connected with the road, and who only see trains passing at a high rate of speed, have no such means of information, and the same is inaccessible to and can not be obtained by them, without great trouble and expense."

[2] Union, etc., R. Co. *v.* Keller, 36 Neb. 189, 54 N. W. R. 420; Sheldon *v.* Hudson River, etc., R. Co., 14 N. Y. 218; Inman *v.* Elberton, etc., R. Co., 90 Ga. 663, s. c. 35 Am. St. R. 232; Fitch *v.* Pacific, etc., R. Co., 45 Mo. 322; Burke *v.* Louisville, etc., R. Co., 7 Heisk. 451; Indianapolis, etc., R. Co. *v.* Paramore, 31 Ind. 143; Niskern *v.* Chicago, etc., R. Co., 22 Fed. R. 811.

munication must necessarily be more or less circumstantial.[1] But, even though circumstantial evidence is sufficient to establish liability, where the evidence is such that it is a mere conjecture as to whether or not the company set the fire it is proper to nonsuit the plaintiff.[2] Where, however, it is shown that there was no probable cause for the fire except the railway locomotives it may be sufficient to fasten it upon the company.[3] It is not necessary that the plaintiff should produce evidence to exclude every other possible cause of the fire.[4] The plaintiff is not always required to show that any particular engine set out the fire, and evidence that other engines of the company, similar in general construction to that supposed to have set out the fire, set out fire about the time of the injury has often been held admissible.[5] As tending to show that the

[1] Louisville, etc., R. Co. *v.* McCorkle, 12 Ind. App. 691, 40 N. E. R. 26; Sheldon *v.* Hudson River, etc., R. Co., 14 N. Y. 218; Union, etc., R. Co. *v.* DeBusk, 12 Colo. 294, 3 L. R. A. 350; Union Pacific R. Co. *v.* Keller, 36 Neb. 189, 54 N. W. R. 420. "The origin of fires is often proved by circumstances. It is not necessary to prove it by direct or positive evidence. No witness may have testified that the fire was started by an engine operated by appellant, and yet the evidence may have fully justified the inference that it was so started." Ohio, etc., Railway Co. *v.* Trapp, 4 Ind. App. 69, s. c. 30 N. E. R. 812.

[2] Megow *v.* Chicago, etc., R. Co., 86 Wis. 466, s. c. 56 N. W. R. 1099.

[3] Baltimore, etc., R. Co. *v.* Shipley, 39 Md. 251; Field *v.* New York, etc., R. Co., 32 N. Y. 339; Johnson *v.* Chicago, etc., R. Co., 77 Iowa 666; Karsen *v.* Milwaukee, etc., R. Co., 29 Minn. 12, 7 Am. & Eng. R. Cas. 501; Smith *v.* London, etc., R. Co., L. R. 6 C. P. 14. Where it was shown that a fire sprang up just after a train passed, that there was no other fire on the premises before and no other apparent cause for the fire, it was held that the evidence was sufficient to warrant a finding that it was set by the passing train. Union, etc., R. Co. *v.* DeBusk, 12 Colo. 294, 38 Am. & Eng. R. Cas. 321. See Union, etc., R. Co. *v.* Jones, 9 Colo. 379.

[4] Crist *v.* Erie R. Co., 58 N. Y. 638.

[5] Railway Co. *v.* Gilbert, 52 Fed. R. 711; Gulf, etc., R. Co. *v.* Johnson, 54 Fed. R. 474; Koontz *v.* Oregon, etc., R. Co., 20 Ore. 3, 23 Pac. R. 820, 43 Am. & Eng. R. Cas. 11; Crocker *v.* McGregor, 76 Me. 282; Henderson *v.* Philadelphia, etc., R. Co., 144 Pa. St. 461, s. c. 48 Am. & Eng. R. Cas. 16; Annapolis, etc., R. Co. *v.* Gantt, 39 Md. 115; Stertz *v.* Stewart, 74 Wis. 160, 42 N. W. R. 214; Chicago, etc., R. Co. *v.* Gilbert, 52 Fed. R. 711; Smith *v.* Boston, etc., R. Co., 63 N. H. 25; Thatcher *v.* Maine, etc., R. Co., 85 Me. 502; Campbell *v.* Missouri Pacific R. Co., 121 Mo. 340, 25 L. R. A. 175; Hoskison *v.* Central Vermont R. Co., 66 Vt. 618, 30 Atl. R. 24; Chicago, etc., R. Co. *v.* Zimmerman, (Ind. App.) 40 N. E. R. 703; Northern Pa-

fire was set by the defendant, it has also been held competent to prove that at various times before the fire occurred the engines of the company set out fires along its line in the vicinity.[1] Proof that fires were set along the line of the railway is not admissible unless it is shown that they were set by the railway company.[2] But it has been held competent to show that coals of fire had previously been dropped or been found on the track at or near the place where the injury occurred.[3] Where the plaintiff seeks to confine the setting of the fire to a single engine, proof that the same engine set other fires is admissible.[4] But proof that other engines set out fires at different times has been held inadmissible.[5] Evidence is not admissible to show

cific R. Co. *v.* Lewis, 51 Fed. R. 658; Loring *v.* Worcester, etc., R. Co., 131 Mass. 469. Where plaintiff's building which was destroyed was 125 feet from the railway track it was proper for the plaintiff to show, as tending to rebut the presumption that defendant's engines did not set the fire, that property in a direct line, but farther away had been set on fire. Hoskison *v.* Central Vermont R. Co., 66 Vt. 618, 30 Atl. R. 24.

[1] Grand Trunk, etc., R. Co. *v.* Richardson, 91 U. S. 454; Henderson *v.* Philadelphia, etc., R. Co., 144 Pa. St. 461, s. c. 48 Am. & Eng. R. Cas. 16; Field *v.* New York, etc., R. Co., 32 N. Y. 339; Webb *v.* Rome, etc., R. Co., 49 N. Y. 420; Koontz *v.* Oregon, etc., R. Co., 20 Ore. 3, 23 Pac. R. 820, 43 Am. & Eng. R. Cas. 11; Steele *v.* Pacific Coast R. Co. 74 Cal. 323, 32 Am. & Eng. R. Cas. 333. Some of the authorities holding such evidence admissible seem to us to go to the extreme. Where the particular engine which set the fire is known and designated, proof that it set other fires is admissible, but not proof that other engines set out fires. Ireland *v.* Cincinnati, etc., R. Co., 79 Mich. 163.

[2] St. Louis, etc., R. Co. *v.* Jones, 59 Ark. 105 26 S. W. R. 595. Where evidence is admissible of other fires it must appear that the fires were not very remote from the fire causing the damage. If the fires are remote in time it must appear that the machinery and appliances remained in the same condition of repair or the evidence will not be admitted. Collins *v.* New York, etc., R. Co., 109 N. Y. 243, 32 Am. & Eng. R. Cas. 366. "Reasonable latitude must, of course, be allowed. The purpose of such proofs would be defeated if they were confined to the exact or precise time of the occurrence." Henderson *v.* Philadelphia, etc., R. Co., 144 Pa. St. 461.

[3] Longabaugh *v.* Virginia City, etc., R. Co., 9 Nev. 271; Smith *v.* Old Colony, etc., R. Co., 10 R. I. 22; St. Joseph, etc., R. Co. *v.* Chase, 11 Kan. 47.

[4] Patton *v.* St. Louis, etc., R. Co., 87 Mo. 117, s. c. 23 Am. & Eng. R. Cas. 364; Atchison, etc., R. Co. *v.* Bales, 16 Kan. 252; Louisville, etc., R. Co. *v.* McCorkle, 12 Ind. App. 691, 40 N. R. E. 26; Lake Erie, etc., R. Co. *v.* Middlecoff, 150 Ill. 27, 37 N. E. R. 660.

[5] St. Louis, etc., R. Co. *v.* Jones, 59 Ark. 105, 26 S. W. R. 595.

that the railway company settled with other persons for loss caused by the same fire.[1]

§ 1244. **Proof that company negligently set fire.**—In jurisdictions in which a presumption of negligence arises on proof that the fire was set by the locomotives of the defendant much less evidence may be required on the part of the plaintiff than in those cases where no such presumption arises. Of course, before the plaintiff can secure the benefit of such a presumption he must show that the company set the fire, and, when he has done this, it has been held that he has made out a *prima facie* case,[2] and may recover unless the defendant successfully overcomes the presumption of negligence against it. But, in those cases where no such presumption arises and the burden is on the plaintiff to show negligence as well as the setting of the fire, it necessarily follows that the plaintiff must produce more evidence than in the former class of cases. The evidence necessary to prove setting of the fire is the same in either case, for what would prove that the fire was set by the company in one case would prove that the fire was set by the company in another similar case, although in one case the burden of proof of negligence may be on the plaintiff while in the other case the defendant may be presumptively negligent. And it often happens that negligence can not be directly proved, but must be proved by circumstantial evidence. That such evidence is admissible is settled both by reason and authority.[3] Since the question of negligence is ordinarily one for the jury, and, as some juries might infer negligence from a state

[1] The rule is thus stated in Louisville, etc., R. Co. *v.* Roberts, 13 Ind. App. 692, 42 N. E. R. 247: "On the trial, the court, over appellant's objection, permitted the appellee to prove that appellant had paid other landowners for loss sustained by them caused by the same fire. The evidence was introduced as tending to prove that appellant recognized its liability for the losses occasioned by the fire in question. This was error. The fact that appellant had paid such losses of others was not admissible in evidence as tending to prove that appellant was liable to appellee."

[2] Reed *v.* Missouri Pacific R. Co., 50 Mo. App. 504; St. Louis, etc., R. Co. *v.* Strotz, 47 Ill. App. 342; Niskern *v.* Chicago, etc., R. Co., 22 Fed. R. 811.

[3] Atchison, etc., R. Co. *v.* Bales, 16 Kan. 252; Philadelphia, etc., R. Co. *v.* Schultz, 93 Pa. St. 341.

of facts from which other juries might fail to find negligence, it necessarily follows that there will be some conflict in the authorities as to what is sufficient evidence to show negligence. But, as to what tends to show, or, is competent as tending to show negligence, the authorities are pretty well agreed. Negligence may be inferred where property is set on fire by a locomotive which is shown to have been without a spark arrester. The absence of a spark arrester is *prima facie* evidence of negligence.[1] So, where fire is shown to have originated from a worn-out and defective spark arrester a *prima facie* case of negligence is made out.[2] And where an engine emits sparks of large and unusual size, it may be inferred that it is not provided with a proper spark arrester,[3] or where sparks are thrown to a great height or far from the track.[4] And proof that an engine frequently set fires has been held competent as tending to show negligence on the part of the company.[5] It is

[1] Lackawanna, etc., R. Co. *v.* Doak, 52 Pa. St. 379, s. c. 91 Am. Dec. 166.

[2] Louisville, etc., R. Co. *v.* McCorkle, 12 Ind. App. 691, 40 N. E. R. 26, and cases cited; Ryan *v.* Gross, 68 Md. 377, s. c. 11 Cent. R. 502.

[3] Pennsylvania R. Co. *v.* Watson, 81½ Pa. St. 293; Philadelphia, etc., R. Co. *v.* Schultz, 93 Pa. St. 341; Philadelphia, etc., R. Co. *v.* Hendrickson, 80 Pa. St. 182, s. c. 21 Am. R. 97; Penn. R. Co. *v.* Lacey, 89 Pa. St. 458; Jackson *v.* Chicago, etc., R. Co., 31 Iowa 176; Henry *v.* Southern, etc., R. Co., 50 Cal. 176; Toledo, etc., R. Co. *v.* Maxfield, 72 Ill. 95; Herring *v.* Wilmington, etc., R. Co., 10 Ired. L. 402; Toledo, etc., R. Co. *v.* Kingman, 49 Ill. App. 43.

[4] Huyett *v.* Philadelphia, etc., R. Co., 23 Pa. St. 373; Missouri, etc., Co. *v.* Texas, etc., R. Co., 41 Fed. R. 917; Chicago, etc., R. Co. *v.* Ostrander, 116 Ind. 259, s. c. 19 N. E. R. 110; Cincinnati, etc., R. Co. *v.* Smock, 133 Ind. 411, 33 N. E. R. 108.

[5] Gandy *v.* Chicago, etc., R. Co., 30 Iowa 420; Atchison, etc., R. Co. *v.* Stanford, 12 Kan. 354; Hull *v.* Sacramento, etc., R. Co., 14 Cal. 387; St. Joseph, etc., R. Co. *v.* Chase, 11 Kan. 47; Jacksonville, etc., R. Co. *v.* Peninsular, etc., Co., 27 Fla. 1 and 157, s. c. 9 So. R. 661, 17 L. R. A. 33. "If engines in good repair and properly constructed do not ordinarily set out fires, defects in an engine, or negligence in running them, may be inferred from the frequent escape of fire therefrom. Circumstances of this kind may be considered by the jury." Slossen *v.* Burlington, etc., R. Co., (Iowa) 10 N. W. R. 860, 7 Am. & Eng. R. Cas. 509. In Jacksonville, etc., R. Co. *v.* Peninsular, etc., Co., 27 Fla. 1 and 157, the court said: "The authorities hold that, where it is shown, as it is in this case, that the fatal fire had been set out from a designated engine, it is admissible to introduce evidence of other fires previously set out by the same engine, but not by any other engine of the defendant company. Ireland *v.* Cincinnati, W.

also proper to show, as tending to prove negligence on the part of the company, that it ran its trains at a great and unusual speed;[1] that wood was being used for fuel in a locomotive constructed for burning coal;[2] and that the engine emitted large quantities of sparks while standing near combustible material at a time when a strong wind was blowing.[3] Where the alleged negligence of the company consisted in permitting inflammable material to accumulate, proof of the accumulation and that it was discovered on fire shortly after the passage of a train has been held sufficient to support a verdict for plaintiff.[4] Where the only evidence to establish the defendant's responsibility was proof that it had settled with another party for property destroyed by the same fire, it was held that no negligence was shown.[5]

§ 1245. Evidence to rebut presumption of negligence.— Where a presumption of negligence arises from mere proof of setting the fire the burden is upon the defendant to prove that it was guilty of no negligence before it can escape liability. As tending to rebut a presumption of negligence the defendant may show that its engines were equipped with approved appara-

& M. R. Co., 79 Mich. 163; Coale *v.* Hannibal & St. J. R. Co., 60 Mo. 227; Brighthope R. Co. *v.* Rogers, 76 Va. 443; Gibbons *v.* Wisconsin Valley R. Co., 58 Wis. 335; Slossen *v.* Burlington, C. R. & N. R. Co., 60 Iowa 215; Lanning *v.* Chicago, B. & Q. R. Co., 68 Iowa 502; Baltimore & S. R. Co. *v.* Woodruff, 4 Md. 242, 59 Am. Dec. 72. Former fires by the same engine are admissible as evidence tending to prove its defective condition or construction, or improper management, and those put out by other engines are excluded because they are matters collateral to the issue, and not evidence of the imperfect condition or bad management of the particular locomotive."

[1] Gandy *v.* Chicago, etc., R. Co., 30 Iowa 420; Martin *v.* Western, etc., R. Co., 23 Wis. 437. Evidence of unusual speed is not admissible, however, unless it be shown that such speed would make the danger from fires greater. Brusberg *v.* Milwaukee, etc., R. Co., 50 Wis. 231, 6 N. W. R. 821.

[2] Chicago, etc., R. Co. *v.* Ostrander, 116 Ind. 266, 38 Am. & Eng. R. Cas. 346; Chicago, etc., R. Co. *v.* Quaintance, 58 Ill. 389; St. Joseph, etc., R. Co. *v.* Chase, 11 Kan. 47.

[3] Fero *v.* Buffalo, etc., R. Co., 22 N. Y. 209.

[4] Terre Haute, etc., R. Co. *v.* Walsh, 11 Ind. App. 13, 38 N. E. R. 534.

[5] Missouri, etc., R. Co. *v.* Fulmore, (Tex.) 29 S. W. R. 688; Dillingham *v.* Whitaker, (Tex.) 25 S. W. R. 723. Indeed, we think such evidence is inadmissible.

tus for preventing the escape of sparks and that such apparatus was in good repair. But the mere use of good machinery is not always enough to relieve a defendant for it may be guilty of negligence in operating such machinery and there are authorities which hold, when this is also alleged, that the defendant must show in addition to the use of improved machinery that it was guilty of no negligence in operating the machinery.[1] And although it is shown that the machinery was properly operated it must also appear that the machinery was in good repair before the plaintiff's *prima facie* case will be overcome.[2] If the defendant makes it appear that its locomotives were equipped with approved contrivances to prevent fires, that they were in good order, and that the engines were carefully and skilfully managed, the plaintiff can not recover unless he alleges and shows negligence in some other respect, nothwithstanding the fires were set out by the company.[3] If

[1] Johnson *v.* Northern Pacific R. Co., 1 N. Dak. 354, 48 N. W. R. 227, 45 Am. & Eng. R. Cas. 554; Chicago, etc., R. Co. *v.* Zimmerman, 12 Ind. App. 504, 40 S. E. R. 703; Texas, etc., R. Co. *v.* Levine, 87 Tex. 437, 29 S. W. R. 466; St. Louis, etc., R. Co. *v.* Lindley, (Tex.) 29 S. W. R. 1101; Missouri, etc., R. Co. *v.* Kelley, (Tex.) 30 S. W. R. 488; Martin *v.* Texas, etc., R. Co., 87 Tex. 117, 26 S. W. R. 1052. Much, however, may depend upon the theory of the complaint. The rule is thus stated in Gulf, etc., Railway *v.* Benson, 69 Tex. 407, s. c. 5 S. W. R. 822: "When property situate contiguous to the right of way of a railroad company is burned by sparks emitted from the company's locomotive engine passing over the road, which ignite the dry grass on the right of way, and injury results therefrom, in a suit for damages brought by the injured party, the burden of proof is on the railway company to show that there was no negligence. This burden of proof is, however, satisfied when the company shows by undisputed evidence that it was using at the time, and upon the very engine in question, the best and most approved mechanical appliances known and in use to prevent the escape of fire from its engine and sparks from the smoke-stack, and that the same were in good repair and condition, and were operated by a skillful engineer in a careful manner." This statement of the law is adopted and followed in the case of Missouri, etc., R. Co. *v.* Texas, etc., R. Co., 41 Fed. R. 917.

[2] Texas, etc., R. Co. *v.* Gaines, (Tex.) 26 S. W. R. 873. But where the mismanagement of the engine which set the fire is the only negligence alleged the defendant need not show that the engine was in good repair. Atchison, etc., R. Co. *v.* Ayers, (Kan.) 42 Pac. R. 722.

[3] Menominie, etc., R. Co. *v.* Milwaukee, etc., R. Co., (Wis.) 65 N. W. R. 176; New York, etc., R. Co. *v.* Baltz, 141 Ind. 661, 36 N. E. R. 414;

the plaintiff does not attempt to charge the setting of the fire to any particular locomotive the defendant may introduce evidence showing that all its engines were provided with the most approved appliances,[1] but where the fire is attributed to a particular engine evidence as to the condition of other engines would seem to be incomptent. It is also competent for the defendant to show that its engines had been regularly and carefully inspected and found in good condition.[2]

§ 1246. **Attorney's fees.**—In some states by statute the plaintiff is permitted to recover, in addition to the damage actually done, a reasonable fee for his attorney. Such a statute is in force in the state of Kansas.[3] But before a recovery of such a fee will be decreed the plaintiff must demand the same in his complaint or petition and then submit the question to the court or jury trying the case upon the merits.[4] Where an

Galveston, etc., R. Co. *v.* Rheiner, (Tex.) 25 S. W. R. 971; Missouri, etc., R. Co. *v.* Stafford, (Tex.) 31 S. W. R. 319; Savannah, etc., R. Co. *v.* Pelzer, etc., Co., 60 Fed. R. 39. The rule is thus stated in a recent case: "We recognize also the wisdom and sound policy of the act of the legislature in requiring a screen to be used, the best possible contrivance known to science, and in general use; that railroads should be held to strict diligence in the use of same, seeing that it is in good order, perfect condition, and without defect, and even leaving the burden of evidence on the railroad to show this care and diligence and sufficiency of the machine used in the place of the old one first noticed or prescribed by the legislature. And yet, when a railroad has brought itself clearly and conclusively within the line indicated, then it results that, under the law in Kentucky, they are not responsible if, by accident, fire does escape, and causes serious damage, even as claimed in this case. If any further obligation or responsibility is to be imposed on such company, it must be by legislative authority, and not by the courts. Whatever may be our sympathy for a sufferer by the loss of his property if it was shown to have been destroyed by fire from a railroad engine (as we think this was not), we are unauthorized to adjudge him compensation out of the property of another, who is clearly within the requirements of the law." Louisville, etc., R. Co. *v.* Mitchell, (Ky.) 29 S. W. R. 860. See, also, Spaulding *v.* Chicago, etc., Railway Co., 33 Wis.582.

[1] Haley *v.* St. Louis, etc., R. Co., 69 Mo. 614.

[2] Chicago, etc., R. Co. *v.* Quaintance, 58 Ill. 389; Baltimore, etc., R. Co. *v.* Shipley, 39 Md. 251; Cleveland *v.* Grand Trunk R. Co., 42 Vt. 449.

[3] St. Louis, etc., R. Co. *v.* Hoover, (Kan.) 43 Pac. R. 854.

[4] Fort Scott, etc., R. Co. *v.* Tubbs, 47 Kan. 630, s. c. 28 Pac. R. 612, s. c. 49 Am. & Eng. R. Cas. 685; Fort Scott, etc., R. Co. *v.* Karracker, 46 Kan. 511, s. c. 26 Pac. R. 1027; Missouri Pacific R. Co. *v.* Merrill, 40 Kan. 404.

insurance company which had paid part of the owner's loss on account of fire alleged to have been negligently set by defendant was joined as a party plaintiff it was held proper to include an attorney's fee in the judgment where the only interest the insurance company had was the right of subrogation to the insured's interest in the judgment.[1]

§ 1247. **Personal and other injuries caused by fires.**—It sometimes happens that personal and other injuries, aside from the mere burning of property, are caused by fires set out by railway companies. In such cases where the injuries are a direct and proximate result of the railway company's negligence it will be liable to one who is free from contributory negligence for damages on account of such injuries. Thus, a railway company has been held liable for the death of a person caused by the explosion of a powder mill which had been ignited by sparks negligently permitted to escape from a locomotive.[2] And where a person was injured while acting with reasonable prudence in attempting to save from destruction the property of another in danger on account of fire negligently set out by a railway company, it was held that the company setting out the fire would be liable for the injuries such person had sustained.[3] Where loss of life is caused by a fire negligently set without any contributory negligence on the part of the person bringing an action or his intestate, the company setting the fire may be liable.[4] But where a person voluntarily exposes himself to danger and is injured by the fire there can be no recovery.[5] Where fences are destroyed by fires negligently set and as a proximate result of such destruction animals escape and are lost,[6] or crops are destroyed,[7] the company may be liable.

[1] Atchison, etc., R. Co. *v.* Huitt, (Kan. App.) 41 Pac. R. 1051.

[2] Babcock *v.* Fitchburg R. Co., 19 N. Y. Supp. 774.

[3] Liming *v.* Illinois Central R. Co., 81 Iowa 246, 47 N. W. R. 66, 45 Am. & Eng. R. Cas. 581.

[4] Rajnowski *v.* Detroit, etc., R. Co., 74 Mich. 20, s. c. 78 Mich. 681.

[5] Pike *v.* Grand Trunk, etc., R. Co., 39 Fed. R. 255, s. c. 38 Am. & Eng. R. Cas. 336; Seale *v.* Gulf, etc., R. Co., 65 Tex. 274.

[6] St. Louis, etc., R. Co. *v.* McKinsey, 78 Tex. 298, s. c. 14 S. W. R. 645.

[7] Miller *v.* St. Louis, etc., R. Co., 90 Mo. 389, 29 Am. & Eng. R. Cas. 172 and 254.

CHAPTER XLIX.

INJURIES TO TRESPASSERS, LICENSEES AND STRANGERS.

§ 1248. Who are licensees.
1249. Difference between invitation and license.
1250. Duty to licensees.
1251. Liability for injuries to licensees.
1252. Who are trespassers.
1253. Duty to trespassers.
1254. Liability for injuries to trespassers.
1255. Trespassers on cars.
1256. Strangers at stations.
1257. Injuries to trespassers upon track.
1258. Injuries to persons in company's yards.
§ 1259. Liability for injury to trespassing children.
1260. Injury to trespassing children—Illustrative and conflicting cases.
1261. Contributory negligence of children.
1262. Imputable negligence.
1263. Liability for injury to persons on adjacent highway.
1264. Liability for frightening horses.
1265. Liability to strangers for wilful acts of employes.

§ 1248. **Who are licensees.**—It is sometimes extremely difficult to distinguish a license from an invitation on the one hand and from mere sufferance or acquiescence on the other. License implies permission or authority, and is, therefore, more than mere sufferance, but it does not imply an invitation. Thus, one who occasionally uses a railroad track or the like, without objection, and by the mere sufferance or passive acquiescence of the company, is not a licensee unless he has either express or clearly implied permission or authority so to do.[1] So, on the other hand, one may have permission to do

[1] Jeffersonville, etc., R. Co. *v.* Goldsmith, 47 Ind. 43; Morrow *v.* Sweeney, 10 Ind. App. 626, s. c. 38 N. E. R. 187; Palmer *v.* Chicago, etc., R. Co. 112 Ind. 250; Terre Haute, etc., R. Co. *v.* Graham, 95 Ind. 286; Brown *v.* Louisville, etc., R. Co., (Ky.) 30 S. W. R. 639; Akers *v.* Chicago, etc., R. Co., 58 Minn. 540, s. c. 60 Am. & Eng. R. Cas. 30; Central R. Co. *v.* Brinson, 70 Ga. 207, s. c. 19 Am. & Eng. R. Cas. 42; Baltimore, etc., R. Co. *v.*

a certain thing for his own sole benefit, and yet not be invited to do so. A license will be much more readily implied in some cases than in others. Thus, continuous use by many persons may give rise to the implication of a license where merely occasional use by one or few persons would not do so, and a license to cross a track may be implied where a license to use it longitudinally would not be implied. One who goes upon the premises of another, without permission, express or implied, although no objection is made, may nevertheless be a trespasser. If he has permission he will, as a general rule at least, be deemed to be a licensee, and if he is invited he is more than a licensee and a higher duty is due him. One who goes upon the premises of a railroad company merely to speak to an employe and not upon any business with the company is a mere licensee.[1] The same has been held to be true of one who went to a mine to seek employment.[2] And city firemen and policemen are likewise held to be mere licensees, under ordinary circumstances, even when upon another's premises in the discharge of their duties.[3] One who

State, 62 Md. 479, s. c. 19 Am. & Eng. R. Cas. 83; Carrington *v.* Louisville, etc., R. Co., 88 Ala. 472, s. c. 41 Am. & Eng. R. Cas. 543; Glass *v.* Railroad Co., 94 Ala. 581, s. c. 10 So. R. 215; Blanchard *v.* Lake Shore, etc., R. Co., 126 Ill. 416, s. c. 18 N. E. R. 799; Finlayson *v.* Chicago, etc., R. Co., 1 Dill. (U. S. C. C.) 579; Memphis, etc., R. Co. *v.* Womack, 84 Ala. 149; Glass *v.* Memphis, etc., R. Co., 94 Ala. 581, s. c. 10 So. R. 215; Anderson *v.* Chicago, etc., R. Co., 87 Wis. 195, 58 N. W. R. 79; Philadelphia, etc., R. Co. *v.* Hummell, 44 Pa. St. 375; Bancroft *v.* Boston, etc., R. Co., 97 Mass. 275; Parker *v.* Portland, etc., R. Co., 69 Me. 173, s. c. 31 Am. R. 262.

[1] Woolwine *v.* Chesapeake, etc., R. Co., 36 W. Va. 329, s. c. 15 S. E. R. 81; Galveston Oil Co. *v.* Morton, 70 Tex. 400, s. c. 7 S. W. R. 756; Lachat *v.* Lutz, 94 Ky. 287, s. c. 22 S. W. R. 218; Faris *v.* Hoberg, 134 Ind. 269, s. c. 33 N. E. R. 1028; Wright *v.* Rawson, 52 Iowa 329, s. c. 35 Am. R. 275. In Patterson's Ry. Ac. Law, 176, § 174, it is said that "licensees are persons who are neither passengers, servants, nor trespassers, and, not standing in any contractual relations to the railway, are permitted by the railway to come upon its premises for their own interests, convenience or gratification." Quoted in Woolwine *v.* Chesapeake, etc., R. Co., 36 W. Va. 329.

[2] Larmore *v.* Crown Point Iron Co., 101 N. Y. 391.

[3] 2 Jaggard on Torts 891; Pennsylvania R. Co. *v.* Meyers, 136 Ind. 242, s. c. 36 N. E. R. 32; Woodruff *v.* Bowen, 136 Ind. 431, s. c. 34 N. E. R. 1113, 22 L. R. A. 198; Blatt *v.* McBarron, 161 Mass. 21, s. c. 36 N. E. R. 468; Gibson *v.* Leonard, 143 Ill. 182, s. c. 36 Am. St. R. 376; Beehler *v.* Daniels,

comes upon the premises of a railroad company, in the usual course of business with it, for the purpose of loading and unloading, or delivering and receiving freight is not a mere licensee, but is entitled to the care due one who is invited to come upon the premises of another.[1] And this is true of an employe of one railroad company who is engaged in delivering cars to another railroad company upon the latter's tracks, in the usual course of business between the two companies.[2] But where a shipper and his employes take an empty car which they find upon a side-track and push it up to a chute and load it, all "without notice to, or the knowledge of the company," they are, "at best, mere licensees, if not trespassers."[3] And one who, for his own convenience in unloading freight, erects a movable platform on the right of way, is a mere licensee, and the company is not bound to see that the platform is so placed as not to be struck by a train.[4] One who comes upon the premises of a railroad company by implied invitation will become no more than a licensee if he remains upon the premises, without excuse, an unreasonable time after his business is completed, and this rule has been applied to one who came to a station to take a certain train, and, having missed it, remained in the depot a long time without any

18 R. I. 563, s. c. 27 L. R. A. 512, 29 Atl. R. 6. Compare Learoyd *v.* Godfrey, 138 Mass. 315; Parker *v.* Barnard, 135 Mass. 116; Low *v.* Grand Trunk R. Co., 72 Me. 313, s. c. 39 Am. R. 331.

[1] Toledo, etc., R. Co. *v.* Hauck, 8 Ind. App. 367, 35 N. E. R. 573; Chadderdon *v.* Michigan Cent. R. Co., 100 Mich. 293, s. c. 58 N.W. R. 998; Newson *v.* New York, etc., R. Co., 29 N. Y. 383; Conlan *v.* New York, etc., R. Co., 74 Hun 115, 26 N. Y. Supp. 659; DeBolt *v.* Kansas City, etc., Railway Co., 123 Mo. 496, s. c. 27 S. W. R. 575; International, etc., R. Co. *v.* Hall, (Tex. C. App.) 25 S. W. R. 52; Chicago, etc., R. Co. *v.* Fillmore, 57 Ill. 265; New Orleans, etc., R. Co. *v.* Bailey, 40 Miss. 395; Railroad Co. *v.* Hanning, 15 Wall. (U. S.) 649; Campbell *v.* Portland, etc., R. Co., 62 Me. 552. See, also, O'Callaghan *v.* Bode, 84 Cal. 489; International, etc., R. Co. *v.* Neira, (Tex. C. App.) 28 S. W. R. 95; Chicago, etc., R. Co. *v.* Dignan, 56 Ill. 487.

[2] Turner *v.* Boston, etc., R. Co., 158 Mass. 261, s. c. 33 N. E. R. 520.

[3] Cleveland, etc., R. Co. *v.* Stephenson, 139 Ind. 641, s. c. 37 N. E. R. 720. See, also, Oatts *v.* Cincinnati, etc., R. Co., (Ky.) 22 S. W. R. 330.

[4] McCabe *v.* Chicago, etc., R. Co., 88 Wis. 531, s. c. 60 N. W. R. 260.

business there.[1] So, although a railroad company is in the habit of stopping its trains to allow passengers to get on and off at other places than stations, whenever signaled to do so, the license to others than employes engaged in the performance of their duties to use the right of way extends only to those who come thereon for the purpose of boarding or alighting from the trains.[2]

§ 1249. **Difference between invitation and license.**—We have shown that the mere sufferance or failure to object is not sufficient to constitute a license unless under such circumstances that a license should be inferred, and we have also stated that there is a difference between a license and an invitation. It is frequently said that while mere permission is no more than a license, yet if the owner or occupant of lands, by any enticement, allurement or inducement, causes others to come upon the same, he owes a duty to such persons to use reasonable care to see that the premises are safe for that purpose and is liable for injuries caused by the violation of such duty to one who is free from contributory negligence.[3] There is, however, no invariable test that can be stated in general terms. That of mutuality, as announced by the supreme court of Massachusetts seems to be the best that has been suggested. It is stated in the following words: "To come under an im-

[1] Heinlein *v.* Boston, etc., R. Co., 147 Mass. 136. See, also, Armstrong *v.* Medbury, 67 Mich. 250.

[2] Matson *v.* Port Townsend, etc., R. Co., 9 Wash. 449, s. c. 37 Pac. R. 705.

[3] Evansville, etc., R. Co. *v.* Griffin, 100 Ind. 221; Indiana, etc., R. Co. *v.* Barnhart, 115 Ind. 399; Sweeny *v.* Old Colony, etc., R. Co., 10 Allen (Mass.) 368, s. c. 87 Am. Dec. 644; Zoebisch *v.* Tarbell, 10 Allen (Mass.) 385, s. c. 87 Am. Dec. 660, and note; Kay *v.* Pennsylvania R. Co., 65 Pa. St. 269; Gillis *v.* Pennsylvania R. Co., 59 Pa. St. 129; note to Howe *v.* Omhart, 7 Ind. App. 32, 33 N. E. R. 466, 2 Am. L. Reg. & Rev. (N. S.) 196; Pittsburgh, etc., R. Co. *v.* Bingham, 29 Ohio St. 364; Campbell *v.* Portland Sugar, etc., Co., 62 Me. 552; Corby *v.* Hill, 4 Com. B. (N. S.) 556; Hounsell *v.* Smith, 7 Com. B. (N. S.) 731; Hardcastle *v.* South Yorkshire, etc., R. Co., 4 Hurl. & N. 67; Binks *v.* South Yorkshire, etc., R. Co., 32 L. J. (N. S.) Q. B. 26; Scott *v.* London Docks Co., 11 L. T. Rep. (N. S.) 383; Quimby *v.* Boston, etc., R. Co., 69 Me. 340; Grand Rapids, etc, Co. *v.* Martin, 41 Mich. 667; Coombs *v.* New Bedford, etc., Co., 102 Mass. 572, s. c. 3 Am. R. 102; Bennett *v.* Railroad Co., 102 U. S. 577; Pennsylvania R. Co. *v.* Atha, 22 Fed. R. 920.

plied invitation, as distinguished from a mere license, the visitor must come for a purpose connected with the business in which the occupant is engaged, or which he permits to be carried on there. There must at least be some mutuality of interest in the subject to which the visitor's business relates, although the particular thing which is the subject of the visit may not be for the benefit of the occupant.'"[1] It is believed that the decisions in the cases cited in the preceding section could well have been based upon this ground, although, in some of them, it was not expressly mentioned. But this test fails where the railroad company, by its conduct has induced the public to use a crossing in the belief that it is a public crossing which it will protect them in using, as for instance, where it constructs and opens the crossing and keeps a flagman there, who signals travelers to cross. In such a case the traveler is not invited to come upon business connected with the company, but he is invited and induced to cross by the conduct of the company, and the "inducement" test stated in the first part of this section applies.[2]

§ 1250. **Duty to licensees.**—It is said that the licensor owes a duty to his licensee to give him notice of hidden dangers or traps.[3] Expressions to this effect are found in some of the decided cases, but we think they do not accurately state the law. Doubtless a land-owner can not lawfully shoot a licensee

[1] Plummer *v.* Dill, 156 Mass. 426, s. c. 31 N. E. R. 128, 32 Am. St. R. 463; Hart *v.* Cole, 156 Mass. 475; Indermaur *v.* Dames, L. R. 1 C. P. 274; O'Connor *v.* Illinois Cent. R. Co., 44 La. Ann. 339; note in 2 Am. L. Reg. & Rev. (N. S.) 196; Benson *v.* Baltimore, etc., Co., 77 Md. 535, 26 Atl. R. 973; Bennett *v.* Railroad Co., 102 U. S. 577; Railway Co. *v.* Ferguson, 57 Ark. 16, s. c. 38 Am. St. R. 217; Campbell Neg., § 44; 2 Jaggard Torts, 896; Beach on Contrib. Neg., § 51.

[2] Sweeny *v.* Old Colony, etc., R. Co., 10 Allen (Mass.) 368, s. c. 87 Am. Dec. 644. See, also, Murphy *v.* Boston, etc., R. Co., 133 Mass. 121; Holmes *v.* Drew, 151 Mass. 578; Davis *v.* Central. Cong. Soc., 129 Mass. 367; Johnson *v.* Lake Superior, etc., R. Co., 86 Wis. 64, s. c. 56 N. W. R. 161; Clampit *v.* Chicago, etc, R. Co., 84 Iowa 71, s. c. 50 N. W. R. 673; Taylor *v.* Delaware, etc., R. Co., 113 Pa. St. 162; Byrne *v.* New York, etc., R. Co., 104 N. Y. 362, s. c. 58 Am. R. 512; *ante*, § 1154.

[3] 2 Am. L. Reg. & Rev. (N. S.) 197.

under ordinary circumstances or set spring guns or traps for him,[1] and it may be that if the licensor makes the premises more dangerous after the license is granted in such a way that the increased danger is not open to observation it is his duty to notify the licensee,[2] but we do not believe that he is bound to notify him of ordinary dangers incident to the condition and use of the premises at the time the license was granted. The better rule is that the licensee takes his license subject to its concomitant perils,[3] and the licensor, as a general rule, owes him no duty except to refrain from wilfully or wantonly injuring him.[4] "In the language of continental jurisprudence

[1] Reardon *v.* Thompson, 149 Mass. 267; Woodruff *v.* Bowen, 136 Ind. 431, s. c. 22 L. R. A. 198, 204.

[2] See Norfolk, etc., R. Co. *v.* Wheeler, (Va.) s. c. 29 L. R. A. 825; McKone *v.* Michigan Cent. R. Co., 51 Mich. 601; New Orleans, etc., R. Co. *v.* Hanning, 15 Wall. (U. S.) 649; Corby *v.* Hill, 4 C. B. (N. S.) 556.

[3] Evansville, etc., R. Co. *v.* Griffin, 100 Ind. 221, s. c. 50 Am. R. 783; Indiana, etc., R. Co. *v.* Barnhart, 115 Ind. 399; Cleveland, etc., R. Co. *v.* Adair, 12 Ind. App. 569, s. c. 39 N. E. R. 672, 40 N. E. R. 822; Faris *v.* Hoberg, 134 Ind. 269; Grethen *v.* Chicago, etc., R. Co., 22 Fed. R. 609; Gibson *v.* Leonard, 143 Ill. 182, s. c. 36 Am. St. R. 376; Sutton *v.* New York, etc., R. Co., 66 N. Y. 243; Matthews *v.* Bensel, 51 N. J. L. 30, s. c. 16 Atl. R. 195; Schmidt *v.* Bauer, 80 Cal. 565, s. c. 22 Pac. R. 256; Pittsburgh, etc., R. Co. *v.* Bingham, 29 Ohio St. 364; Illinois Cent. R. Co. *v.* Godfrey, 71 Ill. 500; Sweeny *v.* Old Colony R. Co., 10 Allen (Mass.) 368, s. c. 87 Am. Dec. 644, and note; Diebold *v.* Pennsylvania Co., 50 N. J. L. 478; Woolwine *v.* Chesapeake, etc., R. Co., 36 W. Va. 329, s. c. 16 L. R. A. 271; Holmes *v.* Northeastern Railroad Co., L. R. 4 Exch. 255; Sullivan *v.* Waters, 14 Ir. C. L. R. 460, Blackmore *v.* Toronto, etc., R. Co., 38 Up. Can. Q. B. 172. See, also, City of Indianapolis *v.* Emmelman, 108 Ind. 530; Baltimore, etc., R. Co. *v.* Sherman, 30 Gratt. (Va.) 602; Baltimore, etc., R. Co. *v.* State, 62 Md. 479; Gillis *v.* Pennsylvania R. Co., 59 Pa. St. 129; Akers *v.* Chicago, etc., R. Co., 58 Minn. 540, s. c. 60 Am. & Eng. R. Cas. 30.

[4] Nicholson *v.* Erie R. Co., 41 N. Y. 525, 530; Cleveland, etc., R. Co. *v.* Tartt, 64 Fed. R. 823; Parker *v.* Pennsylvania Co., 134 Ind. 673, s. c. 34 N. E. R. 504; McClaren *v.* Indianapolis, etc., R. Co., 83 Ind. 319; Pennsylvania Co. *v.* Meyers, 136 Ind. 242; Wright *v.* Boston, etc., R. Co., 142 Mass. 296, s. c. 7 N. E. R. 866; Johnson *v.* Boston, etc., R. Co., 125 Mass. 75; Spicer *v.* Chesapeake, etc., R. Co., 34 W. Va. 514; Illinois Cent. R. Co. *v.* Godfrey, 71 Ill. 500; Central R. Co. *v.* Brinson, 70 Ga. 207, s. c. 19 Am. & Eng. R. Cas 42; Illinois Cent. Railroad Co. *v.* Hetherington, 83 Ill. 510; Baltimore, etc., R. Co. *v.* State, 62 Md. 479, s. c. 50 Am. R. 233; St. Louis, etc., Co. *v.* Fairbairn, 48 Ark. 491; Morrissey *v.* Eastern R. Co., 126 Mass. 377, s. c. 30 Am. R. 686, and authorities cited in last note *supra*. It certainly owes him

there is no question of *culpa* between a gratuitous licensee and the licensor, as regards the safe condition of the property to which the license applies. Nothing short of '*dolus*' will make the licensor liable.'"[1] It is held by some of the courts, however, that if a railroad company licenses or acquiesces in the use of its track or premises by others it must exercise reasonable care not only to avoid injuring them after they are discovered to be in danger but also to keep a careful lookout to discover and avoid injury to all who may be expected to be upon their right of way or premises.[2] This rule, especially when applied in favor of those who walk along a railroad track between crossings seems to us to be not only contrary to the weight of authority but also impracticable and in violation of the true principle that should govern such cases. If it be true, as generally conceded, that a licensee takes his license subject to the "concomitant risks and perils," he must surely take it subject to the use of the road in the manner in which it was used at the time the license was granted, that is, subject to the running of trains in the ordinary manner without any special reference to him, and he occupies, therefore, to this extent, substantially the position of a trespasser. In other words, the company owes him no duty of active vigilance to specially look out for and protect him, for he must know that his license

no duty of active vigilance. Walsh *v.* Fitchburg R. Co., 145 N. Y. 301, s. c. 27 L. R. A. 724.

[1] Pollock on Torts, § 426.

[2] Lynch *v.* St. Joseph, etc., Co., 111 Mo. 601, s. c. 19 S. W. R. 1114; Chicago, etc., R. Co. *v.* Wilgus, 40 Neb. 660, s. c. 58 N. W. R. 1125; Johnson *v.* Lake Superior, etc., R. Co., 86 Wis. 64, s. c. 56 N. W. R. 161; (but see Anderson *v.* Chicago, etc., R. Co., 87 Wis. 195, s. c. 58 N. W. R. 79, 83); Troy *v.* Cape Fear, etc., R. Co., 99 N. Car. 298, s. c. 6 S. E. R. 77; Smith *v.* Norfolk, etc., R. Co., 114 N. Car. 728, s. c. 60 Am. & Eng. R. Cas. 102; St. Louis, etc., R. Co. *v.* Crosnoe, 72 Tex. 79, s. c. 37 Am. & Eng. R. Cas. 313. See, also, Daley *v.* Norwich, etc., R. Co., 26 Conn. 591; (but see Nolan *v.* New York, etc., R. Co., 53 Conn. 461.); Kansas, etc., R. Co. *v.* Pointer, 9 Kan. 620; Brown *v.* Hannibal, etc., R. Co., 50 Mo. 461; Murphy *v.* Chicago, etc., R. Co., 45 Iowa 661; International, etc., R. Co. *v.* Lee, (Tex.) 34 S. W. R. 160, 161; Fiedler *v.* St. Louis, etc., R. Co., 107 Mo. 645; Chamberlain *v.* Missouri Pac. R. Co., (Mo.) 33 S. W. R. 437; Pickett *v.* Wilmington, etc., R. Co., (N. Car.) 23 S. E. R. 264. See, also, Roth *v.* Union Depot Co., (Wash.) 43 Pac. R. 641.

is subject to all risks incident to the use of the track by the company in the same manner in which it was used at the time the license was granted and that the company assumes no new obligation or duty. Indeed, it seems to us that he is bound to know that a railroad company has no power to license the use of its tracks in such a manner as to interfere with its duties to the public as a common carrier. If it owes a duty to every bare licensee to run its trains with reference to him, to look out for him, to signal, to slow up and, perhaps to stop whereever it has reason to expect him, it can do little else, its trains can not be on time and the traveling public must suffer. It certainly is not obliged to patrol its tracks from one end to the other to keep off trespassers and to prevent those who use it longitudinally from claiming a license on the ground of acquiescence. It seems to us, therefore, that the only duty which it owes to such persons, whether they are trespassers or bare licensees, is not to wilfully or wantonly injure them but to use reasonable care to avoid injury to them after their danger is discovered. It seems to us also that some of the courts beg the question when they say that the company must keep a lookout and use care to discover and protect persons on the track where they may be expected, although not at a crossing or the like. Is the company bound to expect them at any such place, and to run its trains with reference to them? Is not the assumption that such a duty rests upon the company an undue assumption? The just and reasonable assumption would seem to be that they will not be on the track when trains are passing or, if they are, that, as they take their license subject to "concomitant perils," they will look out for their own safety without special warning or change by the company in the manner of using its road, and that it may act on this assumption until it discovers their danger.

§ 1251. **Liability for injuries to licensees.**—We have endeavored to show in the preceding section that there is, ordinarily, no duty to a licensee except to refrain from wilful or wanton injury to him and to use reasonable care to prevent in-

jury to him after discovering his danger. If there is no duty to the plaintiff or no violation of such duty there is, of course, no liability.[1] If wilfulness is relied upon, the complaint must, in most jurisdictions, proceed upon that theory and not upon the theory of mere negligence.[2] But, in such a case contributory negligence of the plaintiff is no defense.[3] If negligence is relied upon, negligence of the plaintiff which proximately contributes to his injury will constitute a good defense. The theory of some of the decisions, however, is that, even where there is no wilfulness, the failure of the company to use ordinary care after the discovery of the plaintiff's danger, when the exercise of such care would have prevented the injury, is the proximate cause rather than the original negligence of the plaintiff in going into a place of danger without exercising

[1] Thiele *v.* McManus, 3 Ind. App. 132; Morrow *v.* Sweeney, 10 Ind. App. 626; Faris *v.* Hoberg, 134 Ind. 269; Gilson *v.* Delaware, etc., R. Co., 65 Vt. 213, 36 Am. St. R. 802, and note, 813; Cooley on Torts, 659, 660; Whart. Neg. §3; Shearm. & Redf. Neg., § 11; 16 Am. & Eng. Ency. L. 415.

[2] Where the complaint is for wilfulness there can be no recovery for mere negligence, and *vice versa*. Belt R. etc., Co. *v.* Mann, 107 Ind. 89; Pennsylvania R. Co. *v.* Sinclair, 62 Ind. 301; Pennsylvania R. Co. *v.* Smith, 98 Ind. 42; Louisville, etc., R. Co. *v.* Bryan, 107 Ind. 51; Chicago, etc., R. Co. *v.* Dickson, 88 Ill. 431; Parker *v.* Pennsylvania Co., 134 Ind. 673; Verner *v.* Alabama, etc., R. Co., 103 Ala. 574, s. c. 15 So. R. 872; Highland Ave., etc., R. Co. *v.* Winn, 93 Ala. 306, s. c. 9 So. R. 509; Levin *v.* Memphis, etc., R. Co., (Ala.) 19 So. R. 395; Shearm. & Redf. on Neg., § 7. But see 2 Jaggard on Torts, 824; Louisville, etc., R. Co. *v.* Hurt, 101 Ala. 34, s. c. 13 So. R. 130; Coleman *v.* Kentucky Cent. R. Co., (Ky.) 33 S. W. R. 945. As to the distinction between wilfulness and negligence, see Beach on Contrib. Neg., § 62; 16 Am. & Eng. Ency. of Law, 392, *et seq.* Many of the decisions, however, fail to make this distinction and a recovery for what is called wilful or wanton negligence has frequently been allowed under a complaint for damages on account of alleged negligence.

[3] Terre Haute, etc., R. Co. *v.* Graham, 95 Ind. 286, s. c. 12 Am. & Eng. R. Cas. 77; Pennsylvania, R. Co. *v.* Sinclair, 62 Ind. 301, s. c. 30 Am. R. 185; Indianapolis, etc., R. Co. *v.* Boettcher, 131 Ind. 82; Carroll *v.* Minnesota, etc., R. Co., 13 Minn. 30, s. c. 97 Am. Dec. 221; Central R. Co. *v.* Vaughan, 93 Ala. 209, s. c. 9 So. R. 468; International, etc., R. Co. *v.* Tabor, (Tex.) 33 S. W. R. 894; Kellny *v.* Missouri Pac. R. Co., 101 Mo. 67, s. c. 13 S. W. R. 806; Derby *v.* Kentucky Cent. R. Co., (Ky.) 4 S. W. R. 303; Kansas Pac. R. Co. *v.* Whipple, 39 Kan. 531; Florida, etc., R. Co. *v.* Hirst, 30 Fla. 1, s. c. 16 L. R. A. 631; Beach on Contrib. Neg., §§ 50, 64; Bishop's Non-Cont. Law, § 1042; Cooley on Torts, (2nd ed.) 810.

reasonable care.[1] This subject will be more fully discussed, however, when we come to consider the liability to trespassers and persons on railroad tracks.[2] One who is wrongfully ejected from a train has no right to travel on the railroad track if there is another safe and convenient route from the premises, and the company is not liable for injury to him while so doing, in the absence of wilfulness or failure to exercise ordinary care after discovering his danger.[3] But he does not become a trespasser and is not necessarily guilty of contributory negligence unless he fails to get off the track at the earliest practicable opportunity that a reasonably prudent man would have discovered and seized.[4] One who attempts to cross a platform at a railroad station for his own convenience as a short-cut from one street to another is a mere licensee and can not recover for an injury received by falling into a hole in such platform although the railroad company had passively permitted the plaintiff and the public generally to so use it.[5] So, an employe who goes upon the track or elsewhere upon the company's premises not in the line or discharge of his duty, and without any invitation, express or implied, is at most a mere

[1] See Patterson's Ry. Acc. Law, 51; Beach on Contrib. Neg., §§ 25, 54, 55; Smith *v.* Norfolk, etc., R. Co., 114 N. Car. 728, s. c. 19 S. E. R. 923; Farmer *v.* Wilmington, etc., R. Co., 88 N. Car. 564, s. c. 20 Am. & Eng. R. Cas. 481; Keefe *v.* Chicago, etc., R. Co., (Iowa) 60 N. W. R. 503. Such cases usually, however, fall within the rule against wilful or wanton injury, because the conduct of an engineer in recklessly running over a child or person whose danger he has discovered in time evinces a willingness to inflict the injury, although there is neither negligence nor wilfulness where the person on the track is apparently able to take care of himself and the circumstances are such that the engineer has a right to presume he will get off in time.

[2] See *post*, §§ 1253, 1254, 1257.

[3] Verner *v.* Alabama, etc., R. Co., 103 Ala. 574, s. c. 15 So. R. 872. See, also, Bedell *v.* Berkey, 76 Mich. 435; Forsyth *v.* Boston, etc., R. Co., 103 Mass. 510; Van Schaick *v.* Hudson River, etc., R. Co., 43 N. Y. 527.

[4] Ham *v.* Delaware, etc., Canal Co., 155 Pa. St. 548, s. c. 26 Atl. R. 757. See Nichols *v.* Washington, etc., R. Co., 83 Va. 99, s. c. 5 Am. St. R. 257.

[5] Redigan *v.* Boston, etc., R. Co., 155 Mass. 44, s. c. 14 L. R. A. 276, 28 N. E. R. 1133. See, also, Illinois Cent. R. Co. *v.* Beard, 49 Ill. App. 232. So held where part of the roof of a building blew off and injured the plaintiff who was on the premises without business with the company. Pittsburgh, etc., R. Co. *v.* Bingham, 29 Ohio St. 364; Lary *v.* Cleveland, etc. R. Co., 78 Ind. 323.

licensee to whom the company owes no duty to keep such place safe.[1]

§ 1252. **Who are trespassers.**—It may be stated, as a general rule, that any one who goes upon the track or premises of a railroad company, except at a public crossing or in a highway, without the invitation or license of the company, express or implied, is a trespasser. An invitation to the public is implied, however, to come upon the premises of the company, at proper places, to do business with it, and a license or even an invitation may be implied where the company constructs, maintains, and permits the use of a crossing not originally public under such circumstances that all persons who desire to use it may do so in the well founded belief that it is a public crossing.[2] So, according to many of the authorities, where the public have for a long time crossed the track of a railroad company at one particular place, with its acquiescence, a license may be implied and a duty may rest upon the company to exercise reasonable care in running its trains at such crossing, although not in a public highway.[3] But in

[1] Cleveland, etc., R. Co. *v.* Martin, 13 Ind. App. 485, s. c. 41 N. E. R. 1051, (where a section man having only half an hour for dinner, on a cold day, went into the company's pump house to dine.); Baker *v.* Chicago, etc., R. Co., (Iowa) 63 N. W. R. 667; Burling *v.* Illinois, etc., R. Co., 85 Ill. 18; Mulherrin *v.* Delaware, etc., R. Co., 81 Pa. St. 366; Sullivan *v.* Waters, 14 Ir. C. L. R. 460; Pennsylvania Co. *v.* Meyers, 136 Ind. 242, s. c. 36 N. E. R. 32; Pittsburgh, etc., R. Co., *v.* Adams, 105 Ind. 151; Cowhill *v.* Roberts, 71 Hun 127, 24 N. Y. Supp. 533; Gillshannon *v.* Stony Brook, etc., R. Co., 10 Cush. (Mass.) 228; Texas, etc., R. Co. *v.* Skinner, 4 Tex. C. App. 661, 23 S. W. R. 1001; Mellor *v.* Merchants, etc., R. Co., 150 Mass. 362. But compare Ryan *v.* Fowler, 24 N. Y. 410; Ewald *v.* Chicago, etc., R. Co., 70 Wis. 420, 36 N. W. R. 12.

[2] *Ante*, § 1249, p 1951, note 2. See, also, Stewart *v.* Cincinnati, etc., R. Co., 89 Mich. 315, s. c. 49 Am. & Eng. R. Cas. 456; Retan *v.* Lake Shore, etc., R. Co., 94 Mich. 146, s. c. 55 Am. & Eng. R. Cas. 97; Nichols *v.* Washington, etc., R. Co., 83 Va. 99, s. c. 32 Am. & Eng. R. Cas. 27; Spooner *v.* Delaware, etc., R. Co., 115 N. Y. 22; Murphy *v.* Boston, etc., R. Co., 133 Mass. 121.

[3] Byrne *v.* New York, etc., R. Co., 104 N. Y. 362, s. c. 10 N. E. R. 539; Barry *v.* New York, etc., R. Co., 92 N. Y. 289; Swift *v.* Staten Island, etc., R. Co., 123 N. Y. 645, 25 N. E. R. 378; Owens *v.* Pennsylvania R. Co., 41 Fed. R. 187; Taylor *v.* Delaware, etc., R. Co., 113 Pa. St. 162, s. c. 28 Am. & Eng. R. Cas. 656, 57 Am. R. 446; Philadelphia, etc., R. Co. *v.* Troutman, 11 W. N. C. (Pa.) 453, 6 Am. & Eng. R. Cas. 117; Kelly *v.* Southern, etc., R. Co., 28 Minn. 98, s. c. 6 Am. & Eng. R. Cas.

most of the cases in which this broad statement is made, it will be found that there was something from which an invitation might be implied or a custom to give signals, or the like, which the traveler had a right to expect, and other well considered decisions make this distinction.[1] As we have already shown, mere sufferance or passive acquiescence in the occasional use of the track between crossings does not necessarily amount to a license and where nothing more is shown, one who so uses the track is a trespasser.[2] But, as will hereafter appear, some of the courts infer a license from frequent use and hold that, in any event the company should use reasonable care to discover and not to injure persons on the track at places where it may reasonably expect them to be. One court has even held that where persons have been accustomed for a long time to use a railroad track as a path, without objection from the company, they are not trespassers and the company is liable to them for injuries caused by its alleged negligence in the failure to exercise such care, notwithstanding a statute forbidding any person to use a railway track as a highway and expressly providing that it should be deemed to be a trespass in any action brought by him against the company.[3] As we have elsewhere shown, one may properly step upon a railroad track which is a part of a street without becoming a trespasser,[4] but it has been held that one who walks along between the rails of a track laid in an alley, but not so im-

264; Harriman *v.* Railway Co., 45 Ohio St. 11, s. c. 12 N. E. R. 451; Norfolk, etc, R. Co. *v.* Wilson, 90 Va. 263, s. c. 18 S. E. R. 35; Norfolk, etc., R. Co. *v.* Carper, 88 Va. 556, s. c. 14 S. E. R. 328; Delaney *v.* Milwaukee, etc., R. Co., 33 Wis. 67.

[1] See Atchison, etc., R. Co. *v.* Parsons, 42 Ill. App. 93; Evans *v.* Atlantic, etc., R. Co., 62 Mo. 49; Stewart *v.* Pennsylvania R. Co., (Ind.) 14 Am. & Eng. R. Cas. 679; Wright *v.* Boston, etc., R. Co., 142 Mass. 296; Morrissey *v.* Eastern R. Co., 126 Mass. 377, s. c. 30 Am. R. 686, and note; Illinois Cent. R. Co. *v.* Godfrey, 71 Ill. 500, s. c. 22 Am. R. 112.

[2] *Ante*, § 1248.

[3] Le May *v.* Missouri Pac. R. Co., 105 Mo. 361, s. c. 16 S. W. R. 1049. See, also, Davis *v.* Chicago, etc., R. Co., 58 Wis. 646, s. c. 46 Am. R. 667; Mason *v.* Chicago, etc., R. Co., 89 Wis. 151, s. c. 61 N. W. R. 300. But see Missouri Pac. R. Co. *v.* Moseley, 57 Fed. R. 921, and Anderson *v.* Chicago, etc., R. Co., 87 Wis. 195, s. c. 58 N. W. R. 79, 83.

[4] *Ante*, § § 1093, 1094.

bedded as to constitute part of the roadway is a trespasser.[1] Where, by mutual consent, two railway companies having adjacent and parallel tracks upon which cars are habitually left standing, permit the watchmen separately employed by each one to stand upon the tracks of each company irrespective of the one which employed him, for the purpose of examining and taking the numbers of the cars, a watchman while so engaged upon the track of the company which did not employ him is not a trespasser thereon.[2] It has also been held that one who goes upon the track in an emergency, as to recover his hat which has been carried there by the wind,[3] or who wanders upon it from a highway on a dark night,[4] is not strictly a trespasser.

§ 1253. **Duty to trespassers.**—The general rule is that the owner or occupier of premises owes no duty to a trespasser thereon except to do him no wilful or wanton injury.[5] A trespasser is a wrong-doer, and it is a general principle of jurisprudence that the courts will not aid a wrong-doer.[6] The fact that the trespasser is a wrong-doer does not, however, justify malicious, wanton or wilful maltreatment of him, and the failure to use reasonable care to avoid injury to him after the discovery of his danger may sometimes be sufficient evidence of wilfulness or wantoness.[7] But neither negligence nor wilfulness can

[1] Montgomery *v.* Alabama, etc., R. Co., 97 Ala. 305, s. c. 12 So. R. 170.

[2] Watts *v.* Richmond, etc., R. Co., 89 Ga. 277, s. c. 15 S. E. R. 365; McMarshall *v.* Chicago, etc., R. Co., 80 Iowa 757, s. c. 45 N. W. R. 1065.

[3] Bernhard *v.* Rensselaer, etc., R. Co., 1 Abb. Ct. App. 131.

[4] Baltimore, etc., R. Co. *v.* Boteler, 38 Md. 568.

[5] Kirtley *v.* Chicago, etc., R. Co., 65 Fed. R. 386, 392; Philadelphia, etc., R. Co. *v.* Hummell, 44 Pa. St. 375; Augusta R. Co. *v.* Andrews, 89 Ga. 653, s. c. 16 S. E. R. 203; Maynard *v.* Boston, etc., R. Co., 115 Mass. 458; Wright *v.* Boston, etc., R. Co., 129 Mass. 440; Lary *v.* Cleveland, etc., R. Co., 78 Ind, 323; Terre Haute, etc., R. Co. *v.* Graham, 95 Ind. 286; Brown *v.* European, etc., R. Co., 58 Me. 384; Cleveland, etc., R. Co. *v.* Tartt, 64 Fed. R. 823; Frost *v.* Eastern Railway Co., 64 N. H. 220; Duff *v.* Allegheny, etc., R. Co., 91 Pa. St. 458; Bresnahan *v.* Michigan Cent. R. Co., 49 Mich. 410.

[6] 1 Jaggard on Torts, 189; Bishop's Noncont. Law, § 54; Kirtley *v.* Chicago, etc., R. Co., 65 Fed. R. 386, 392.

[7] Or, it may, perhaps, constitute the proximate cause of the injury and entitle the trespasser, in some jurisdictions to recover as for negligence. See, generally, Planz *v.* Boston, etc., R. Co., 157 Mass. 377, s. c. 32 N. E. R.

ordinarily be shown in this way where an adult or person apparently able to take care of himself is upon a railroad track, because the railroad employes have a right to assume, in the absence of anything to the contrary, that he will get off the track or take such other precautions as may be available to avoid injury to himself. In some jurisdictions, however, it is held that these rules do not apply so strictly against children; that the owner of premises may be liable for injuries to children where he has left something naturally calculated to attract them to the place where they were injured; and that it is the duty of the engineer or other employes of a railroad company in charge of its train to keep a lookout even for trespassers upon the track. It is doubtless true that the company may owe such a duty to the passengers, but we believe the better rule to be that trespassers can not, ordinarily at least, complain of the failure to perform it. The entire subject, however, will be more fully and specifically treated in subsequent sections.

§ 1254. **Liability for injuries to trespassers.**—There is, as we have seen, some conflict among the authorities as to the duty due a trespasser, and this makes it difficult to determine the liability of the company in such cases. But when the question of the duty of the company to a trespasser is settled the question as to its liability to him is comparatively free from difficulty. If the company wilfully injures him it will be liable even though he may have been guilty of contributory negligence. So, in some jurisdictions, the term "gross negligence" is still used and it is held that the company is liable

356; Denver, etc., R. Co. *v.* Harris, 122 U. S. 597, s. c. 7 Sup. Ct. R. 1286; Lake Shore, etc., R. Co. *v.* Prentice, 147 U. S. 101, 107, s. c. 13 Sup. Ct. R. 261; Seaboard, etc., R. Co. *v.* Joyner, (Va.) 23 S. E. R. 773; Wallace *v.* City, etc., R. Co., 26 Ore. 174, s. c. 37 Pac. R. 477; Scheffler *v.* Minneapolis, etc., R. Co., 32 Minn. 518, s. c. 21 N. W. R. 711; Isbell *v.* New York, etc., R. Co., 27 Conn. 393; Haden *v.* Sioux City, etc., R. Co., (Iowa) 60 N. W. R. 537; Texas, etc., R. Co., *v.* O'Donnell, 58 Tex. 27; Isabel *v.* Hannibal, etc., Railroad Co., 60 Mo. 475; Buswell on Personal Injuries, §§ 71, 73, 120; Davies *v.* Mann, 10 Mees. & W. 546; 1 Shearm. & Redf. Neg. §§ 98, 99.

where the conduct of its servants, resulting in injury to the trespasser is grossly negligent or so reckless as to evince an entire disregard of consequences or a willingness to inflict the injury, and that it is liable if they fail to use reasonable care to avoid injury to him after discovering his danger and apparent inability to take care of himself, if such care would have prevented the injury. Several of the courts even go so far as to hold the company liable in such a case where it fails to use reasonable care to discover the trespasser in time; but this we regard as contrary to principle. On the other hand it has been held in many cases that one who trespasses upon a railroad track or other dangerous place upon the company's premises is guilty of contributory negligence, and this is certainly true unless he uses care proportioned to the danger, or, in other words, such reasonable care as the circumstances demand. If he does not do so, the company is not liable unless it wilfully or wantonly injures him, or at least fails to use due care after discovering his danger and inability to escape. These rules, and the modifications or exceptions sometimes made in the case of children, or persons obviously unable to take care of themselves, will be fully considered and illustrated in subsequent sections.

§ 1255. **Trespassers on cars.**—A railroad company owes trespassers no contract duty. Indeed, as already stated, the general rule is that it owes them no duty except not to wilfully injure them, and this rule applies to those who are attempting to steal a ride or otherwise trespass upon the company's cars.[1] They are not in a position to invoke the doctrine

[1] Toledo, etc., R. Co. *v.* Brooks, 81 Ill. 245, 292; Planz *v.* Boston, etc., R. Co., 157 Mass. 377, s. c. 32 N. E. R 356; Brevig *v.* Chicago, etc., R. Co., (Minn.) 66 N. W. R. 401; Duff *v.* Alleghany, etc., R. Co., 91 Pa. St. 458; Pennsylvania R. Co. *v.* Price, 96 Pa. St. 256; Waterbury *v.* New York, etc., R. Co., 17 Fed. R. 671; Brown *v.* Missouri, etc., R. Co., 64 Mo. 536; Chicago, etc., R. Co. *v.* Smith, 46 Mich. 504, s. c. 4 Am. & Eng. R. Cas. 535; Richmond, etc., R. Co. *v.* Burnsed, 70 Miss. 437, s. c. 12 So. R. 958; Southwestern R. Co. *v.* Singleton, 66 Ga. 252; Hoar *v.* Maine Cent. R. Co., 70 Me. 65; Eaton *v.* Delaware, etc., R. Co., 57 N.Y. 382. See, also, McNamara *v.* Great Northern R. Co., (Minn.) 63 N. W. R. 726; Bollinger *v.* Texas, etc., R. Co., 47 La.Ann. 721, s. c. 17 So.

of apparent authority, and can only hold the company liable for acts of its employes done within the scope of their actual authority, express or implied.[1] Indeed, we think the better rule is that a trespasser who is ejected from a train by a brakeman or other subordinate employe not in charge of the train must show, in order to recover from the company for injuries so inflicted, that such employe possessed authority to do the act which caused the injury.[2] There are, however, authorities which hold that the ejection of trespassers is within the scope of the implied authority of a brakeman,[3] and where an employe is placed in charge of the train such authority may be implied.[4] In one case a boy who was trespassing upon a freight train was struck by a piece of coal thrown at him by a brakeman, and was injured in trying to get off, but it was held that he could not recover from the company because the brakeman had no implied authority to eject trespassers.[5] In another case it was held that a boy who was injured in jumping from an engine upon which he was a trespasser could not recover although he was frightened off by the fireman.[6] And in still another case it was held that a boy who was playing upon a flat car, and who was injured in jumping off in obedience to an employe's order, could not recover from the company because

R. 253; Illinois Cent. R. Co. *v.* Meacham, 91 Tenn. 428, s. c. 19 S. W. R. 232; Pittsburgh, etc., R. Co. *v.* Redding, 140 Ind. 101, s. c. 39 N. E. R. 921. But compare Louisville, etc.. R. Co. *v.* Popp, (Ky.) 27 S. W. R. 992.

[1] Brevig *v.* Chicago, etc., R. Co., (Minn.) 66 N. W. R. 401, 404.

[2] Lake Shore, etc., R. Co. *v.* Peterson, (Ind.) 42 N. E. R. 480; Marion *v.* Chicago, etc., R. Co., 59 Iowa 428, s. c. 13 N. W. R. 415, 8 Am. & Eng. R. Cas. 177; Farber *v.* Missouri Pac. R. Co., 116 Mo. 81, s. c. 22 S. W. R. 631; Pennsylvania Co. *v.* Toomey, 91 Pa. St. 256; Cauley *v.* Pittsburg, etc., R. Co., 98 Pa. St. 498; Corcoran *v.* Concord, etc., R. Co., 56 Fed. R. 1014; Texas, etc., R. Co. *v.* Moody, (Tex. C. App.) 23 S. W. R. 41; International, etc., R. Co. *v.* Anderson, 82 Tex.516, s. c. 17 S. W. R. 1039; Bess *v.* Chesapeake, etc., R. Co., 35 W. Va. 492, s. c. 14 S. E. R. 234.

[3] Hoffman *v.* New York, etc., R. Co., 87 N. Y. 25; Kansas City, etc., R. Co. *v.* Kelly, 36 Kan. 655, s. c. 14 Pac. R. 172; Brevig *v.* Chicago, etc., R. Co., (Minn.) 66 N. W. R. 401; Patterson's Ry. Acc. Law, § 111. See, also, Smith *v.* Louisville, etc., R. Co., 95 Ky. 11, 23 S. W. R. 652.

[4] Carter *v.* Railway Co., 98 Ind. 552; Patterson's Ry Acc. Law, § 111.

[5] Towanda Coal Co. *v.* Heeman, 86 Pa. St. 418.

[6] Chicago, etc., R. Co. *v.* Smith, 46 Mich. 504.

it owed him no duty, and that his father could not recover because of his contributory negligence in permitting the boy to trespass upon the car.[1] So, one of the courts which considers that a brakeman has implied authority to eject trespassers, has recently held that where a person bribed the brakeman to let him ride in a freight car, they thereby became joint trespassers and the former could not recover from the company for an assault by the brakeman in afterwards ejecting him in an improper manner.[2] The company may be held liable, however, although the injured person be a trespasser, if its employes, while acting within the scope of their actual authority, wilfully injure him or eject him with unnecessary force and violence.[3] The fact that an employe who is not in charge of the train, and has no authority in the premises, invites or permits a person to ride on the train without paying fare does not make the latter a passenger or impose upon the company any greater duty to him than it owes to an ordinary trespasser.[4] Although the youth, inexperience, or ignorance, of the person injured may sometimes be important in determining the ques-

[1] Cauley *v.* Pittsburgh, etc., R. Co., 95 Pa. St. 398.

[2] Brevig *v.* Chicago, etc., R. Co., (Minn.) 66 N. W. R. 401.

[3] Louisville, etc., R. Co. *v.* Dunkin, 92 Ind. 601, s. c. 15 Am. & Eng. R. Cas. 422; Carter *v.* Louisville, etc., R. Co., 98 Ind. 552; St. Louis, etc., R. Co. *v.* Reagan, 52 Ill. App. 488; Schultz *v.* Third Ave. R. Co., 89 N. Y. 242, s. c. 9 Am. & Eng. R. Cas. 412; Southern Pac. R. Co. *v.* Kennedy, (Tex. C. App.) 29 S. W. R. 394; Benton *v.* Chicago, etc., R. Co., 55 Iowa 496. See, also, Thompson *v.* Yazoo, etc., R. Co., 72 Miss. 715, s. c. 17 So. R. 229; Chicago, etc., R. Co. *v.* Doherty, 53 Ill. App. 282; Brill *v.* Eddy, 115 Mo. 596, s. c. 22 S. W. R. 488 (receiver held liable for act of watchman in removing boy from car.) Alabama, etc., R. Co. *v.* Frazier, 93 Ala. 45, s. c. 9 So. R. 303; Smith *v.* Louisville, etc., R. Co., 95 Ky. 11, 23 S. W. R. 652; Indianapolis, etc., R. Co. *v.* Pitzer, 109 Ind. 179.

[4] Chicago, etc., R. Co. *v.* Casey, 9 Bradw. (Ill.) 632, (invitation by engineer); Chicago, etc., R. Co. *v.* Michie, 83 Ill. 427; Sherman *v.* Hannibal, etc., R. Co., 72 Mo. 62; Snyder *v.* Hannibal, etc., R. Co., 60 Mo. 413; Flower *v.* Pennsylvania, etc., R. Co., 69 Pa St. 210. This doctrine has even been extended to a case in which the conductor permitted a boy to ride upon the train, without paying fare, in violation of the rules of the company. Duff *v.* Allegheny, etc., R. Co., 91 Pa. St. 458, s. c. 2 Am. & Eng. R. Cas. 1. See, also, Hot Springs, etc., R. Co. *v.* Dial, 58 Ark. 318, s. c. 24 S. W. R. 500; Keating *v.* Michigan Cent., etc., R. Co., 97 Mich. 154. But compare Waterbury *v.* New York, etc., R. Co., 17 Fed. R. 671, and note.

tion of contributory negligence, it can not be considered as enlarging or extending the implied authority of the company's employes. It "can not operate to enlarge the boundaries of the agent's authority"[1] nor "confer an authority on one who has none."[2]

§ 1256. **Strangers at stations.**—We shall elsewhere consider the liability of railroad companies to passengers, and those intending to become passengers, for injuries received at stations. But there are others to whom a railroad company may owe a duty at its stations, although they are neither passengers nor employes. It undoubtedly owes a duty to exercise reasonable care to all who come to its stations upon its own invitation, express or implied. Thus, a railroad company is liable to one who comes to the station to meet a friend who is on the company's train, or, to use a familiar quotation, "to welcome the coming or speed the parting guest," for injuries caused him by the failure of the company to exercise reasonable care to keep the station platform in a safe condition and properly lighted.[3] So, a traveler who goes to the depot for a time-table,

[1] Chicago, etc., R. Co. *v.* Casey, 9 Bradw. (Ill.) 632, 643.

[2] Flower *v.* Pennsylvania R. Co., 69 Pa. St. 210; Towanda Coal Co. *v.* Heeman, 86 Pa. St. 418; Snyder *v.* Hannibal, etc., R. Co., 60 Mo. 413. See, also, Barney *v.* Hannibal, etc., R. Co., 126 Mo. 372, s. c. 28 S. W. R. 1069; Keating *v.* Michigan Cent. R. Co., 97 Mich. 154, s. c. 56 N. W. R. 346. But it may be of importance upon the question of the negligence or conduct of an employe in authority in evicting him from the train at a dangerous place or the like. Indianapolis, etc., R. Co. *v.* Pitzer, 109 Ind. 179; Louisville, etc., R. Co. *v.* Sullivan, 81 Ky. 624, s. c. 50 Am. R. 186; Kline *v.* Central Pac. R. Co., 37 Cal. 400; Lovett *v.* Salem, etc., R. Co., 9 Allen (Mass.) 557.

[3] New York, etc., R. Co. *v.* Mushrush, 11 Ind. App. 192, s. c. 37 N. E. R. 954; Cherokee Packet Co. *v.* Hilson, 95 Tenn. 1, s. c. 31 S. W. R. 737; Hamilton *v.* Texas, etc., Ry. Co., 64 Tex. 251, s. c. 53 Am. R. 756, 21 Am. & Eng. R. Cas. 336; Louisville, etc., R. Co. *v.* Berry, 88 Ky. 222, s. c. 10 S. W. R. 472; Doss *v.* Missouri, etc., R. Co., 59 Mo. 27; McKone *v.* Michigan, etc., R. Co., 51 Mich. 601, s. c. 17 N. W. R. 74. See, also, Tobin *v.* Portland, etc., R. Co., 59 Me. 183; Ingalls *v.* Adams Express Co., 44 Minn. 128 (police officer); Langan *v.* St. Louis, etc., R. Co., 72 Mo. 392, s. c. 3 Am. & Eng. R. Cas. 355 (passenger's servant); Baltimore, etc., R. Co. *v.* Rose, 65 Md. 485; Sullivan *v.* Vicksburg, etc., R. Co., 39 La. Ann. 800, s. c. 30 Am. & Eng. R. Cas. 168. Nor is such a person necessarily a trespasser because he fails to leave the platform at once and take the nearest route home. New York, etc., R.

to see when his train leaves, or whether there is any change in the schedule, is not a trespasser upon the company's walk leading to the depot and may recover for an injury received, without fault on his part, by the negligence of the company in throwing off mail bags upon such walk, where he has no knowledge of any such custom.[1] Indeed, railroad companies have been held liable in many cases for injuries to persons rightfully upon the station platform by mail bags negligently thrown from passing trains by postal clerks with the knowledge and consent of the companies.[2] But where there is no custom to throw out mail bags at the particular platform and the company has no reason to apprehend that they will be so thrown out, it is not, it seems, liable for the act of a postal clerk in so doing,[3] and it owes no duty to a stranger or trespasser to exercise care in this regard or to keep the crane used to catch the mail pouch in safe condition.[4] The company is, of course, liable to one, who, in response to its notification to call and get goods that have been shipped to him and received at its freight depot, comes to such depot, and, while walking along a proper passage way in the exercise of due care, is injured by freight falling upon him which had been carelessly piled up by the company's servants.[5] It has also

Co. *v.* Mushrush, *supra*; Keefe *v.* Boston, etc., R. Co., 142 Mass. 251, s. c. 7 N. E. R. 874. But he may become a trespasser or bare licensee by unreasonable delay. Heinlein *v.* Boston, etc., R. Co., 147 Mass. 136, s. c. 16 N. E. R. 698. See, also, Harris *v.* Stevens, 31 Vt. 79.

[1] Bradford *v.* Boston, etc., R. Co., 160 Mass. 392, s. c. 35 N. E. R. 1131.

[2] Galloway *v.* Chicago, etc., R. Co., 56 Minn. 346, s. c. 57 N. W. R. 1058; Snow *v.* Fitchburg R. Co., 136 Mass. 552, s. c. 18 Am. & Eng. R. Cas. 161; Carpenter *v.* Boston, etc., R. Co., 97 N. Y. 494, s. c. 21 Am. & Eng. R. Cas. 331. So, where the servants of the company are negligent in handling baggage. Tebbutt *v.* Bristol, etc., R. Co., L. R., 6 Q. B. 73.

[3] Muster *v.* Chicago, etc., R. Co., 61 Wis. 325, s. c. 18 Am. & Eng. R. Cas. 113; Walton *v.* New York, etc., R. Co., 139 Mass. 556. See, also, Walker *v.* Hannibal, etc., R. Co., 121 Mo. 575, s. c. 26 S. W. R. 360, 59 Am. & Eng. R. Cas. 607; Cunningham *v.* Grand Trunk R. Co., 31 U. C. Q. B. 350.

[4] Poling *v.* Ohio River R. Co., 38 W. Va. 645, s. c. 18 S. E. R. 782. But see Illinois Cent. R. Co. *v.* Wall, 53 Ill. App. 588.

[5] Danville, etc., R. Co. *v.* Brown, 90 Va. 340, s. c. 18 S. E. R. 278. See, also, Toledo, etc., R. Co. *v.* Grush, 67 Ill. 262, s. c. 16 Am. R. 618.

been held that where a lunch stand is kept at a railroad station by authority of the company, which can only be reached by going over the company's platform, the company is responsible for the condition of the platform to persons who pass over it to get lunch.[1] But the company owes no such duty to a hotel-keeper, who goes to its depot to solicit guests for his own sole benefit,[2] unless, perhaps, where it has invited, or, at least, licensed him so to do.[3] It may, indeed, be stated as a general rule, that one who goes upon the platform at a railroad station from mere curiosity, or for the transaction of business in no way connected with the company, can not recover for injuries received because of defects therein.[4]

§ 1257. **Injuries to trespassers upon track.**—What we have already said concerning the limited duty to trespassers applies to trespassers upon a railroad track.[5] It is generally, and, we

[1] Dillingham *v.* Teeling, (Tex.) 24 S. W. R. 1094. See, also, Clussman *v.* Long Island R. Co., 9 Hun (N. Y.) 618, (telegraph office kept by company).

[2] Post *v.* Texas,, etc., R. Co., (Tex.) 23 S. W. R. 708.

[3] See Tobin *v.* Portland, etc., R. Co., 59 Me. 183, s. c. 8 Am. R. 415.

[4] St. Louis, etc., R. Co. *v.* Fairbairn, 48 Ark. 491, s. c. 30 Am. & Eng. R. Cas. 166; Gillis *v.* Pennsylvania R. Co., 59 Pa. St. 129; Kansas City R. Co. *v.* Kirksey, 48 Ark. 366, s. c. 3 S. W. R. 190; Baltimore, etc., R. Co. *v.* Schwindling, 101 Pa. St. 258, s. c. 47 Am. R. 706, 8 Am. & Eng. R. Cas. 544; Pittsburgh, etc., R. Co. *v.* Bingham, 29 Ohio St. 364, s. c. 23 Am. R. 751; Burbank *v.* Illinois Cent. R. Co., 42 La. Ann. 1156, s. c. 45 Am. & Eng. R. Cas. 593. See, also, Omaha, etc., R. Co. *v.* Martin, 14 Neb. 295, s. c. 19 Am. & Eng. R. Cas. 236; Redigan *v.* Boston, etc., R. Co., 155 Mass. 44, s. c. 14 L. R. A. 276, 28 N. E. R. 1133. In the first case above cited, the general rule was stated as in the text, but it was held that one who went upon the company's premises to read a notice of stock killed, which was posted there in pursuance of the statute, with the owner of missing stock, who could not read, was invited there and that the company was bound to use ordinary care to keep the platform in repair for such persons.

[5] *Ante*, § 1253; also Cleveland, etc., R. Co. *v.* Adair, 12 Ind. App. 569, s. c. 39 N. E. R. 672; Atchison, etc., R. Co. *v.* Todd, 54 Kan. 551, s. c. 38 Pac. R. 804; St. Louis, etc., R. Co. *v.* Monday, 49 Ark. 257, s. c. 4 S. W. R. 782; Morrissey *v.* Eastern R. Co., 126 Mass. 377; Mason *v.* Missouri, etc., R. Co., 27 Kan. 83, s. c. 41 Am. R. 405; Tennis *v.* Interstate, etc., R. Co., 45 Kan. 503; Roden *v.* Chicago, etc., R. Co., 133 Ill. 72, s. c. 23 Am. St. R. 585; Dillon *v.* Connecticut River R. Co., 154 Mass. 478; Spicer *v.* Chesapeake, etc., R. Co., 34 W. Va. 514; Louisville, etc., R. Co. *v.* Williams, 69 Miss. 631, s. c. 12 So. R. 957; Candelaria *v.*

think, correctly, held that a railroad company is not bound to keep a lookout for trespassers upon the track.[1] But some authorities hold that it must keep a lookout for trespassers as well as others.[2] And in some jurisdictions the rule is modified so far as to require the company to keep a lookout in cities and other places where trespassers or licensees may reasonably be expected.[3] Under most statutes and ordinances trespassers

Atchison, etc., R. Co., (N. Mex.) 27 Pac. R. 497; Toomey *v.* Southern Pac. R. Co., 86 Cal. 374, s. c. 24 Pac. R. 1074.

[1] Burg *v.* Chicago, etc., R. Co., 90 Iowa 106, s. c. 57 N. W. R. 680, s. c. 60 Am. & Eng. R. Cas. 159; Thomas *v.* Chicago, etc., R. Co., (Iowa) s. c. 61 N. W. R. 967; McAllister *v.* Burlington, etc., R. Co., 64 Iowa 395, s. c. 20 N. W. R. 488: Scheffler *v.* Minneapolis, etc., R. Co., 32 Minn. 518, s. c. 21 N. W. R. 711; Memphis, etc., R. Co. *v.* Womack, 84 Ala. 149; East Tennessee, etc., R. Co. *v.* King, 81 Ala. 177; Georgia Pac. R. Co. *v.* Ross, (Ala.) 14 So. R. 282; Baltimore, etc., R. Co. *v.* State, 62 Md. 479, s. c. 50 Am. R. 233; State *v.* Baltimore, etc., R. Co., 69 Md. 494; Ward *v.* Southern Pac. R. Co., 25 Ore. 433, s. c. 36 Pac. R. 156, 60 Am. & Eng R. Cas. 34; Woodruff *v.* Northern Pac. R. Co., 47 Fed. R. 689; Louisville, etc., R. Co. *v.* Greene, (Ky.) 19 Am. & Eng. R. Cas. 95; Terre Haute, etc., R. Co. *v.* Graham, 95 Ind. 286, s. c., 12 Am. & Eng. R. Cas. 77; Givens *v.* Kentucky Cent. R. Co., (Ky.) 15 S. W. R. 1057; Louisville, etc., R. Co., *v.* Williams, 69 Miss. 631; Anderson *v.* Chicago, etc., R. Co., 87 Wis. 195, s. c. 60 Am. & Eng. R. Cas. 86; Chenery *v.* Fitchburg R. Co., 160 Mass. 211, s. c. 35 N. E. R. 554.

[2] Troy *v.* Cape Fear, etc., R. Co., 99 N. Car. 298, s. c. 6 Am. St. R. 521; Clark *v.* Wilmington, etc., R. Co., 109 N. Car. 430, s. c. 14 L. R. A., 749; McDonald *v.* International, etc., R. Co., 86 Tex. 1, s. c. 22 S. W. R. 939; Smith *v.* Norfolk, etc., R. Co., 114 N. Car. 728, s. c. 25 L. R. A. 286, (apparently modifying former North Carolina decisions which are extreme); Railroad Co. *v.* Sympkins, 54 Tex. 615, s. c. 6 Am. & Eng. R. Cas. 11; Patton *v.* East Tennessee, etc., R. Co., 89 Tenn. 370, s. c. 48 Am. & Eng. R. Cas. 581; Gunn *v.* Ohio River R. Co., 36 W. Va. 165, s. c. 32 Am. St. R. 842; East Tennessee, etc., R. Co. *v.* St. John, 5 Sneed (Tenn.) 524, s. c. 73 Am. Dec. 149; Texas, etc., R. Co. *v.* Watkins, (Tex.) 29 S. W. R. 232.

[3] South, etc., R. Co. *v.* Donovan, 84 Ala. 141, s. c. 4 So. R. 142; Davis *v.* Chicago, etc., R. Co., 58 Wis. 646, s. c. 17 N. W. R. 406; Townley *v.* Chicago, etc., R. Co., 53 Wis. 626, s. c. 11 N. W. R. 55; Cassida *v.* Oregon R. Co., 14 Ore. 551; Chicago, etc., R. Co. *v.* Grablin, 38 Neb. 90, s. c. 56 N. W. R. 796, 57 N. W. R. 522; Battishill *v.* Humphreys, 64 Mich. 494; Johnson *v.* Lake Superior, etc., Co., 86 Wis. 64; Reilly *v.* Hannibal, etc., R. Co., 94 Mo. 600. In Williams *v.* Kansas City, etc., R. Co., 96 Mo. 275, s. c. 9 S. W. R. 573, it is shown that this is as far as the rule has been modified in Missouri, although some of the cases state in general terms that the company must keep a lookout for tres-

upon the track are not entitled to the benefit of signals required to be given at public crossings.[1] So, it has been held in some cases that one who trespasses upon the track is *ipso facto* guilty of negligence,[2] and there are many cases in which persons have been held guilty of contributory negligence in trespassing upon the track and then failing to exercise such care as their dangerous position and the circumstances required.[3] It is also the rule that the company's employes may presume that one apparently able to do so will get off the track in time.[4] But where a very young child is seen upon the track

passers and licensees, and is liable if it ought to have discovered the injured party in time, but negligently failed to do so. See, also, Powell *v.* Missouri Pac. R. Co., 59 Mo. App. 626; Norfolk, etc., R. Co. *v.* Carper, 88 Va. 556, s. c. 14 S. E. R. 328; Whalen *v.* Chicago, etc., R. Co., 75 Wis. 654, s. c. 44 N. W. R. 849.

[1] *Ante*, § 1158, and authorities there cited; also Atlanta, etc., R. Co. *v.* Gravitt, 93 Ga. 369, s. c. 44 Am. St. R. 145; Schackleford *v.* Louisville, etc., R. Co., 84 Ky. 43; Spicer *v.* Chesapeake, etc., R. Co., 34 W. Va. 514, s. c. 11 L. R. A. 385; Parker *v.* Wilmington, etc., R. Co., 86 N. Car. 221.

[2] State *v.* Baltimore, etc., R. Co., 58 Md. 482, s. c. 15 Am. & Eng. R. Cas. 409, and note; McAllister *v.* Burlington, etc., R. Co., 64 Iowa 395, s. c. 20 N. W. R. 488; Illinois Cent. R. Co. *v.* Hall, 72 Ill. 222; Schexnaydre *v.* Texas, etc., R. Co., 46 La. Ann. 248 (deaf mute); Tucker *v.* Baltimore, etc., R. Co., 59 Fed. R. 968; Savannah, etc., R. Co. *v.* Meadows, 95 Ala. 137, 10 So. R. 141; Dell *v.* Phillips, etc., Co., 169 Pa. 549, 32 Atl. R. 601; Philadelphia, etc., R. Co. *v.* Hummell, 44 Pa. St. 375; Parker *v.* Pennsylvania Co., 134 Ind. 673, s. c. 34 N. E. R. 504; Little Schuylkill, etc., R. Co. *v.* Norton, 24 Pa. St. 465, s. c. 64 Am. Dec. 672, and note; Grethen *v.* Chicago, etc., R. Co., 22 Fed. R. 609; Glass *v.* Memphis, etc., R. Co., 94 Ala. 581, s. c. 10 So. R. 215; Roden *v.* Chicago, etc., R. Co., 133 Ill. 72, s. c. 24 N. E. R. 425.

[3] Kirtley *v.* Chicago, etc., R. Co., 65 Fed. R. 386; Missouri Pac. R. Co. *v.* Moseley, 57 Fed. R. 921; Hughes *v.* Galveston, etc., R. Co., 67 Tex. 595, s. c. 4 S. W. R. 219; Central Trust Co. *v.* Wabash, etc., R. Co., 26 Fed. R. 896, and note; Frazer *v.* South, etc., R. Co., 81 Ala. 185, 1 So. R. 85, and note; Bresnahan *v.* Michigan Cent. R. Co., 49 Mich. 410, s. c. 8 Am. & Eng. R. Cas. 147; McClaren *v.* Indianapolis, etc., R. Co., 83 Ind. 319; Teunenbrock *v.* South Pac. R. Co., 59 Cal. 269, s. c. 6 Am. & Eng. R. Cas. 8; Kansas City R. Co. *v.* Cook, 66 Fed. R. 115; Virginia Midland R. Co. *v.* Barksdale, 82 Va. 330.

[4] *Ante*, § 1153; Bouwmeester *v.* Grand Rapids, etc., R. Co., 67 Mich. 87, s. c. 34 N. W. R. 414; St. Louis, etc., R. Co. *v.* Monday, 49 Ark. 257, s. c. 4 S. W. R. 782; Syme *v.* Richmond, etc., R. Co., 113 N. Car. 558, s. c. 18 S. E. R. 114; Pennsylvania Co. *v.* Myers, 136 Ind. 242, s. c. 36 N. E. R. 32; Indianapolis, etc., R. Co. *v.* McClaren, 62 Ind. 566; Nichols *v.* Louisville, etc., R. Co., (Ky.) 6 S. W. R. 339; Kennedy *v.* Denver, etc., R. Co., 10 Col. 493, s. c. 16 Pac. R. 210; Candee *v.* Kansas City, etc., R. Co., 130 Mo.

they can not safely act upon the presumption that it will get off the track or exercise the care of an adult.[1] So, even in the case of an adult the circumstances may be such that no such presumption can be indulged.[2] And, as we have elsewhere said, the company is liable where it wilfully injures a trespasser[3] or fails to exercise reasonable care after discovering, or, according to some of the authorities, after it ought to have discovered, his danger and inability to escape, if the exercise of such care would have prevented the injury.[4] Although there is a clear distinction between negligence and wilfulness, yet a reckless and wanton disregard of consequences, evincing a willingness to inflict injury, may amount to wilfulness, although there is no direct proof of actual intention to inflict the injury complained of.[5] Thus, where a trespasser was seen by

142, s. c. 31 S. W. R. 1029; Campbell *v.* Kansas City, etc., R. Co., 55 Kan. 536, s. c. 40 Pac. R. 997; Louisville, etc., R. Co. *v.* Cronback, 12 Ind. App. 66, s. c. 41 N. E. R. 15; Omaha, etc., R. Co. *v.* Cook, 42 Neb. 905, s. c. 62 N. W. R. 235.

[1] Galveston, etc., R. Co. *v.* Hewitt, 67 Tex. 473, s. c. 3 S. W. R. 705; Indianapolis, etc., R. Co. *v.* Pitzer, 109 Ind. 179; Spooner *v.* Delaware, etc., R. Co., 115 N. Y. 22, s. c. 21 N. E. R. 696; Donahoe *v.* Wabash, etc., R. Co., 83 Mo. 543, s. c. 53 Am. R. 594; Payne *v.* Humeston, etc., R. Co., 70 Iowa 584, s. c. 31 N. W. R. 886; Pennsylvania R. Co. *v.* Morgan, 82 Pa. St. 134; Hyde *v.* Union Pac. R. Co., 7 Utah 356, 26 Pac. R. 979; Kenyon *v.* New York, etc., R. Co. 5 Hun (N. Y.) 479. But see Missouri Pac. R. Co. *v.* Hansen, (Neb.) 66 N. W. R. 1105 (child twelve years old); Meredith *v.* Richmond, etc., R. Co., 108 N. Car. 616, s. c. 13 S. E. R. 137 (boy thirteen years old).

[2] Cincinnati, etc., R. Co. *v.* Cooper, 120 Ind. 469, s. c. 22 N. E. R, 340; Herring *v.* Wilmington, etc., R. Co., 10 Ired. (N. Car.) 402; Lake Shore, etc., R. Co. *v.* Miller, 25 Mich. 274; Tanner *v.* Louisville, etc., R. Co., 60 Ala. 621; St. Louis, etc., R. Co. *v.* Manly, 58 Ill. 300.

[3] Kansas Pac. R. Co. *v.* Whipple, 39 Kan. 531, s. c. 18 Pac. R. 730; Lake Shore, etc., R. Co. *v.* Bodemer, 139 Ill. 596, s. c. 32 Am. St. R. 218, 29 N. E. R. 692; Esrey *v.* Southern Pac. R. Co., 103 Cal. 541, s. c. 37 Pac. R. 500; Palmer *v.* Chicago, etc., R. Co., 112 Ind. 250; Dennis *v.* Louisville, etc., R. Co., 116 Ind. 42; *ante*, §§ 1253, 1254.

[4] Sutzin *v.* Chicago, etc., R. Co., (Iowa) 63 N. W. R. 709; Omaha, etc., R. Co. *v.* Cook, 37 Neb. 435; Union Pac. R. Co. *v.* Mertes, 35 Neb. 204, s. c. 52 N. W. R. 1099; Mobile, etc., R. Co. *v.* Watly, 69 Miss. 145; Raines *v.* Chesapeake, etc., R. Co., (W. Va.) 60 Am. & Eng. R. Cas. 75; Louisville, etc., R. Co. *v.* Lohges, 6 Ind. App. 288, s. c. 33 N. E. R. 449; Wren *v.* Louisville, etc., R. Co., (Ky.) 20 S. W. R. 215; Gulf, etc., R. Co. *v.* Lankford, (Tex.) 29 S. W. R. 933; 1 Shearm. & Redf. Neg., § 99; *ante*, § 1175.

[5] Palmer *v.* Chicago, etc., R. Co., 112 Ind. 250, s. c. 14 N. E. R. 70; Penn-

the engineer upon a long trestle in time to have stopped the train, and the latter did nothing to stop or slacken the speed of the train, but went on, speculating on the chances of the trespasser's reaching the end of the trestle before the train, although it must have been apparent that the trespasser could not escape, it was held that the engineer was guilty of such recklessness as amounted to wilfulness, that the company was liable for running over and killing such trespasser while upon the trestle, regardless of his contributory negligence.[1]

§ 1258. **Injuries to persons in company's yards.**—No duty rests upon a railroad company in favor of trespassers or bare licensees, who use its track as a footway, to keep its switches blocked in its private yard in order to prevent injury to such persons.[2] So, it has been held that staking cars across a highway in the railroad company's yard is not an unlawful act, nor negligence *per se*, and that one who travels along the right of way of a railroad company is a trespasser and can not recover for injuries received where a highway crosses the tracks of the company in its own yard from a car which is being staked along the track on such right of way.[3] The court was of the opinion that the highway crossing was simply for the purpose of passing from one side of the railroad to the other, and that the plaintiff did not cease to be a trespasser merely because he happened to have reached the crossing at the time he was injured. In another recent case it was held that one who crosses on a railroad ferry-boat in violation of the rules of the company forbidding the carriage of passengers thereon,

sylvania R. Co. *v.* Sinclair, 62 Ind. 301; Lake Erie, etc., R. Co. *v.* Brafford, (Ind. App.) 43 N. E. R. 882; Lake Shore, etc., R. Co. *v.* Bodemer, 139 Ill. 596, s. c. 32 Am. St. R. 218; Louisville, etc., R. Co. *v.* Trammell, 93 Ala. 350. But it involves conduct which is *quasi* criminal. Louisville, etc., R. Co. *v.* Bryan, 107 Ind. 51; Parker *v.* Pennsylvania Co., 134 Ind. 673.

[1] Central R., etc., Co. *v.* Vaughan, 93 Ala. 209, s. c., 30 Am. St. R 50.

[2] International, etc., R. Co. *v.* Lee, (Tex.) 34 S. W. R. 160; Akers *v.* Chicago, etc., R. Co., (Minn.) 60 Am. & Eng. R. Cas. 30, 60 N. W. R. 669.

[3] Kelly *v.* Michigan Cent. R. Co., 65 Mich. 186, s. c. 8 Am. St. R. 876. Sherwood, J., dissented in this case, and the decision is certainly very close to the line.

and, in seeking to return, again enters the company's yard, remains a trespasser in proceeding through such yard to reach a public ferry-boat after he has been ordered off the railroad boat, although the company's employes direct him as to the way through the yard to the ferry landing, which way is at least as safe as any other exit.[1] Even as to employes, the company is under no obligation to ring the bell or sound the whistle upon a switching engine engaged in making up trains in its yard, for the purpose of notifying such employes, who are familiar with the operation of the yard.[2] If one who is not an employe, without the knowledge or consent of the company, goes into its yard which is interlaced with tracks, upon which engines and cars are being switched and changed, he must use care commensurate with the peril in which he has placed himself, and the company owes him no duty except not to injure him wilfully, or by negligence after its employes see his danger and inability to escape in time to prevent such injury by the exercise of due care.[3] The switch-yard of a railroad company is usually even a more dangerous place than the right of way where there is but a single track, and as it is likely to be in continuous use by the company in switching, storing and repairing cars, making up trains, or the like, there is, perhaps, still less reason for implying a license or invitation to strangers

[1] Kansas City, etc., R. Co. *v.* Cook, 66 Fed. R. 115, s. c. 28 L. R. A. 181. The court said: "Plaintiff was not rightfully in the yard; his being there was negligence. The railroad company owed him no duty except to avoid, after discovering his danger, any wanton or unnecessary injury being done him." See, also, Richmond, etc., R. Co., *v.* Watts, 92 Ga. 88, s. c. 17 S. E. R. 983.

[2] Aerkfetz *v.* Humphreys, 145 U. S. 418, s. c. 12 Sup. Ct. R. 835. See, also, Goodes *v.* Boston, etc., R. Co., 162 Mass. 287, s. c. 38 N. E. R. 500. And, on the other hand, it seems that the rule that one who crosses a railroad track must, as a matter of law, look and listen before doing so, does not apply to one who is employed in a railroad yard and whose duties make it necessary for him to frequently go upon the tracks. Jordan *v.* Chicago, etc., R. Co., 58 Minn. 8, s. c. 59 N. W. R. 633.

[3] Rome R. Co. *v.* Tolbert, 85 Ga. 447, s. c. 11 S. E. R. 849; Central R., etc., Co. *v.* Rylee, 87 Ga. 491, s. c. 13 L. R. A. 634; Missouri Pac. R. Co. *v.* Moseley, 57 Fed. R. 921; St. Louis, etc., R. Co. *v.* Monday, 49 Ark. 257. See, also, Tucker *v.* Baltimore, etc., R. Co., 59 Fed. R. 968; Chicago, etc., R. Co. *v.* Caulfield, 63 Fed. R. 396.

to use such premises than in the case of the right of way where there is but a single track. In any event, what we have heretofore stated in regard to the risks taken by the licensee and the limited duty due him from the company must apply with at least equal force where the license is to use the company's private yard and tracks therein. Where, however, a public street crosses the tracks in a railroad yard, one who is crossing on such street is not a trespasser or bare licensee. In such a case the railroad company may be liable for injury under circumstances which would not make it liable to a trespasser. Thus, in a recent case, the company was held liable to a traveler upon a street, where it crossed the tracks, for injury by a steer, which, owing to its crippled condition, had been unloaded to be killed, and was negligently allowed to recover and run loose in the yard through which the street crossed.[1]

§ 1259. **Liability for injury to trespassing children—Turntable cases.**—In actions for injuries to children, as in other cases, there can be no recovery unless the defendant has been guilty of a breach of duty.[2] We presume that no court would deny this fundamental doctrine, but, as suggested in a recent case, it is sometimes lost sight of and "in dealing with cases which involve injuries to children courts and juries have sometimes strangely confounded legal obligations with sentiments independent of law."[3] There is sharp conflict among the authorities, however, as to what the duty of a railroad company is to children who come upon its premises as trespassers or mere licensees. We believe the true rule to be that, although the age of the child may be important in determining the question of contributory negligence or the duty of the company after discovering him, the company is, in general, no more bound to keep its premises safe for children who are trespassers or bare licensees not invited or enticed by it than it is to keep them safe for adults.[4] On the other hand, while it

[1] Texas, etc., R. Co. *v.* Juneman, 71 Fed. R. 939.

[2] 2 Thomp. Neg. 1183, note.

[3] City of Indianapolis *v.* Emmelman, 108 Ind. 530, s. c. 9 N. E. R. 155.

[4] McEachen *v.* Boston, etc., R. Co.,

may be contributory negligence for a child to play upon the track or any other dangerous place, yet if he has a right to be there, as, for instance in a public highway, where it crosses the track, he can not be treated as a trespasser.[1] So, if the company invites, allures or entices a child into a place of danger and negligently injures such child while there it may be held liable, in the absence of contributory negligence, for such injury. Some of the authorities have applied this rule in favor of children when they would not have applied it to adults and have held railroad companies liable where that which allured them was not near any public place in which they had a right to be and where they necessarily became intruders or trespassers before they could reach it. This is particularly

150 Mass. 515, s.c. 23 N.E.R. 231; Morrissey *v.* Eastern R. Co., 126 Mass. 377; Pennsylvania Co. *v.* McMullen, 132 Pa. St. 107, s. c. 19 Atl. R. 27; Emerson *v.* Peteler, 35 Minn. 481, s. c. 29 N. W. R. 311; Gavin *v.* City of Chicago, 97 Ill. 66; City of Indianapolis *v.* Emmelman, 108 Ind. 530, s. c. 9 N. E. R. 155; Cauley *v.* Pittsburgh, etc., R. Co., 95 Pa. St. 398; Gillespie *v.* McGowan, 100 Pa. St. 144: Baltimore, etc., R. Co. *v.* Schwindling, 101 Pa. St. 258; Overholt *v.* Vieths, 93 Mo. 422, s. c. 6 S. W. R. 74; Sherman *v.* Hannibal, etc., R. Co., 72 Mo. 62; Frost *v.* Eastern R. Co., 64 N. H. 220, s. c. 9 Atl. R. 790; Clark *v.* Manchester, 62 N. H. 577; McDermott *v.* Kentucky Cent. R. Co., 93 Ky. 408, s. c. 20 S. W. R. 380; Bannon *v.* Baltimore, etc., R. Co., 24 Md. 108; Chicago, etc., R. Co. *v.* McLaughlin, 47 Ill. 265; Atchison, etc., R. Co. *v.* Flinn, 24 Kan. 627; Central Branch, etc., R. Co. *v.* Henigh, 23 Kan. 347; Nolan *v.* New York, etc., R. Co., 53 Conn. 461, s. c. 4 Atl. R. 106; Klix *v.* Nieman, 68 Wis. 271, s. c. 32 N. W. R. 223, 60 Am. R. 854; McAlpin *v.* Powell, 70 N. Y. 126, s. c. 26 Am. R. 555; Fredericks *v.* Ill. Cent. R. Co., 46 La. Ann. 1180, s. c. 15 So. R. 413; Buswell Pers. Inj., § 78, and note. But see Harriman *v.* Railway Co., 45 Ohio St. 11, s. c. 12 N. E. R. 451; Callahan *v.* Eel River, etc., R. Co., 92 Cal. 89, s. c. 28 Pac. R. 104; Union Pac. R. Co. *v.* McDonald, 152 U. S. 262, s. c. 14 Sup. Ct. R. 619; Lynch *v.* Nurdin, 1 Q. B. 29; Powers *v.* Harlow, 53 Mich. 507; Chicago, etc., R. Co. *v.* Bockoven, 53 Kan. 279, s. c. 36 Pac. R. 322: Birge *v.* Gardner, 19 Conn. 507; Indianapolis, etc., R. Co. *v.* Pitzer, 109 Ind. 179, s. c. 10 N. E. R. 70; Westerfield *v.* Levis, 43 La. Ann. 63, s. c. 9 So. R. 52; Mackey *v.* Vicksburg, 64 Miss. 777; Pittsburgh, etc., R. Co. *v.* Shields, (Ohio) 31 Cent. L. J. 168, and note; Kentucky Cent. R. Co. *v.* Gastineau 83 Ky. 119; note to Newman *v.* Phillipsburgh, etc., R. Co., 8 L. R. A. 842; Bransom *v.* Labrot, 81 Ky. 638; Beach on Contrib. Neg., § 204; Cooley on Torts, 303, and see turn-table cases hereinafter cited.

[1] Krenzer *v.* Pittsburgh, etc., R. Co., (Ind.) 43 N. E. R. 649; Louisville, etc., R. Co. *v.* Sears, 11 Ind. App. 654, s. c. 38 N. E. R. 837; Huerzeler *v.* Central, etc., R. Co., 139 N. Y. 490, s. c. 34 N. E. R. 1101; McGuire *v.* Spence, 91 N. Y. 303.

true of some of the turn-table cases. In an early case the supreme court of the United States held that, "while a railway company is not bound to the same degree of care in regard to mere strangers who are unlawfully upon its premises that it owes to passengers conveyed by it, it is not exempt from responsibility to such strangers for injuries arising from its negligence or from its tortious acts," and that when it leaves a turn-table unlocked and unguarded in an exposed place where children are likely to be attracted by it, this may be considered as a constructive invitation to them and the company held liable for their injury.[1] This decision has been followed in many other cases,[2] in some of which the doctrine therein announced was stretched to its utmost limits in its application to the facts. But some of the ablest courts of the land, in recent decisions, have refused to follow it,[3] and in this we believe

[1] Railroad Co. *v.* Stout, 17 Wall. (U. S.) 657.

[2] Keefe *v.* Milwaukee, etc., R. Co., 21 Minn. 297, s. c. 18 Am. R. 393; O'Malley *v.* St. Paul, etc., R. Co., 43 Minn. 289, s. c. 45 N. W. R. 440; Kansas Cent. R. Co. *v.* Fitzsimmons, 22 Kan. 686, s. c. 31 Am. R. 203; Nagel *v.* Missouri Pac. R. Co., 75 Mo. 653; Barrett *v.* Southern Pac. R. Co., 91 Cal. 296; Evansich *v.* Gulf, etc., R. Co., 57 Tex. 123; Fort Worth, etc., R. Co. *v.* Robertson, (Tex.) 14 L. R. A. 781, and note; Ferguson *v.* Columbus, etc., R. Co., 77 Ga. 102; Atchison, etc., R. Co. *v.* Bailey, 11 Neb. 332; Bridger *v.* Asheville, etc., R. Co., 27 S. Car. 456, s. c. 3 S. E. R. 860; Ilwaco R. Co. *v.* Hedrick, 1 Wash. 446, s. c. 25 Pac. R. 335. While the court in the Stout Case, *supra*, stated the rule as to the duty to trespassers too broadly, without even limiting it to children, what was directly decided was that it was for the jury to determine whether the turn-table was a dangerous machine and the company negligent under the particular circumstances of the case. Some of the other cases have assumed that a turn-table is exceptionally dangerous and attractive in itself, and in this, it seems, while professedly relying on that case, have gone to a still greater extreme.

[3] Daniels *v.* New York, etc., R. Co., 154 Mass. 349, s. c. 33 Cent. L. Jour. 322, 13 L. R. A. 248, 28 N. E. R. 283; Walsh *v.* Fitchburg R. Co., 145 N. Y. 301, s. c. 27 L. R. A. 725, 39 N. E. R. 1068; Frost *v.* Eastern R. Co., 64 N. H. 220, s. c. 9 Atl. R. 790. See, also, Lake Shore, etc., R. Co., *v.* Clark, 41 Ill. App. 343. In Bates *v.* Nashville, etc., R. Co., 90 Tenn. 36, s. c. 15 S. W. R. 1069, and Kolsti *v.* Minneapolis, etc., R. Co., 32 Minn. 133, it was held proper to instruct the jury that the company was not required to so fasten or secure the turn-table that boys could not displace such fastening and put the table in motion. But compare Callahan *v.* Eel River, etc., R. Co., 92 Cal. 89, s. c. 28 Pac. R. 104.

they are justified by reason, if not by the weight of authority. But even if a railroad company should be held liable, as in some of the cases, where it leaves a turn-table unguarded and unfastened in an exposed place near a highway or place where the public have a right to go and children frequently do go, it does not follow, it seems to us, that it would be liable where the turn-table is far from such a place in an isolated position upon the company's grounds, and we believe that, in such a case, the court might so hold as a matter of law.[1]

§ 1260. **Injury to trespassing children—Illustrative and conflicting cases.**—The importance of this subject renders desirable a statement of what has been held in some of the conflicting authorities. On the one hand it has been held, in accordance with what we regard as the true rule, that cars are not "dangerous machines" and attractive to children, within the meaning of the rule adopted in some of the turn-table cases, and that a railroad company owes no duty to a child trespassing in its yard to see that he does not jump on its cars, or to fence its freight yard,[2] nor to keep its cars in good repair, or the doors shut,[3] nor to guard them so that such a child can not be injured by loosening the brakes.[4] So, where a railroad

[1] See St. Louis, etc., R. Co. *v.* Bell, 81 Ill. 76, s. c. 25 Am. R. 269. Certainly this must be true where the child could not have been attracted by it until after he became a trespasser. See Chicago, etc., R. Co. *v.* Bockoven, 53 Kan. 279, s. c. 36 Pac. R. 322, 333.

[2] Barney *v.* Hannibal, etc., R. Co, 126 Mo. 372, s. c. 28 S. W. R. 1069, 11 Lewis' Am. R. & Corp. R. 668. See, also, Rushenburg *v.* St.Louis, etc., R. Co., 109 Mo. 112, s. c. 19 S. W. R. 216; Bishop *v.* Union R. Co., 14 R. I. 314; Catlett *v.* Railway Co., 57 Ark. 411, s. c. 21 S. W. R. 1062, 54 Am. & Eng. R. Cas. 113; Louisville, etc., R. Co. *v.* Hurt, (Ky.) 13 S. W. R. 275; Chicago, etc., R. Co. *v.* Stumps, 69 Ill. 409. But see as to effect of failure to fence, generally: Keyser *v.* Chicago, etc., R. Co., 56 Mich. 559, s. c. 23 N. W. R. 311, 56 Am. R. 405; Schmidt *v.* Milwaukee, etc., R. Co., 23 Wis. 186; Union Pac. R. Co. *v.* McDonald, 152 U. S. 262, s. c. 14 Sup. Ct. R. 619, and note to 31 Am. & Eng. R. Cas. 423; note to Bottoms *v.* Seaboard, etc., R. Co., 25 L. R. A. 784.

[3] McEacheon *v.* Boston, etc., R. Co., 150 Mass. 515, s. c. 23 N. E. R. 231; Curley *v.* Missouri Pac. R. Co., 98 Mo. 13, s. c. 10 S. W. R. 593.

[4] Central Branch, etc., R. Co. *v.* Henigh, 23 Kan. 347; Haesley *v.* Winona, etc , R. Co., 46 Minn. 233, s. c. 48 N. W. R. 1023. See, also, Gay *v.* Essex, etc., R. Co., 159 Mass. 238, s. c. 21 L. R. A. 448.

company kept old cars and coal dumps in its yard, which was enclosed by a fence from which trespassers had knocked off planks, leaving it open in places, and children were accustomed to go into the yard to play, notwithstanding they were frequently warned and driven out by the employes of the company, it was held that the company had done nothing to invite children there and was not liable for injury to a boy while riding on a coal dump pushed by his companions.[1] In another case it appeared that section men had left a hand-car, when they quit work, at the foot of an embankment, four or five feet below the level of the track, and not near any public place; that some boys had found it and placed it upon the track, when the boy who was injured was attracted to it by seeing them run it on the track, and that he thereupon joined in the sport and was injured by jumping or falling off while it was descending a grade at a high rate of speed. It was held that the company was not negligent in leaving the hand-car unlocked beside the track, and was not liable for such injuries.[2] So, it has been held in many cases that a railroad company is not obliged to keep a lookout for trespassing children upon its track, under ordinary circumstances, or move its cars with reference to them until their presence in danger is discovered.[3] On the other hand, it has been held that where a railroad company allows cars to stand with open doors on a side-track near its depot and close to a public street, where, as it knows, children are in the habit of going to play, it is negligence for

[1] O'Connor *v.* Illinois Cent. R. Co., 44 La. Ann. 339, s. c. 10 So. R. 678.

[2] Robinson *v.* Oregon, etc., R. Co., 7 Utah 493, s. c. 27 Pac. R. 689.

[3] Morrissey *v.* Eastern, etc., R. Co., 126 Mass. 377; Wright *v.* Boston, etc., R. Co., 142 Mass. 296, s. c. 7 N. E. R. 866; Cleveland, etc., R. Co. *v.* Adair, 12 Ind. App. 569, s. c. 39 N. E. R. 672; Woodruff *v.* Northern Pacific R. Co., 47 Fed. R. 689; Chrystal *v.* Troy, etc., R. Co., 105 N. Y. 164; Masser *v.* Chicago, etc., R. Co., 68 Iowa 602; Hepfel *v.* St. Paul, etc., R. Co., 49 Minn. 263, s. c. 51 N. W. R. 1049; Central, etc., R. Co. *v.* Rylee, 87 Ga. 491, s. c. 13 S. E. R. 584; Mitchell *v.* Philadelphia, etc., R. Co., 132 Pa. St. 226, s. c. 19 Atl. R. 28; Pennsylvania R. Co. *v.* McMullen, 132 Pa. 107, 19 Atl. R. 27; McDermott *v.* Kentucky Cent. R. Co., 93 Ky. 408, s. c. 20 S. W. R. 380; Louisville, etc., R. Co. *v.* Williams, 69 Miss. 631, s. c. 12 So. R. 957; Williams *v.* Kansas City, etc., R. Co., 96 Mo. 275, s. c. 9 S. W. R. 573; Givens *v.* Kentucky Cent. R. Co., (Ky.) 15 S. W. R. 1057.

it to back other cars against those standing upon the switch, for the purpose of coupling, without any notice and without seeking to ascertain whether children were in the cars.[1] So, it has been held that a railroad company is liable for an injury to a boy caused by the explosion of a torpedo which had been left upon the track by its employes at a place where children were in the habit of going with the knowledge and acquiescence of the company and was picked up by another boy who was with him.[2] In another case it was held that where a railroad company had built a stock-yard some distance from the nearest public place and a child was injured while swinging on a defective gate within the inclosure the company could not be held liable, although it knew that children were in the habit of playing in the vicinity, if such child first climbed over the outer fence or gate therein to get within the inclosure and upon the inside gate, but that it might be liable if the outside gate was negligently left open and the child entered in that way, or if the company had knowledge that children frequently climbed over the outer gate and swung upon the defective gate and took no measure to keep them away or prevent injury to them.[3] There are also cases to which we have referred in a former section, in which it is held that railroad companies must keep a lookout for children upon their tracks, although trespassers or bare licensees, wherever they may reasonably be expected; but most of the courts which have adopted this rule apply it in favor of adults as well as children.

§ 1261. **Contributory negligence of children.**—The general rule is well settled that children are only required to exercise such care for their own safety as may reasonably be expected in view of their age and condition,[4] or, in other words, a child

[1] Louisville, etc., R. Co. *v.* Popp, (Ky.) 27 S. W. R. 992, s. c. 10 Lewis Am. R. & Corp. R. 280.

[2] Harriman *v.* Railway Co., 45 Ohio St. 11, s. c. 12 N. E. R. 451; Pittsburgh, etc., R. Co. *v.* Shields, (Ohio) 31 Cent. L. J. 168. But see Carter *v.* Columbia, etc., R. Co., 19 S. Car. 20, s. c. 45 Am. R. 754.

[3] Chicago, etc., R. Co. *v.* Bockoven, 53 Kan. 279, s. c. 36 Pac. R. 322.

[4] Union Pac. R. Co. *v.* McDonald, 152 U. S. 262, s. c. 14 Sup. Ct. R. 619, 60 Am. & Eng. R. Cas. 1; Railroad Co.

must exercise such care as other children of the same age are accustomed to exercise under similar circumstances,[1] unless there is evidence that he is of more or less than average intelligence or the like. This simply means that he, like every one else, must exercise ordinary or reasonable care under the circumstances. The question is usually one for the jury to determine,[2] but the child may be so young that the court may say that he was *non sui juris* and incapable of contributory negligence or so old and intelligent that he was guilty of contributory negligence as matter of law, where it is clear that he did not exercise such care as should reasonably be expected of children of the same age and intelligence under the circumstances. There is no fixed period below which children are *non sui juris* and at which they at once become *sui juris*. Thus it has been held that children of various ages, from one to seven years, were *non sui juris*,[3] while in other cases children

v. Gladmon, 15 Wall. (U. S) 401; Chicago, etc., R. Co. *v.* Grablin, 38 Neb. 90, s. c. 60 Am. & Eng. R. Cas. 133, 138; Baker *v.* Flint, etc., R. Co., 68 Mich. 90, s. c. 35 N. W. R. 836; Baltimore, etc., R. Co. *v.* McDonnell, 43 Md. 534; Byrne *v.* New York, etc., R. Co., 83 N. Y. 620; Illinois Cent. R. Co. *v.* Slater, 129 Ill. 91, s. c. 21 N. E. R. 575; Plumley *v.* Birge, 124 Mass. 57; Ridenhour *v.* Kansas City, etc., R. Co., 102 Mo. 270, s. c. 13 S. W. R. 889, 14 S. W. R. 760; note to Slattery *v.* O'Connell, 10 L. R. A. 653; Beach Contrib. Neg., § 136; Shearm. & Redf. Neg., § 73; Pierce on Railroads, 332.

[1] Cincinnati, etc., R. Co. *v.* Wright, (Ind.) 43 N. E. R. 688; Cleveland Rolling Mill Co. *v.* Corrigan, 46 Ohio St. 283, s. c. 20 N. E. R. 466, 3 L. R. A. 385; Haynes *v.* Raleigh, etc., Co., 114 N. Car. 203, s. c. 41 Am. St. R. 786; Illinois Cent. R. Co. *v.* Slater, 129 Ill. 91, s. c. 16 Am. St. R. 242; Collins *v.* South Boston, etc., R. Co., 142 Mass. 301; Townley *v.* Chicago, etc., R. Co., 53 Wis. 626, s. c. 11 N. W. R. 55; Murray *v.* Richmond, etc., R. Co., 93 N. Car. 92. But see Western, etc., R. Co. *v.* Young, 81 Ga. 397, s. c. 12 Am. St. R. 320; Gulf, etc., R. Co. *v.* McWhirter, 77 Tex. 356, s. c. 19 Am. St. R. 755.

[2] Louisville, etc., R. Co. *v.* Sears, 11 Ind. App. 654, s. c. 38 N. E. R. 837; Houston, etc., R. Co. *v.* Simpson, 60 Tex. 103; Collins *v.* South Boston, etc., R. Co., 142 Mass. 301, s. c. 7 N. E. R. 856; City of Pekin *v.* McMahon, 154 Ill. 141, s. c. 39 N. E. R. 484, 27 L. R. A. 206; Dowling *v.* N. Y., etc., R. Co., 90 N. Y. 670; Stone *v.* Dry Dock, etc., R. Co. 115 N. Y. 104, s. c. 21 N. E. R. 712 (with which compare, however, Tucker *v.* New York Cent. etc., R. Co., 124 N. Y. 308, s. c. 26 N. E. R. 916); Strawbridge *v.* Bradford, 128 Pa. St. 200; Schierhold *v.* North Beach, etc., R. Co., 40 Cal. 447; note to Slattery *v.* O'Connell, 10 L. R. A. 653.

[3] Chicago City R. Co. *v.* Wilcox, 138 Ill. 370, s. c. 27 N. E. R. 899 (citing cases but not deciding the question); Central Trust Co. *v.* Wabash, etc., R. Co., 31 Fed. R. 246; Barnes *v.* Shreve-

less than seven years old have been held *sui juris*, and even capable of being adjudged guilty of contributory negligence as matter of law for not exercising such care as might reasonably be expected of children of that age.[1] In supposed analogy to the rule of the criminal law it has been held in some jurisdictions that a child between seven and fourteen years of age is presumptively incapable of exercising judgment and discretion and that after he has attained that age the contrary presumption prevails, although the presumption may be rebutted in either case.[2] But, as a matter of fact, a child of ordinary intelligence and capacity, between seven and fourteen years of age, is, as every one knows, capable of exercising some judgment and care, and no child on arriving at the age of fourteen makes a sudden leap from darkness into light, from mental incapacity to judgment and discretion, from inability to exercise any discretion or care to ability to exercise discretion and care.[3] We think, therefore, that there is no foundation for any such presumption, and that the better rule is that it is usually for the jury to determine, without regard to any such arbitrary presumption, whether the particular child has exercised such care, if any, under the circumstances, as might reasonably be expected of a child of his age and capacity, and that a child under fourteen years of age may be declared guilty

port, etc., R. Co., 47 La. Ann. 1218, s. c. 17 So. R. 782; Citizens' St. R. Co. *v.* Stoddard, 10 Ind. App. 278, s. c. 37 N. E. R. 723; Mangam *v.* Brooklyn R. Co., 38 N. Y. 455, s. c. 98 Am. Dec. 66, and note; Bottoms *v.* Seaboard, etc., R. Co., 114 N. Car. 699, s. c. 41 Am. St. R. 799; Freer *v.* Cameron, 4 Rich. L. 228, 55 Am. Dec. 663, and note; Bish. Non. Cont. Law, § 586; Beach on Contrib. Neg., § 117.

[1] Hayes *v.* Norcross, 162 Mass. 546, s. c. 39 N. E. R. 282; Wright *v.* Boston R. Co., 142 Mass. 296; Cleveland, etc. R. Co. *v.* Tartt, 64 Fed. R. 830.

[2] Lovell *v.* DeBardelaben, etc., Co., 90 Ala. 13, s. c. 7 So. Rep. 756; Pratt, etc., Co. *v.* Brawley, 83 Ala. 371, s. c. 3 So. R. 555; Rhodes *v.* Georgia, etc., R. Co., 84 Ga. 320; Trumbo *v.* City St. Car Co., 89 Va. 780; Nagle *v.* Allegheny Valley R. Co., 88 Pa. St. 35, explained in Kehler *v.* Schwenk, 144 Pa. St. 348, s. c. 22 Atl. R. 910.

[3] See authorities cited in note 2 *supra*, p. 1978; also, Hepfel *v.* St. Paul, etc., R. Co., 49 Minn. 263, s. c. 51 N. W. R. 1049; Holmes *v.* Atlantic Ave. R. Co., 16 N. Y. S. R. 743; Bridger *v.* Asheville, etc., R. Co., 27 S. Car. 456, s. c. 3 S. E. R. 860; Central R., etc., Co. *v.* Golden, 93 Ga. 510, s. c. 21 S. E. R. 68; Paducah, etc., R. Co. *v.* Hoehl, 12 Bush (Ky.) 41.

of contributory negligence by the court, as a matter of law, where the facts are undisputed and no other inference could reasonably be drawn by ordinary and reasonable men. While most of the courts, we think, would admit the correctness of this rule, yet they differ when they come to apply it to the facts. We shall refer briefly to some of the cases in which the question arose as to whether very young children were guilty of negligence as matter of law, selecting, as far as possible, those in which the children were trespassers or bare licensees. In one case a boy between ten and eleven years old, who had been warned against playing on a turn-table, was held guilty of contributory negligence as matter of law, although he did not fully understand the danger,[1] and in another case a boy between seven and eight years old was held guilty of contributory negligence as matter of law in going to sleep on the track.[2] So, a boy eleven years old was held guilty of contributory negligence in trespassing upon the track without paying attention.[3] And in many other cases children of from seven to twelve years of age have been held guilty of contributory negligence in crossing in front of a rapidly moving train,[4] in climbing over or crawling under cars,[5] and in crossing without paying any attention when they must have seen the approaching train if they had looked.[6] So, where a boy six-

[1] Twist *v.* Winona, etc., R. Co., 39 Minn. 164, s. c. 39 N. W. R. 402, 12 Am. St. R. 626. So where the boy was thirteen years old. Merryman *v.* Chicago, etc., R. Co., 85 Iowa 634, s. c. 52 N. W. R. 545. But see Union Pac. R. Co. *v.* Dunden, 37 Kans. 1, s. c. 14 Pac. R. 501.

[2] Krenzer *v.* Pittsburgh, etc., R. Co., (Ind.) 43 N. E. R. 649. See, also, Raden *v.* Georgia R. Co., 78 Ga. 47.

[3] Masser *v.* Chicago, etc., R. Co., 68 Iowa 602, s. c. 27 N. W. R. 776. See, also, Central R. Co. *v.* Brinson, 70 Ga. 207; Houston, etc., R. Co. *v.* Smith, 77 Tex. 179, s. c. 13 S. W. R. 972.

[4] Motel *v.* Sixth Ave. R. Co., 99 N. Y. 632; Wendell *v.* N. Y., etc., R. Co., 91 N. Y. 420; Manahan *v.* Steinway, etc., R. Co., 125 N. Y. 760.

[5] *Ante*, § 1169; Powers *v.* Chicago, etc., R. Co., 57 Minn. 322, s. c. 59 N. W. R. 307; Oregon, etc., Co. *v.* Egley, 2 Wash. 409, s. c. 26 Pac. R. 973; Gay *v.* Essex, etc., R. Co., 159 Mass. 238, s. c. 21 L. R. A. 448; Wallace *v.* New York, etc., R. Co., 165 Mass. 236, s. c. 42 N. E. R. 1125. See Ecliff *v.* Wabash, etc., R. Co., 64 Mich. 196, s. c. 31 N. W. R. 180; Ostertag *v.* Pacific R. Co., 64 Mo. 421; Central R., etc., Co. *v.* Rylee, 87 Ga. 491, s. c. 13 L. R. A. 634; Lewis *v.* Baltimore, etc., R. Co., 38 Md. 588.

[6] Tucker *v.* New York, etc., R. Co., 124 N. Y. 308, s. c. 26 N. E. R. 916;

teen years old deliberately stood on a railroad track with his back to an engine which was twenty feet away and which he knew was liable to move at any moment, he was held negligent as matter of law.[1] On the other hand, there are many cases in which, under somewhat similar circumstances, it was held that the children could not be said to have been negligent as matter of law, although they would undoubtedly have been so adjudged if they had been adults, and in some instances it seems to us, from the facts stated, they did not exercise any care whatever, or, at least, that they did not exercise such care as might reasonably be expected of children of their age and capacity.[2]

§ 1262. **Imputable negligence.**—In some jurisdictions the rule prevails that in actions by or on behalf of children who are *non sui juris* the contributory negligence of their parents, custodians or others who stand *in loco parentis* is imputed to them.[3] This rule, however, has met with well-merited criti-

Sheets *v.* Connolly St. R. Co., 54 N. J. L. 518, s. c. 24 Atl. R. 483; Shirk *v.* Wabash R. Co., (Ind. App.) 42 N. E. R. 656. See, also, Marden *v.* Boston, etc., R. Co., 159 Mass. 393, s. c. 34 N. E. R. 404.

[1] Lofdahl *v.* Minneapolis, etc., R. Co., 88 Wis. 421, s. c. 60 N. W. R. 795.

[2] See Taylor *v.* Delaware, etc., R. Co., 113 Pa. St. 162; Powers *v.* Harlow, 53 Mich. 507, s. c. 51 Am. R. 154; Kansas Central R. Co. *v.* Fitzimmons, 22 Kans. 686; Stone *v.* Dry Dock, etc., R. Co., 115 N. Y. 104; Omaha, etc., R. Co. *v.* Morgan, 40 Neb. 604, s. c. 59 N. W. R. 81; Dealey *v.* Mullen, 149 Mass. 432; Barry *v.* New York, etc., R. Co., 92 N. Y. 289; Mackey *v.* Vicksburg, 64 Miss. 777; Wyatt *v.* Citizens' R. Co., 55 Mo. 485; Avey *v.* Galveston, etc., R. Co., 81 Tex. 243, s. c. 16 S. W. R. 1015; Eswin *v.* St. Louis, etc., R. Co., 96 Mo. 290, s. c. 9 S. W. R. 577; Tobin *v.* Missouri Pac. R. Co., (Mo.) 18 S. W. R. 996; Houston, etc., R. Co. *v.* Boozer, 70 Tex. 530, s. c. 8 S. W. R. 119; Wright *v.* Detroit, etc., R. Co., 77 Mich. 123, s. c. 43 N. W. R. 765; Rauch *v.* Lloyd, 31 Pa. St. 358; Huerzeler *v.* Central, etc., R. Co., 139 N. Y. 490; McGuire *v.* Chicago, etc., R. Co., 37 Fed. R. 54; Lake Erie, etc., R. Co. *v.* Mackey, (Ohio St.) 29 L. R. A. 757.

[3] Hartfield *v.* Roper, 21 Wend. (N. Y.) 615, s. c. 34 Am. Dec. 273, and note; Meeks *v.* Southern Pac. R. Co., 52 Cal. 602; Lovett *v.* Salem, etc., R. Co., 9 Allen (Mass.) 557; Wright *v.* Malden, etc., Co., 4 Allen (Mass.) 283; Holly *v.* Boston, etc., Co., 8 Gray (Mass.) 123; Brown *v.* European, etc., R. Co., 58 Me. 384; Smith *v.* Atchison, etc., R. Co., 25 Kan. 738; Mangam *v.* Brooklyn, etc., R. Co., 38 N. Y. 455; Kyne *v.* Wilmington, etc., R. Co., 8 Houst. (Del.) 185, 14 Atl. R. 922; Ohio, etc., R. Co. *v.* Stratton, 78 Ill. 88; Toledo, etc., R. Co. *v.* Grable, 88 Ill. 441 (but later cases render it doubtful if

cism,[1] and is denied in most jurisdictions.[2] So, even where it obtains, it will not prevent a recovery if the child exercised such reasonable and ordinary care as an adult would have exercised under the same circumstances.[3] Where, however, the action is brought by the parent for his own benefit it is justly held that he can not recover if the child was *non sui juris* and the parent was guilty of contributory negligence in permitting it to go into a dangerous place where it was injured by reason of its failure to exercise ordinary care,[4] or if the child, although

this doctrine now prevails in Illinois); Louisville, etc., R. Co. *v.* Murphy, 9 Bush (Ky.) 522; Fitzgerald *v.* St. Paul, etc., R. Co., 29 Minn. 336, s. c. 43 Am. R. 212; Hathaway *v.* Toledo, etc., R. Co., 46 Ind. 25; Lafayette, etc., R. Co. *v.* Huffman, 28 Ind. 287; Pittsburgh, etc., R. Co. *v.* Vining, 27 Ind. 513. But see Louisville, etc., R. Co. *v.* Sears, 11 Ind. App. 654, s. c. 38 N. E. R. 837; Cleveland, etc., R. Co. *v.* Keely, 138 Ind. 600, s. c. 37 N. E. R. 406; Wail *v.* Dry Dock, etc., R. Co., 119 N. Y. 147, s. c. 23 N. E. R. 487; Barrett *v.* Southern Pac. Co., 91 Cal. 296, s. c. 27 Pac. R. 666; McGeary *v.* Eastern R. Co., 135 Mass. 363. See, also, Waite *v.* Northeastern Ry., El. Bl. & El. 719.

[1] Beach on Contrib. Neg., § 127, *et seq.*; 1 Shearm. & Red. Neg., (4th ed.) § 75; 2 Jaggard on Torts, 984; Cooley on Torts, 681; Buswell Pers. Inj., § 108.

[2] Bottoms *v.* Seaboard, etc., R. Co., 114 N. Car. 699, s. c. 25 L. R. A. 784; Newman *v.* Phillipsburg, etc., R. Co., 52 N. J. L. 446, s. c. 8 L. R. A. 842; Kay *v.* Pennsylvania R. Co., 65 Pa. St. 269, s. c. 3 Am. R. 628; Robinson *v.* Cone, 22 Vt. 213, s. c. 54 Am. Dec. 67; Wymore *v.* Mahaska County, 78 Iowa 396, s. c. 6 L. R. A. 545, and note; Winters *v.* Kansas City, etc., R. Co., 99 Mo. 509, s. c. 6 L. R. A. 536; Cleveland, etc., R. Co. *v.* Manson, 30 Ohio St. 451; Norfolk, etc., R. Co. *v.* Ormsby, 27 Gratt. (Va.) 455; Huff *v.* Ames, 16 Neb. 139, s. c. 49 Am. R. 716; Galveston, etc., R. Co. *v.* Moore, 59 Tex. 64, s. c. 46 Am. R. 265; Norfolk, etc., R. Co. *v.* Groseclose, 88 Va. 267, s. c. 13 S. E. R. 454; Shippy *v.* Village of Au Sable, 85 Mich. 280, s. c. 48 N. W. R. 584; Pratt, etc., Co. *v.* Brawley, 83 Ala. 371; Daley *v.* Norwich, etc., R. Co., 26 Conn. 591, s. c. 68 Am. Dec. 413; Ferguson *v.* Columbus, etc., R. Co., 77 Ga. 102; Allen *v.* Texas, etc., R. Co., (Tex. C. App.) 27 S. W. R. 943; St. Louis, etc., R. Co. *v.* Rexroad, 59 Ark. 180, s. c. 26 S. W. R. 1037; Louisville, etc., R. Co. *v.* Gobin, 52 Ill. App. 565; Westbrook *v.* Mobile, etc., R. Co., 66 Miss. 560; s. c. 6 So. R. 321; Bisaillon *v.* Blood, 64 N. H. 565, s. c. 15 Atl. R. 147; Chicago City, R. Co. *v.* Wilcox, (Ill.) 8 L. R. A. 494, and note (reversed on rehearing, 138 Ill. 370, s. c. 21 L. R. A. 77); Atlanta, etc., R. Co. *v.* Gravitt, 93 Ga. 369, s. c. 44 Am. St. R. 145.

[3] Chicago City R. Co. *v.* Robinson, 127 Ill. 1, s. c. 18 N. E. R. 772, 4 L. R. A. 126; Wiswell *v.* Doyle, 160 Mass. 42, s. c. 35 N. E. R. 107; O'Brien *v.* McGlinchy, 68 Me. 552, 556.

[4] Bellefontaine, etc., R. Co. *v.* Snyder, 18 Ohio St. 399, s. c. 24 Ohio St. 670; Smith *v.* Hestonville, etc., R. Co., 92 Pa. St. 450, s. c. 37 Am. R. 705;

sui juris, was injured by reason of its failure to exercise such care as might reasonably be expected of one of its age and capacity.[1] But a parent is not necessarily negligent in permitting a child to go with a custodian apparently capable of taking care of it to a place where there is a concealed danger unknown to both,[2] and it has been held that the fact that the child escaped through a door momentarily left open and ran into a place of danger does not necessarily show negligence on the part of the parents,[3] and that domestic exigencies,[4] or even poverty,[5] may sometimes excuse the parents from the exercise of such watchfulness as might otherwise be required of them.

§ 1263. **Liability for injury to persons on adjacent highway.**—Railroad companies should so construct and maintain their premises which abut upon highways, and their tracks

Schlenks *v.* Central, etc., R. Co., (Ky.) 23 S. W. R. 589; Foley *v.* New York, etc., R. Co., 78 Hun 248, s. c. 28 N. Y. Supp. 816; Evansville, etc., R. Co. *v.* Wolf, 59 Ind. 89; Pratt, etc., R. Co. *v.* Brawley, 83 Ala. 371, s. c. 3 So. R. 555; Glassey *v.* Hestonville, etc., R. Co. 57 Pa. St. 172; Williams *v.* Texas, etc., R. Co., 60 Tex. 205; Senn *v.* Southern R. Co., 124 Mo. 621, s. c. 28 S. W. R. 66; Westerfield *v.* Levis, 43 La. Ann. 63, s. c. 9 So. R. 52; Atlanta, etc., R. Co. *v.* Gravitt, 93 Ga. 369, s. c. 20 S. E. R. 550 (negligence of custodian imputed to father but not to mother).

[1] Chicago, etc., R. Co. *v.* Harney, 28 Ind. 28; Burke *v.* Broadway, etc., R. Co., 34 How. Pr. 239; Fitzgerald *v.* St. Paul, etc., R. Co., 29 Minn. 336, s. c. 43 Am. R. 212.

[2] Union Pac. R. Co. *v.* McDonald, 152 U. S. 262, s. c. 14 Sup. Ct. R. 619, 60 Am. & Eng. R. Cas. 1.

[3] Weissner *v.* St. Paul, etc., R. Co., 47 Minn. 468, s. c. 50 N. W. R. 606; Pittsburg, etc., R. Co. *v.* Pearson, 72 Pa. St. 169; Houston City R. Co. *v.* Dillon, 3 Tex. Civ. App. 303, s. c. 22 S. W. R. 1066; Morgan *v.* Illinois, etc., R. Co., 5 Dill. (U. S. C. C.) 96; Farris *v.* Cass Ave., etc., R. Co., 80 Mo. 325.

[4] Citizens St. R. Co. *v.* Stoddard, 10 Ind. App. 278, s. c. 37 N. E. R. 723; Slattery *v.* O'Connell, 153 Mass. 94, s. c. 26 N. E. R. 430; McMahon *v.* Northern Cent. R. Co., 39 Md. 438; Atchison, etc., R. Co. *v.* Calvert, 52 Kan. 547, s. c. 34 Pac. R. 976; Elgin, etc., R. Co. *v.* Raymond, 47 Ill. App. 242.

[5] Pittsburg, etc., R. Co. *v.* Pearson, 72 Pa. St. 169; Philadelphia, etc., R. Co. *v.* Long, 75 Pa. St. 257; O'Flaherty *v.* Union R. Co., 45 Mo. 70; Isabel *v.* Hannibal, etc., R. Co., 60 Mo. 475; Walters *v.* Chicago, etc., R. Co., 41 Iowa 71. But this holding is questionable. See Illinois, etc., R. Co. *v.* Slater, 129 Ill. 91, s. c. 21 N. E. R. 575; Mayhew *v.* Burns, 103 Ind. 328; Cumming *v.* Brooklyn City R. Co., 104 N. Y. 669, s. c. 10 N. E. R. 855.

which run along or across highways, that they shall not cause injury to travelers who are lawfully and properly using such highways, and if the company is negligent in this respect it will be liable to a traveler, who, while exercising due care on his part, is injured by such negligence.[1] Thus, where a traveler, while walking upon a highway under a bridge upon which a railroad crossed the highway, was injured by a brick which fell from one of the abutments, the company was held liable.[2] So, where a bolt upon an elevated railroad company's track broke and fell, with an iron plate, upon a traveler who was driving upon the highway under the structure, it was held that the company was liable, in the absence of proof of proper inspection.[3] In another case, the plaintiff was injured by cross-ties which fell from a moving gondola car upon him while he was walking along a pathway outside of the railroad right of way, and it was held that the mere fact that the ties fell from the car and injured him was, under the doctrine of *res ipsa loquitur*, *prima facie* evidence of negligence on the part of the railroad company.[4] So, where cars are derailed by the negligence of the company and run into an adjacent building, causing damage to person and property, the company is liable

[1] Beatty *v.* Central Iowa R. Co., 58 Iowa 242; Titcomb *v.* Fitchburg R. Co., 12 Allen (Mass.) 254; Conlon *v.* Eastern R. Co., 135 Mass. 195; Goldthorpe *v.* Hardman, 13 Mees. & W. 377; Robbins *v.* Jones, 15 Com. B. (N. S.) 221; North Penn. R. Co. *v.* Robinson, 44 Pa. St. 175. See, also, notes to Lepnick *v.* Gaddis, 26 L. R. A. 686; Baltimore, etc., R. Co. *v.* Breinig, 25 Md. 378,90 Am. Dec.49, *et seq.*; Sweeny *v.* Old Colony R. Co., 10 Allen 368, 87 Am. Dec. 644; Elliott on Roads and Streets, 543.

[2] Kearney *v.* London, etc., R. Co., L. R., 5 Q. B. 411. See, also, Pennsylvania, etc., R. Co. *v.* Graham, 63 Pa. St. 290; Cooke *v.* Boston, etc., R. Co., 133 Mass. 185; Dickie *v.* Boston, etc., R. Co., 131 Mass. 516.

[3] Volkmar *v.* Manhattan, etc., R. Co., 134 N. Y. 418, s. c. 31 N. E. R. 870. See, also, Lowery *v.* Manhattan, etc., R. Co., 99 N. Y. 158.

[4] Howser *v.* Cumberland, etc., R.Co., 80 Md. 146, s. c. 30 Atl. R. 906, 11 Lewis' Am. R. & Corp. R. 702. Several of the courts have shown a tendency to unduly extend this doctrine, it seems to us, under the lead of Judge Thompson, and it is, perhaps, doubtful if the case just cited does not do so. See the article on "*Res Ipsa Loquitur*," by Judge Thompson in 10 Cent. L. Jour. 261; Byrne *v.* Boadle, 2 Hurl. & C. 722, Bigelow's Lead. Cas. 578; Mullen *v.* St. John, 57 N. Y. 567; Hogan *v.* Manhattan R. Co., (N. Y.) 43 N. E. R. 403.

in the absence of contributory negligence.[1] But it has been held that a railroad company owes no duty with respect to the speed of its trains to one who is casually near its track in the country where there is no road or pathway, and, although some of its cars leave the track, owing to the high rate of speed, and injure such person, the company is not liable, at least, unless, for some reason, the injury might have been anticipated.[2] If, however, the company has invited or induced the public to use a footway over and along one side of its bridge and separated it by a fence from its track, it is liable to one who is injured while using such footway without contributory negligence, by reason of its failure to exercise ordinary care.[3] In the case just cited the company failed to give any signal and the engine struck a man who was upon the track at the crossing and knocked some tools which he was carrying over the fence and against the plaintiff, who was upon the footway. It was held that he was entitled to recover from the company for the injury thus caused.

§ 1264. **Liability for frightening horses.**—A railroad company is not liable for injuries resulting from horses becoming frightened upon a highway at the mere sight of its trains or the noises necessarily incident to the running of trains and the operation of the road.[4] Thus, there can be no recovery

[1] Walsh *v.* Missouri Pac. R. Co., 102 Mo. 582, s. c. 14 S. W. R. 873; Lane *v.* Illinois Cent. R. Co., 43 La. Ann. 833, s. c. 9 So. R. 560; Lake Erie, etc., R. Co. *v.* Lowder, 7 Ind. App. 537, s. c. 34 N. E. R. 447. But see Ewing *v.* Pittsburgh, etc., R. Co., 147 Pa. St. 40, s. c. 23 Atl. R. 340.

[2] Holland *v.* Sparks, 92 Ga. 753, s. c. 18 S. E. R. 990. See, also, Dillon *v.* Connecticut, etc., R. Co., 154 Mass. 478, s. c. 28 N. E. R. 899.

[3] Hamill *v.* Pennsylvania R. Co., 56 N. J. L. 370, 60 Am. & Eng. R. Cas. 124.

[4] Favor *v.* Boston, etc., R. Co., 114 Mass. 350; Lamb *v.* Old Colony R. Co., 140 Mass. 79; Flint *v.* Norwich, etc., R. Co., 110 Mass. 222; Whitney *v.* Maine Cent. R. Co., 69 Me. 208; Hahn *v.* Southern Pac. R. Co., 51 Cal. 605; Burton *v.* Philadelphia, etc., R. Co., 4 Harr. (Del.) 252; Yingst *v.* Lebanon, etc., St. R. Co., 167 Pa. St. 438, s. c. 31 Atl. R. 687; Ochiltree *v.* Chicago, etc., R. Co., (Iowa) 62 N. W. R. 7, 11; Heininger *v.* Great Northern, etc., R. Co., 59 Minn. 458, s. c. 61 N. W. R., 558; Peru, etc., R. Co. *v.* Hasket, 10 Ind. 409; Baltimore, etc., R. Co., *v.* Thomas, 60 Ind. 107; Ohio, etc., R. Co. *v.* Trowbridge, 126 Ind. 391; Louisville, etc., R. Co. *v.* Schmidt, 134 Ind. 16.

where the horse is frightened by a statutory signal properly given.[1] So, on the other hand, the failure to give a statutory signal will not render the company liable if it is not the proximate cause of the injury,[2] and, according to what we regard as the better rule, the company owes no duty to one who is not upon the highway near the crossing to give the statutory signals, and it is not, therefore, liable to one whose horse, while upon a parallel highway which does not cross the track or in a field, is frightened and runs away because the statutory signals were not given for the crossing of a neighboring highway and the owner thus failed to hear and prepare for the approach of the train.[3] But much necessarily depends upon the language and purpose of the particular statute in question, and the authorities upon the subject are not all in accord.[4] If the failure to give the statutory signals is the proximate cause of the injury, one to whom that duty is due, and who is himself free from contributory negligence, may, of course, recover

[1] Barron *v.* Chicago, etc., R. Co., 89 Wis. 79, s. c. 61 N. W. R. 303; Phillips *v.* New York, etc., R. Co., 84 Hun 412, 32 N. Y. Supp. 299.

[2] Leavitt *v.* Terre Haute, etc., R. Co., 5 Ind. App. 513; Pennsylvania Co. *v.* Hensil, 70 Ind. 569. So, where a car is left in a highway in violation of statute, the violation of the statute must be a proximate cause of the frightening of the horses and resulting injury in order to render the company liable. Cleveland, etc., Co. *v.* Wynant, 114 Ind. 525, 532. See, also, McDonald *v.* International, etc., R. Co., 81 Tex. 1, s. c. 40 Am. St. R. 803, and note; also, Gilson *v.* Delaware, etc., Co., 65 Vt. 213, 36 Am. St. R. 802, and note.

[3] Louisville, etc., R. Co. *v.* Lee, 47 Ill. App. 384; St. Louis, etc., R. Co. *v.* Payne, 29 Kan. 166; Williams *v.* Chicago, etc., R. Co., 135 Ill. 491, s. c. 25 Am. St. R. 397; East Tenn., etc., R. Co. *v.* Feathers, 10 Lea (Tenn.) 103. To same effect, see Louisville, etc., R. Co. *v.* Hall, 87 Ala. 708, s. c. 13 Am. St. R. 84; Nashville, etc. R. Co. *v.* Hembree, 85 Ala. 481; O'Donnell *v.* Providence, etc., R. Co., 6 R. I. 211; Holmes *v.* Central, etc., Co., 37 Ga. 593; Atlanta, etc., R. Co. *v.* Gravitt, 93 Ga. 369, s. c. 44 Am. St. R. 145; Elwood *v.* New York, etc., R. Co., 4 Hun (N. Y.) 808; Blanchard *v.* Lake Shore, etc., R. Co., 126 Ill. 416, s. c. 9 Am. St. R. 630; Favor *v.* Boston, etc., R. Co., 114 Mass. 350, s. c. 19 Am. R. 364; Hall *v.* Brown, 54 N. H. 495; Pike *v.* Chicago, etc., R. Co., 39 Fed. R. 754.

[4] See Ransom *v.* Chicago, etc., R. Co., 62 Wis. 178, s. c. 51 Am. R. 718; Wakefield *v.* Connecticut, etc , R. Co., 37 Vt. 330, s. c., 86 Am. Dec. 711; Norton *v.* Eastern R. Co., 113 Mass. 366; Harty *v.* Central R. Co., 42 N. Y. 468; Hart *v.* Chicago, etc., R. Co., 56 Iowa 166, s. c. 41 Am. R. 93; Lonergan *v.* Illinois Cent. R. Co., 87 Iowa 755, 759; Chicago, etc., R. Co. *v.* Metcalf, 44 Neb. 848, s. c. 63 N. W. R. 51.

from the company under ordinary circumstances.[1] So, on the other hand, there are, perhaps, exceptional cases in which the company may be held liable for injuries caused by giving the statutory signals, as, for instance, where the engineer sees that the horse is already frightened and its driver in danger, and that no one else is near who could be affected by the failure to give the signal.[2] In order to render the company liable, however, for injuries caused by giving statutory signals, it must be a very clear case of negligence or wilfulness, for an engineer can not be expected, upon the spur of the moment, to survey the surroundings and determine with absolute accuracy whether he shall give the signals in compliance with the statute and thus, perhaps, add to the fright of horses and probability of injury to them and their driver, or disobey the letter of the statute with the possibility of a fine for so doing, and injury or death to his passengers and those who may be about to cross the track. Although a railroad company is not liable, under ordinary circumstance, for the fright of horses caused by the operation of its road in the usual manner, it is liable for frightening horses and causing injury by unnecessary and excessive whistling or letting off steam under such circumstances as to constitute negligence or wilfulness.[3] Such act

[1] Cosgrove *v.* New York, etc., Co., 87 N. Y. 88, s. c. 6 Am. & Eng. R. Cas. 35; Ransom *v.* Chicago, etc., R. Co., 62 Wis. 178, s. c. 51 Am. R. 718; Rosenberger *v.* Grand Trunk R. Co., 8 Ont. App. 482, s. c. 15 Am. & Eng. R. Cas. 448; Grand Trunk R. Co. *v.* Rosenberger, 9 Can. S. C. 311, s. c. 19 Am. & Eng. R. Cas. 8. See, also, Rupard *v.* Chesapeake, etc., R. Co., 88 Ky. 280, 7 L. R. A. 316, and note.

[2] See Louisville, etc., R. Co. *v.* Stanger, 7 Ind. App. 179.

[3] Hill *v.* Portland, etc., R. Co., 55 Me. 438; Pennsylvania R. Co. *v.* Barnett, 59 Pa. St. 259, s. c. 98 Am. Dec. 346; Toledo, etc., R. Co. *v.* Harmon, 47 Ill. 298 (wilfulness); Chicago, etc., R. Co. *v.* Dunn, 52 Ill. 451; Chicago, etc., R. Co. *v.* Dickson, 88 Ill. 431; Borst *v.* Lake Shore, etc., R. Co., 66 N. Y. 639; Billman *v.* Indianapolis, etc., R. Co., 76 Ind. 166, s. c., 40 Am. R. 230, 6 Am. & Eng. R. Cas. 41; Louisville, etc., R. Co. *v.* Schmidt, 81 Ind. 264, s. c. 8 Am. & Eng. R. Cas. 248; Indianapolis, etc., R. Co. *v.* Boettcher, 131 Ind. 82; Manchester, etc., R. Co. *v.* Fullarton, 14 Com. B. N. S. 54, s. c. 108 Eng. Com. L. 54; Stott *v.* Grand Trunk R. Co., 24 U. C. C. P. 347; Northern Pac. R. Co. *v.* Sullivan, 53 Fed. R. 219; Texas, etc,, R. Co. *v.* Scoville, 62 Fed. R. 730 (wilfulness); Cobb *v.* Columbia, etc., R. Co., 37 S. Car. 194, s. c. 15 S. E. R. 878 (wilfulness); Nashville, etc., R. Co. *v.* Starnes, 9 Heisk. (Tenn.) 52. s. c. 24 Am. R. 296 (wilfulness).

must be a proximate cause of the injury, however, and, where negligence alone is relied upon, the injured party must be free from contributory negligence. The mere sounding of a whistle, or the like, even at a place of extraordinary danger where horses are likely to be present, is not actionable negligence *per se*.[1] The company may also be liable where it negligently leaves hand-cars or other obstructions upon a highway,[2] or negligently leaves a derrick projecting over a highway in such a manner as would naturally frighten horses of ordinary gentleness.[3] But it has been held that it is not liable where horses are frightened at a car in the highway unless horses of ordinary gentleness would naturally be frightened thereby.[4] And it has also been held that there can be no recovery where the complaint alleges and proceeds upon the theory that the horses were frightened at the car and the evidence shows that they were frightened at a noise in the car.[5]

§ 1265. Liability to strangers for wilful acts of employes.— We shall elsewhere consider the question as to the liability of a railroad company for the wilful acts of its employes affecting passengers. We shall here treat of the liability to others than passengers. The general rule is that a master is liable for the

[1] Cincinnati, etc., R. Co. *v.* Gaines, 104 Ind. 526; Billman *v.* Indianapolis, etc., R. Co., 76 Ind. 166, s. c. 40 Am. R. 230; Culp *v.* Atchison, etc., R. Co., 17 Kan. 475; Philadelphia, etc., R. Co. *v.* Stinger, 78 Pa. St. 219.

[2] Myers *v.* Richmond, etc., R. Co., 87 N. Car. 345, s. c. 8 Am. & Eng. R. Cas. 293; Ohio, etc., R. Co. *v.* Trowbridge, 126 Ind. 391; Bussian *v.* Milwaukee, etc., R. Co., 56 Wis. 325, s. c. 10 Am. & Eng. R. Cas. 716; Vars *v.* Grand Trunk R.Co., 23 U. C. C. P. 143; Elliott on Roads and Streets, 449. See, also, Grimes *v.* Louisville, etc., R. Co., 3 Ind. App. 573.

[3] Jones *v.* Housatonic R. Co., 107 Mass. 261.

[4] Gilbert *v.* Flint, etc., R. Co., 51 Mich. 488. See, also, Cleveland, etc., R. Co. *v.* Wynant, 114 Ind. 525, s. c. 5 Am. St. R. 644; Elliott on Roads and Streets, 450; Piollett *v.* Summers, 106 Pa. St. 95, s. c. 51 Am. R. 496. As to the evidence in such cases, contrast Cleveland, etc., R. Co. *v.* Wynant, 114 Ind. 525; Cleveland, etc., R. Co. *v.* Wynant, 134 Ind. 681; Bloor *v.* Delafield, 69 Wis. 273, s.c. 18 Am. & Eng. Corp. Cas. 289; Ayer *v.* Norwich, 39 Conn. 376, s. c. 12 Am. R. 396, with Darling *v.* Westmoreland, 52 N. H. 401, s. c. 13 Am. R. 55, and, Crocker *v.* McGregor, 76 Me. 282, s. c. 49 Am. R. 611.

[5] Cleveland, etc., R. Co. *v.* Wynant, 100 Ind. 160, 165, 166.

wilful acts of his servants if done in obedience to the master's order or within the scope of their employment or line of their duty, but not otherwise.[1] The master may also render himself liable by ratifying the act.[2] Railroad companies have been held liable for the act of their engineers in wantonly and wilfully frightening horses by blowing the whistle or letting off steam,[3] for an assault by an employe left in charge of a ticket office growing out of a controversy over his failure to give the plaintiff the proper change,[4] for an assault by an employe in charge of a train upon one who got upon the platform of a baggage car in violation of the rules of the company,[5] for an assault by a gate-keeper upon one who had a proper ticket and was attempting to pass through the gate at a station to take passage upon a train,[6] for the shooting of a trespasser upon a bridge by a watchman whose duty it was to guard the same,[7]

[1] Cooley on Torts, 534, 535; Jaggard on Torts, 276, *et seq.*; Wood's Law of Master and Servant (2d ed.) 524, 565; note to Davis *v.* Houghtelin, 33 Neb. 582, 14 L. R. A. 737; note to Gilliam *v.* South, etc., R. Co., 70 Ala. 268, 15 Am. & Eng. R. Cas. 138; "Assaults by Servants," 38 Cent. L. J. 447; note Pittsburgh, etc., R. Co. *v.* Shields, 31 Cent. L. J. 168; "Master's Liability for Wilful or Malicious Acts of Servants," 2 Am. L. Reg. & Rev. (1894) 120. The narrower doctrine supposed to have been announced in McManus *v.* Cricket, 1 East 106, which was followed in many of the earlier cases is now repudiated in most jurisdictions. Limpus *v.* London General Omnibus Co., 1 H. & C. 526 and Green *v.* London, etc., Co., 7 C. B. (N. S.) 290, are leading cases.

[2] International, etc., R. Co. *v.* Miller, (Tex. C. App.) 28 S. W. R. 233; Bass *v.* Chicago, etc., R. Co., 39 Wis. 636; Gasway *v.* Atlanta, etc., R. Co., 58 Ga. 216; 1 Jaggard on Torts, 43, 421.

[3] *Ante*, § 1264.

[4] Fick *v.* Chicago, etc., R. Co., 68 Wis. 469. See, also, McKernan *v.* Manhattan Railroad Co., 22 J. & S. (N. Y.) 354; Christian *v.* Columbus, etc., R. Co., 79 Ga. 460, s. c. 90 Ga. 124.

[5] Rounds *v.* Delaware, etc., R. Co., 64 N. Y. 129. See, also, Stewart *v.* Brooklyn, etc., R. Co., 90 N. Y. 588, s. c. 43 Am. R. 185; Western, etc., R. Co. *v.* Turner, 72 Ga. 292, s. c. 53 Am. R. 842. But see Louisville, etc., R. Co *v.* Douglass, 69 Miss. 723, 11 So. R. 933.

[6] Indianapolis Union R. Co. *v.* Cooper, 6 Ind. App. 202, s. c. 33 N. E. R. 219. The plaintiff, however, was held to be a passenger and the liability of the company was placed upon the ground of a violation of the duty to a passenger.

[7] Haehl *v.* Wabash R. Co., 119 Mo. 325, s. c. 24 S. W. R. 737. See, also, St. Louis, etc., R. Co. *v.* Hackett, 58 Ark. 381, s. c. 41 Am. St. R. 105. But compare Golden *v.* Newbroad, 52 Iowa 59, s. c. 35 Am. R. 257; Georgia R. Co. *v.* Wood, 94 Ga. 124, s. c. 47 Am. St. R. 146.

and for the act of a street-car driver in purposely running into a carriage.[1] So, where an employe of a railroad company in peaceable possession of a line of road was shot and injured by employes of another company while attempting to take possession and drive away the servants of the former company, for which purpose the latter company had armed such employes, it was held that the defendant company was liable to him.[2] If an employe steps aside from the line of his duty and commits an independent tort on his own account and outside of the scope of his employment the master is not liable therefor.[3] Thus a railroad company is not liable for injuries inflicted by an employe in a purely personal quarrel with one between whom and the corporation there is no connection or privity,[4] nor for an assault by a trainman on one who had been a passenger but had left the train and ceased to be a passenger at the time of the assault.[5] So, where a conductor stops his train,

[1] Cohen *v.* Dry Dock R. Co. 69 N.Y. 170; Mott *v.* Consumers Ice Co., 73 N. Y. 543.

[2] Denver, etc., R. Co. *v.* Harris, 122 U. S. 597, s. c. 7 Sup. Ct. R. 1286.

[3] Jaggard on Torts, 276; Buswell's Law of Personal Injuries, § 37; Stephenson *v.* Southern Pac. R. Co., 93 Cal. 558, s. c. 27 Am. St. R. 223; Hower *v.* Ulrich, 156 Pa. St. 410, s. c. 27 Atl. R. 37; Candiff *v.* Louisville, etc., R. Co., 42 La. Ann. 477, s. c. 7 So. R. 601; Williams *v.* Pullman Palace Car Co., 40 La. Ann. 87, s. c. 3 So. R. 631; Gabrielson *v.* Waydell, 135 N. Y. 1, s. c. 31 N. E. R. 969; Evansville, etc., R. Co. *v.* Baum, 26 Ind. 70; Rounds *v.* Delaware, etc., R. Co., 64 N. Y. 129; Alabama, etc., R. Co. *v.* Harris, 71 Miss. 74, s. c. 14 So. R. 263; Alabama etc., R. Co. *v.* McAfee, 71 Miss. 70, s. c. 14 So. R. 260; Campbell *v.* Northern Pac. R. Co., 51 Minn. 488, s. c. 53 N. W. R. 768.

[4] Cofield *v.* McCabe, 58 Minn. 218, s. c. 59 N. W. R. 1005. See, also, Little Miami R. Co. *v.* Wetmore, 19 Ohio St. 110; Campbell *v.* Northern Pac. Railroad Co., 51 Minn. 488, s. c. 53 N. W. R. 768; Illinois Cent. R. Co. *v.* Ross, 31 Ill. App. 170; Wood *v.* Detroit, etc., R. Co., 52 Mich. 402, s. c. 18 N. W. R. 124; Pittsburgh, etc., R. Co. *v.* Donahue, 70 Pa. St. 119. See, also, Smith *v.* Memphis, etc., Co., (Tenn.) 1 S. W. R. 104, (an extreme case). It has also been held that a railroad company is not liable for an injury received where a firemen from mere wantonness placed a torpedo on the track. Chicago, etc., R. Co. *v.* Epperson, 26 Ill. App. 72. See, also, Jones *v.* Grand Trunk R. Co., 45 Up. Can. (Q. B.) 193; Carter *v.* Columbia, etc., R. Co., 19 S. Car. 20. But compare Harriman *v.* Railway Co., 45 Ohio St. 11.

[5] Central R. Co. *v.* Peacock, 69 Md. 257, s. c. 14 Atl. R. 709; Eads *v.* Metropolitan, etc., R. Co., 43 Mo. App. 536; McGilvray *v.* West End St. R. Co., 164 Mass. 122, s. c. 41 N. E. R. 116; Crocker *v.* New London, etc., R. Co., 24 Conn. 249. But see Peeples *v.*

pursues a boy to his father's house, with a pistol in his hand, seizes him and carries him off on the train, such act is not within the scope of the conductor's employment and the company is not liable therefor.[1] It has also been held that a railroad company is not liable for injuries received by a stranger whom its engineer has, by threats of personal violence, compelled to uncouple cars,[2] nor for injuries caused by hot water turned by the engineer and fireman in sport upon one whom they had invited to ride upon the engine,[3] nor for an assault upon one who was wrongfully riding upon a freight train by invitation of the conductor, in the absence of anything to show that the assailant was acting within the scope of his employment.[4] There is conflict among authorities as to when, if at all, a railroad company is liable for a wrongful arrest, or the like, made or instigated by its employes. On the one hand it has been held that the company is not liable for a false arrest instigated by a ticket agent after the act for which the arrest was made had been fully consummated, as for instance, where he causes the arrest of one suspected of having attempted to rob the till under his charge, after the attempt had ceased,[5] or causes the arrest of one suspected of passing a counterfeit bill after having accepted the same.[6] On the other hand, it has

Brunswick, etc., R. Co., 60 Ga. 281; Savannah, etc., R. Co. *v.* Bryan, 86 Ga. 312, 12 S. E. R. 307; Wise *v.* Covington, etc., R. Co., 13 Ky. L. R. 110.

[1] Gilliam *v.* South, etc., R. Co., 70 Ala. 268, s. c. 15 Am. & Eng. R. Cas. 138.

[2] New Orleans, etc., R. Co. *v.* Harrison, 48 Miss. 112. See, also, Louisville, etc., R. Co. *v.* Douglass, 69 Miss. 723, s. c. 11 So. R. 933; Flower *v.* Pennsylvania R. Co., 69 Pa. St. 210.

[3] International, etc., R. Co. *v.* Cooper, (Tex.) 32 S. W. R. 517. But see Terre Haute, etc., R. Co. *v.* Jackson, 81 Ind. 19, as to liability in case of passenger.

[4] Smith *v.* Louisville, etc., R. Co., 124 Ind. 394. It did not appear in what capacity the assailant worked for the company. It was simply alleged that he was a servant of the company. A somewhat similar case, where a passenger was assaulted by some one carrying a lantern and wearing a badge and lettered cap, but not shown to have been a servant of the company, is Sachrowitz *v.* Atchison, etc., R. Co., 37 Kans. 212. But see Louisville, etc., R. Co. *v.* Kendall, 138 Ind. 313, s. c. 36 N. E. R. 415.

[5] Allen *v.* London, etc., R. Co., L. R., 6 Q. B. 65. See, also, Porter *v.* Chicago, etc., R. Co., 41 Iowa 358; Mali *v.* Lord, 39 N. Y. 381, s. c. 100 Am. Dec. 448.

[6] Mulligan *v.* New York, etc., R. Co., 129 N. Y. 506, s. c. 29 N. E. R. 952, 14

been held that the company is liable for the conduct of a ticket agent who immediately charges a woman who has purchased a ticket from him with giving him counterfeit money, and, upon her refusal to make it good, places his hand upon her shoulder, calls her a counterfeiter and prostitute, and orders her to remain until he calls a policeman to arrest and search her.[1] So, it has been held in some jurisdictions that the company is liable for the act of its conductor in wrongfully arresting or causing the arrest of a passenger as disorderly or a trespasser who refuses to pay fare,[2] while in others it has been held that there is no liability in such cases.[3] The company is liable for a wrongful assault or arrest made or caused by a detective employed by it in the course of such employment, even though he has also been given police powers by the public authorities at its request.[4] But it has been held that a corporation is not

L. R. A. 791, 26 Am. St. R. 539; Laffitte *v.* New Orleans, etc., R. Co., 43 La. Ann. 34, s. c. 12 L. R. A. 337. See, also, Abrahams *v.* Deakin, L. R. (1891), 1 Q. B. 516; Galveston, etc., R. Co. *v.* Donahoe, 56 Tex. 162.

[1] Palmeri *v.* Manhattan R. Co., 133 N. Y. 261, s. c. 28 Am. St. R. 632.

[2] Krulevitz *v.* Eastern R. Co., 143 Mass. 228, s. c. 9 N. E. R. 613; Lafitte *v.* New Orleans, etc., R. Co., 43 La. Ann. 34, 8 So. R. 701; Winneger's Admx. *v.* Central, etc., R. Co., 85 Ky. 547; Gillingham *v.* Ohio River R. Co., 35 W. Va. 588, s. c. 14 L. R. A. 798; Moore *v.* Metropolitan R. Co., L. R., 8 Q. B. 36. See, also, Wheeler, etc., Co. *v.* Boyse, 36 Kans. 350 (liability for false imprisonment); Lynch *v.* Metropolitan, etc., R. Co., 90 N. Y. 77, s. c. 43 Am. R. 141 (same); Corbett *v.* Twenty-third St. R. Co., 42 Hun (N. Y.) 587 (same); Texas, etc., R. Co. *v.* Williams, 62 Fed. R. 440; Duggan *v.* Baltimore, etc., R. Co., 159 Pa. St. 248, s. c. 39 Am. St. R. 672.

[3] See Cunningham *v.* Seattle, etc., Co., 3 Wash. 471; Edwards *v.* London, etc., R. Co., L. R., 5 C. P. 445; Poulton *v.* London, etc., R. Co., L. R., 2 Q. B. 534. It would seem that this is within the scope of the conductor's duties, and if so, the company would be liable if the arrest was wrongful. Compare Sullivan *v.* Old Colony R. Co., 148 Mass. 119, s. c. 1 L. R. A. 513.

[4] St. Louis, etc., R. Co. *v.* Hackett, 58 Ark. 381, s. c. 41 Am. St. R. 105; Dickson *v.* Waldron, 135 Ind. 507, s. c. 35 N. E. R. 1, 24 L. R. A. 483; Evansville, etc., R. Co. *v.* McKee, 99 Ind. 519, s. c. 50 Am. R. 102; Pennsylvania Co. *v.* Weddle, 100 Ind. 138; Union Depot R. Co. *v.* Smith, 16 Col. 361, s. c. 27 Pac. R. 329; Harris *v.* Louisville, etc., R. Co., 35 Fed. R. 116; King *v.* Illinois Cent. R. Co., 69 Miss. 245, s. c. 10 So. R. 42; Edwards *v.* Midland R. Co., L. R., 6 Q. B. D. 287; Eichengreen *v.* Louisville, etc., R. Co., (Tenn.) 34 S. W. R. 219. But see Wells *v.* Washington Market Co., 19 Wash. Law R. 52; Fitzpatrick *v.* New York, etc., R. Co., 15 N. Y. Week. Dig. 506; Jardine *v.* Cornell, 50 N. J. L. 485; Hershey *v.* O'Neill,

liable for a false arrest ordered by its superintendent for an alleged assault upon himself while in charge of its property.[1] In very many instances the question whether the employe or servant was acting within the scope of his authority in such a a sense as to make the employer liable for his torts is one of fact, but there are cases where the question is one of law.[2]

36 Fed. R. 168; Tolchester, etc., Co. *v.* Steinmeier, 72 Md. 313, s. c. 8 L. R. A. 846. As shown in these last cases, the rule must be carefully applied, and the corporation is not liable for the act of the police officer as such and not as a servant of the company. See, also, Walker *v.* Southeastern R. Co., 23 L. T. R. (C. P.) 14.

[1] Tolchester, etc., Co. *v.* Steinmeier, 72 Md. 313, s. c. 8 L. R. A. 846. See, also, Stevens *v.* Midland, etc., R. Co., 10 Exch. 352.

[2] *Ante*, § 210; *post*, § 1266; 1 Elliott's Gen. Pr., § 426; Lake Shore, etc., R. Co. *v.* Peterson, (Ind.) 42 N. E. R. 480.

CHAPTER L.

INJURIES TO EMPLOYES.

§ 1266. Introductory.
1267. Contract the basis of the employer's duty.
1268. Employer's duty to furnish a reasonably safe working place.
1269. Structures near the track.
1270. Failure to fence.
1271. Bridges.
1272. Negligence of employer in failing to keep premises safe—Switch yards.
1273. Machinery and appliances—Master's duty respecting.
1274. Appliances generally used sufficient.
1275. Latent defects.
1276. Delegation of master's duty.
1277. Employer not bound to abandon appliances because newer ones are in use.
1278. Inspection—Duty of.
1279. Foreign cars—Duty of inspection.
1280. Employer's duty to promulgate rules.
1281. Time-tables or schedules.
1282. Violation of rules by employes.
1283. Duty to warn employe of danger.
1284. Duty to employ competent servants.
1285. Presumption of competency of employe.
1286. Burden of proof where incompetency of fellow-servant is alleged.
§ 1287. Trains to be provided with a sufficient crew.
1288. Assumption of risks of service—General doctrine.
1289 Assumption of risks—Employer's method of conducting business.
1290. Risks of service—Illustrative cases.
1291. Duty of employe to acquaint himself with employer's business methods.
1292. Duty of employe in regard to competency of co-employes.
1293. Employe bound to use ordinary care to remedy defects.
1294. Duty of employe to acquaint himself with rules of employer.
1295. Promise to repair.
1296. Brakeman — Assumption of risks.
1297. Engineers and firemen—Assumption of risks.
1298. Dangers from running of trains.
1299. Injuries from explosions.
1300. Injuries from collisions.
1301. Cars negligently loaded.
1302. Dangerous service.
1303. Performing work outside of scope of the contract of employment—Permissive privilege.
1304. Work outside of the ordinary line of duty—Special orders.
1305. Volunteers.

§ 1306. Concurrent negligence.
1307. The rule as to the master's knowledge of defects.
1308. Test of the employer's liability.
1309. Evidence of employer's negligence.
1310. Employer not liable to employe unless the negligence was the proximate cause of the injury.
§ 1311. Knowledge of defects on part of employe—Averment and proof.
1312. Knowledge of defects on part of employe—Evidence of.
1313. Contributory negligence of employes.
1314. Contributory negligence of employes — Illustrative instances.
1315. Contributory negligence—Violation of statutory duty.

§ 1266. **Introductory.**—It is our purpose in this chapter to treat of the class of persons employed by railroad companies usually denominated "servants" or "employes." We do not propose to treat at large of the relation of master and servant, but, although it is our purpose to confine our discussion to the doctrine of master and servant only in so far as it applies to railroad companies in the capacity of employers, still, it is necessary to an intelligent understanding of the subject to speak, incidentally, at least, of the general doctrine. We have elsewhere touched upon the subject.[1] There is a distinction between corporate representatives such as officers and agents[2] and servants or employes although it is very difficult to accurately mark the difference. Agents and officers, it may be said in a general way, represent the corporation to a much greater extent than do servants or employes although servants and employes are to a limited extent corporate representatives. The scope of authority is, as a rule, to be determined from the facts of the particular case and is usually a question of fact.[3] But the extent of the authority of an agent or employe may sometimes be a question of law to be determined by the court.[4]

[1] *Ante*, Chapter VI, §§ 203, 233, Chapter XIII, §§ 283, 303. In a subsequent chapter we have discussed the statutory changes in the law of master and servant. *Post*, Chapter LII. The present chapter deals with the general common law rules governing that subject.

[2] *Ante*, § 301.

[3] *Ante*, § 210.

[4] In the case of Lake Shore, etc., R. Co. *v.* Peterson, (Ind.) 42 N. E. R. 480, the court quoted from Elliott's General Practice, § 426, the following: "Where the facts are undisputed, or the authority is conferred by a writing, the scope of such authority is generally a question of

Whatever the rank or position of an employe, his acts within the line of his duty and scope of his authority will bind the corporation, but outside of that no matter how high his rank, the corporation will not be bound, so that in all cases the controling question is, so far as concerns the doctrine of *respondeat superior*, what was the scope of the employe's authority. The question is not always, we may say by the way, whether there was actual authority, for if the employer has clothed the employe with the *indicia* of authority beyond that actually conferred he will be bound if the acts of the employe are within the limits of the apparent authority.

§ 1267. **Contract the basis of the employer's duty.**—The foundation of the employer's duty is a contract of service creating the relation of employer and employe.[1] The contract may create express duties and there are always implied duties.[2] A wrongful breach of duty on the part of the employer will give a right of action to an employe for compensatory damages provided the employe is free from contributory fault. But where there is no duty there can be no actionable negligence.[3]

law for the court." Mobile, etc., R. Co. *v.* Thomas, 42 Ala. 672; Ludwig *v.* Gorsuch, 154 Pa. St. 413, s. c. 26 Atl. R. 434; Nofsinger *v.* Ring, 4 Mo. App. 576; London, etc., Society *v.* Hagerstown, etc., Bank, 36 Pa. St. 498, 502.

[1] Nimmo *v.* Walker, 14 La. Ann. 581; Baxter *v.* Gray, 4 Scott, N. R. 374; Gillshannon, etc. *v.* Stonybrook R. Co., 10 Cush. 228; Mound City, etc., Co. *v.* Conlon, 92 Mo. 221; Willis *v.* Toledo, etc., R. Co., 72 Mich. 160; Cooley on Torts, 42.

[2] The cases holding the employer liable for a failure to exercise ordinary care in furnishing a safe place in which to work and safe appliances with which to work, are familiar examples of implied duty growing out of the contract of service. Mary Lee, etc., R. Co. *v.* Chambliss, 97 Ala. 171, s. c. 11 So. R. 897, 53 Am. & Eng. R. Cas. 254; Gulf, etc., R. Co. *v.* Johnson, 1 Tex. Civ. App. 103, 20 S. W. R. 1123; Gorham *v.* Kansas City, etc., R. Co., 113 Mo. 408, s. c. 20 S. W. R. 1060; Meador *v.* Lake Shore, etc., R. Co., 138 Ind. 290, s. c. 46 Am. St. R. 384; Harker *v.* Burlington, etc., R. Co., 88 Iowa 409, s. c. 45 Am. St. R. 242; Dickson *v.* Omaha, etc., R. Co., 124 Mo. 140, s. c. 46 Am. St. R. 429; Ragon *v.* Toledo, etc., R. Co., 97 Mich. 265, s. c. 37 Am. St. R. 336. We have elsewhere considered the duty of the employer to provide safe working places and appliances and the cases there referred to show the nature of the implied duty arising out of the contract of service.

[3] Kahl *v.* Love, 37 N. J. Law 5; Warner *v.* Railroad Co., 6 Phila. 537; Rich *v.* New York, etc., R. Co., 87 N. Y. 382. An English author says: "It is essential to the successful mainten-

It is necessary, therefore, in order to create a duty in favor of one as the employe of another that the contract of service should embrace the act out of which the negligence arises.[1]

§ 1268. **Employer's duty to furnish a reasonably safe working place.**—It is the doctrine of the modern cases, that the employer is bound to exercise ordinary care to provide a reasonably safe working place for his employes,[2] and this duty is a personal one which can not be delegated so as to escape liability for a failure to perform it. It is held in very many cases under the general rule stated, that the employer is bound to exercise ordinary care to put and keep the road bed and tracks in a reasonably safe condition.[3] Whether the employer is or is not liable for injuries caused by a defect in the working place

ance of an action for negligence to show the existence of a duty on the part of the plaintiff to the defendant and a loss suffered as a direct consequence of the breach of such duty." Robert's Duty and Liability of Employers, 22; Pollock on Torts, 352; Cooley on Torts, 659, 16 Am. & Eng. Ency. of Law, 415.

[1] Robert's Duty and Liability of Employers, 448. *Post*, § 1303; *ante* § 1267. See Smith *v.* Oxford, etc., Co., 42 N. J. Law 467, s. c. 36 Am. R. 535; Missouri, etc., R. Co. *v.* Texas, etc., R. Co., 38 Fed. R. 816; Interstate, etc., R. Co. *v.* Fox, 41 Kan. 715; Sobieski *v.* St. Paul, etc., R. Co., 41 Minn. 169; Kansas City, etc., R. Co. *v.* Kier, 41 Kan. 661; Union Pac. R. Co. *v.* Springsteen, 41 Kan. 724; Louisville, etc., R. Co. *v.* Hall, 87 Ala. 708; Georgia R. Co. *v.* Nelms, 83 Ga. 70, s. c. 9 S. E. R. 1049; Tustchell *v.* Grand Trunk, etc., R. Co., 39 Fed. R. 419; McGovern *v.* Central Vt. R. Co., 6 N. Y. Supp. 838; Guthrie *v.* Maine, etc., R. Co., 81 Me. 572; Seese *v.* Northern Pac. R. Co., 39 Fed. R. 487; Gorman *v.* Minneapolis, etc., R. Co., 78 Iowa 509; Central R. Co. *v.* Lanier, 83 Ga. 587, s. c. 10 S. E. R. 279; Doyle *v.* St. Paul, etc., R. Co., 42 Minn. 79, s. c. 43 N. W. R. 787.

[2] Hunt *v.* Chicago, etc., R. Co., 26 Iowa 363; Wabash, etc., R. Co. *v.* McDaniels, 107 U. S. 454, s. c. 2 Sup. Ct. R. 932; Aerfetz *v.* Humphrey, 145 U. S. 418, s. c. 12 Sup. Ct. R. 835; Galveston, etc., R. Co. *v.* Goodwin, (Tex. Civ. App.) 26 S. W. R. 1007; Dillingham *v.* Crank, 87 Tex. 104, s. c. 27 S. W. R. 93; Cook *v.* St. Paul, etc., R. Co., 34 Minn. 46, s. c. 24 N. W. R. 311; Gibson *v.* Pacific R. Co., 46 Mo. 163; Snow *v.* Housatonic, etc., R. Co., 8 Allen 441; Patterson *v.* Pittsburgh, etc., R. Co., 76 Pa. St. 389; Russell *v.* Minneapolis, etc., R. Co., 32 Minn. 230, s. c. 20 N. W. R. 147; Bessex *v.* Chicago, etc., R. Co., 45 Wis. 477; Hutchinson *v.* York, etc., R. Co., 5 Exch. 343.

[3] Tonans, etc., R. Co. *v.* Richmond, etc., R. Co., 84 Va. 192, s. c. 4 S. E. R. 339; Snow *v.* Housatonic, etc., R. Co., 8 Allen 441; Hulehan *v.* Green Bay, etc., R. Co., 68 Wis. 520, s. c. 31 Am. & Eng. R. Cas. 322; Bessex *v.* Chicago, etc., R. Co., 45 Wis. 477; Vautrain *v.* St. Louis, etc., R. Co., 8 Mo. App. 538; Fagundes *v.* Central, etc., R. Co.,

depends, primarily, upon whether there was or was not negligence on the part of the employer. It is a mistake to suppose that evidence that a defect existed and that an accident occured is sufficient to establish liability, for such evidence must usually be supplemented by evidence of negligence and by evidence that the negligence was the proximate cause of the injury.[1] As in other cases where custom and usage control there is no liability for injuries caused by the condition of the road bed if the company has furnished and maintained one as good as others in general use.[2] A railroad company is not liable for injuries resulting from the act of a wrong-doer in making the track unsafe.[3] We suppose, however, that the company would be liable if it neglected for an unreasonable time after notice of the act of the wrong-doer to use ordinary care and diligence to make the track safe.

§ 1269. **Structures near the track.**—Many courts hold that structures erected or suffered to remain so near the track as to endanger the safety of employes while engaged in the performance of duties required of them by their contract of service constitute a breach of the employer's duty to exercise ordinary care to put and keep the working place in a reasonably safe condition for use.[4] Other courts, however, hold that the risk

79 Cal. 97, s. c. 21 Pac. R. 437; Lewis *v.* St. Louis, etc., R. Co., 59 Mo. 495, s. c. 21 Am. R. 385; Houston, etc., R. Co. *v.* Dunham, 49 Tex. 181; Davis *v.* Central, etc., R. Co., 55 Vt. 84, s. c. 45 Am. R. 590; Calvo *v.* Charlotte, etc., R. Co., 23 So. Car. 526, s. c. 28 Am. & Eng. R. Cas. 327; St. Louis, etc., R. Co. *v.* Weaver, 35 Kan. 412; Colorado, etc., R. Co. *v.* Ogden, 3 Colo. 499; O'Donnell *v.* Allegheny, etc., R. Co., 59 Pa. St. 239; Hardy *v.* Carolina, etc., R. Co., 76 N. Car. 5; Bowen *v.* Chicago, etc., R. Co., 95 Mo. 268, s. c. 8 S. W. R. 230; Galveston, etc., R. Co. *v.* Croskell, 6 Tex. Civ. App. 160, s. c. 25 S. W. R. 486; Walling *v.* Congaree, etc., R. Co., 41 So. Car. 388, s. c. 19 S. E. R. 723.

[1] Burnes *v.* Kansas City, etc., R. Co., 129 Mo. 41, s. c. 31 S. W. R. 347; Mickee *v.* Walter A. Wood, etc., Co., 71 Hun 569, s. c. 28 N. Y. Supp. 918; Nutt *v.* Southern, etc., R. Co., 25 Ore. 291, s. c. 35 Pac. R. 653; LaPierre *v.* Chicago, etc., R. Co., 99 Mich. 212, s. c. 58 N. W. R. 60; Ragon *v.* Toledo, etc., R. Co., 97 Mich. 265, s. c. 56 N. W. R. 612; Watts *v.* Hart, 7 Wash. 178, s. c. 34 Pac. R. 423, 771.

[2] Atchison, etc., R. Co. *v.* Alsdurf, 47 Ill. 200.

[3] Illinois, etc., R. Co. *v.* Quirk, 51 Ill. App. 607.

[4] Gates *v.* Chicago, etc., R. Co., 4 S. Dak. 433, s. c. 57 N. W. R. 200; Southern, etc., R. Co. *v.* Markey,

from structures near the track is one of the risks of the service which the employe assumes.[1] It seems to us that where the employe has knowledge or is chargeable with knowledge of the existence and situation of such structures he assumes the risk of dangers from them, for we can see no reason why the general rule that an employe assumes the risk of the dangers of the service does not apply,[2] but if the employe does not know

(Texas) 19 S. W. R. 392; Kelleher *v.* Milwaukee, etc., R. Co., 80 Wis. 584, s. c. 50 N. W. R. 942; Piddock *v.* Union Pac. R. Co., 5 Utah 612, s. c. 19 Pac. R. 191; Allen *v.* Burlington, etc., R. Co., 57 Iowa 623, s. c. 11 N. W. R. 614; Chicago, etc., R. Co. *v.* Russell, 91 Ill. 298; Stotsenberg *v.* Pittsburgh, etc., R. Co., 165 Pa. St. 377, 30 A. T. L. R. 980; Rouse *v.* Ledbetter, (Kan.) 43 Pac. R. 249; Texas, etc., R. Co. *v.* Hohn, 1 Texas Civ. App. 36, s. c. 21 S. W. R. 942; Kansas City, etc., R. Co. *v.* Burton, 97 Ala. 240, 12 So. R. 88, 53 Am. & Eng. R. Cas. 115; Ft. Worth, etc., Graves, (Tex. C. App.) 21 S. R. Co. *v.* W. R. 606. See Scagel *v.* Chicago, etc., R. Co., 83 Iowa 380, s. c. 49 N.W. R. 990; Stackman *v.* Chicago, etc., R. Co., 80 Wis. 428, s. c. 50 N. W. R. 404; East Tennessee, etc., R Co. *v.* Thompson, 94 Ala. 636, s. c. 10 So. R. 280.

[1] Austin *v.* Boston, etc., R. Co., 164 Mass. 282, s. c. 41 N. E. R. 288; Sisco *v.* Lehigh, etc., R. Co., 145 N. Y. 296, s. c. 39 N. E. R. 958; Lovejoy *v.* Railroad Co., 125 Mass. 79; Thain *v.* Old Colony, R. Co., 161 Mass. 353, s. c. 37 N. E. R. 309; Goodes *v.* Boston, etc., R. Co., 162 Mass. 287, s. c. 38 N. E. R. 500; Scidmore *v.* Milwaukee, etc., R. Co., 89 Wis. 188, s. c. 61 N. W. R. 765; Fisk *v.* Fitchburg, etc., R. Co., 158 Mass. 238, s. c. 33 N. E. R. 510; Davis *v.* Columbia, etc., R. Co., 21 So. Car. 93; Seymour *v.* Maddox, 16 Q. B. 326; Ryan *v.* Canada, etc., R. Co., 10 Ont. 745. See Jennings *v.* Tacoma, etc., R. Co., 7 Wash. 275, s. c. 34 Pac. R. 937; McKee *v.* Chicago, etc., R. Co., 83 Iowa 616, s. c. 50 N. W. R. 209, 13 L. R. A. 817, 48 Am. & Eng. R. Cas. 154.

[2] Clark *v.* St. Paul, etc., R. Co., 28 Minn. 128, s. c. 9 N. W. R. 581; Rains *v.* St. Louis, etc., R. Co. 71 Mo. 164; Walsh *v.* St. Paul, etc., R. Co., 27 Minn. 367; Evansville, etc., R. Co *v.* Henderson, 142 Ind. 596, s. c. 42 N. E. R. 216; Content *v.* New York, etc., R. Co., (Mass.) 43 N. E. R. 94; Pennsylvania Co. *v.* Finney, (Ind.) 42 N. E. R. 816; Hughes *v.* Winona, etc., R. Co., 27 Minn. 137, s. c. 6 N. W. R. 553; Jolly *v.* Detroit, etc., R. Co., 93 Mich. 370, s. c. 53 N. W. R. 526; Larson *v.* St. Paul, etc., R. Co., 43 Minn. 423, s. c. 45 N. W. R. 722; Olson *v.* St. Paul, etc., R. Co., 38 Minn. 117, s. c. 35 N. W. R. 866; Gibson *v.* Erie R. Co., 63 N. Y. 449; DeForest *v.* Jewett, 88 N. Y. 264; Tuttle *v.* Detroit, etc., R. Co., 122 U. S. 189, s. c. 7 Sup. Ct. R. 1166; Randall *v.* Baltimore, etc., R. Co., 109 U. S. 478; Missouri, etc., R. Co. *v.* Somers, 71 Tex. 700, s. c. 9 S. W. R. 741. See, generally, Foley *v.* Jersey City Electric Light Co., 54 N. J. Law 411, s. c. 24 Atl. R. 487; Platt *v.* Chicago, etc., R. Co., 84 Iowa 694, s. c. 51 N. W. R. 254. Some of the cases exonerate the employer on the ground of contributory negligence, but we think the true ground is that a known

of the danger or is not chargeable with knowledge of it and it is caused by the employer's negligence the employer is liable.[1] If the structure or obstruction has not been near the track a sufficient length of time for an employe to acquire, by the exercise of ordinary care, knowledge of the danger from it, and he has no warning of such danger, then there is, as we believe, an actionable breach of the employer's duty, provided the employer knows or is chargeable with knowledge of the danger, and has been guilty of negligence in not removing it or has been guilty of negligence in failing to warn the employe of the new or increased danger,[2] Where the obstruction on or near the track is not placed there by the employer, then there is no breach of the employer's duty unless it is affirmatively shown that the employer was guilty of negligence in not removing the obstruction or was guilty of negligence in not warning the employe.[3] A temporary obstruction caused by cars breaking loose from a train is not within the general rule that the employer must provide a reasonably safe working place.[4] A distinction is made between cases where the obstruction is a temporary one, such as brush by the side of the track,[5] and cases where the structure is of a permanent nature.[6] We think that

danger is one of the risks of the service.

[1] Scanlon *v.* Boston, etc., R. Co., 147 Mass. 484, s. c. 18 N. E. R. 209, distinguishing Ladd *v.* New Bedford, etc., R. Co., 119 Mass. 412; Yeaton *v.* Boston, etc., R. Co., 135 Mass. 418; Leary *v.* Boston, etc., R. Co., 139 Mass. 580, s. c. 2 N. E. R. 115; Nugent *v.* Boston, etc., R. Co., 80 Me. 62, s. c. 12 Atl. R. 797.

[2] St. Louis, etc., R. Co. *v.* Biggs, 53 Ill. App. 550; Dixon *v.* Western Union Tel. Co., 71 Fed. R. 143; Martin *v.* Louisville, etc., R. Co., 95 Ky. 612, s. c. 26 S. W. R. 801; Kansas City, etc., R. Co. *v.* Burton, 97 Ala. 240, s. c. 12 So. R. 88, 53 Am. & Eng. R. Cas. 115; Welch *v.* New York, etc., R. Co., 17 N. Y. Supp. 342. But in all cases where temporary obstructions are near the track the rule of non-liability for the negligence of fellow-servants exerts an important influence.

[3] Lake Shore, etc., R. Co. *v.* Brazzill, 2 Ohio Dec. 691.

[4] Jenkins *v.* Richmond, etc., R. Co., 39 So. Car. 507, s. c. 18 S. E. R. 182.

[5] Oregon, etc., R. Co. *v.* Tracy, 66 Fed. R. 931, distinguishing Kohn *v.* McNulta, 147 U. S. 238, s. c. 13 Sup. Ct. R. 298; Southern, etc., Co. *v.* Seley, 152 U. S. 145, s. c. 14 Sup. Ct. R. 530; Tuttle *v.* Detroit, etc., R. Co., 122 U. S. 189, s. c. 7 Sup. Ct. R. 1166.

[6] Babcock *v.* Old Colony Railroad Co., 150 Mass. 467, s. c. 23 N. E. R. 325; Eames *v.* Texas, etc., R. Co., 63 Tex.

there is just ground for such a distinction, but that if the employe knows of the obstruction and does not exercise ordinary care to avoid injury from it he can not recover. If the track runs through a forest where the trees are thick and can be readily seen and the dangers from them apprehended there is reason for holding that the employe assumes the risk,[1] and the same rule must apply where trees or brushes are growing along the right of way and employes have knowledge, or are chargeable with knowledge of their situation. Some of the courts seem to require proof of actual knowledge in order to exculpate the employer,[2] but we think this view erroneous, for if the facts are such as make it negligence on the part of the employe not to know there can be no recovery.[3]

§ 1270. **Failure to fence.**—There is a conflict upon the question whether the failure of a railroad company to fence is such a breach of an employer's duty as gives an injured employe a right of action. The weight of authority, although, as yet, there is but scant authority upon the question,

660; Hulehan *v.* Green Bay, etc., R. Co., 68 Wis. 520, s. c. 32 N. W. R. 529; McClarney *v.* Railway Co., 80 Wis. 277, s. c. 49 N. W. R. 963; Union, etc., R. Co. *v.* O'Brien, 49 Fed. R. 538. In Gaffney *v.* New York, etc., R. Co., 15 R. I. 456, s. c. 31 Am. & Eng. R. Cas. 265, it is held that the employer is not liable where the placing of obstructions near the track is the act of a fellow-servant. See, also, Brown *v.* Minneapolis, etc., R. Co., 31 Minn. 553, s. c. 15 Am. & Eng. R. Cas. 333; Hodgkins *v.* Eastern, etc., Co., 119 Mass. 419; Brodeur *v.* Valley Falls R. Co., 16 R. I. 448, s. c. 17 Atl. R. 54.

Manning *v.* Chicago, etc., R. Co., (Mich.) 63 N. W. R. 312.

[2] Dorsey *v.* Phillips, etc., Construction Co., 42 Wis. 583; Johnson *v.* St. Paul, etc., Railway Co., 43 Minn. 53, s. c. 44 N. W. R. 884; Illinois Cent. R. Co. *v.* Welch, 52 Ill. 183; Chicago, etc., R. Co. *v.* Russell, 91 Ill. 298. But see as to Illinois doctrine, Lake Shore, etc., R. Co. *v.* O'Conner, 115 Ill. 254, s. c. 3 N. E. R. 501; Chicago, etc., R. Co. *v.* Avery, 8 Ill. App. 133. See, generally, Sweet *v.* Michigan, etc., R. Co., 87 Mich. 559, s. c. 49 N. W. R. 882.

[3] Pennsylvania Co. *v.* Finney, (Ind.) 42 N. E. R. 816; Muldowney *v.* Illinois, etc., R. Co., 39 Iowa 615; McKee *v.* Chicago, etc., R. Co., 83 Iowa 616, s. c. 50 N. W. R. 209; O'Neal *v.* Chicago, etc., R. Co., 132 Ind. 110, s. c. 31 N. E. R. 669; Wormell *v.* Maine, etc., R. Co., 79 Me. 397, s. c. 10 Atl. R. 49; Batterson *v.* Chicago, etc., R. Co., 53 Mich. 125, s. c. 18 N. W. R. 584; Illick *v.* Flint, etc., R. Co., 67 Mich. 632, s. c. 35 N. W. R. 708.

seems to support the doctrine that the company is liable.[1] But there are well-reasoned cases asserting a different doctrine.[2] It is somewhat difficult to successfully maintain the proposition that the duty to fence is owing to an employe, since that duty is created for a different purpose than that of protecting employes, but the duty is held to exist in favor of passengers,[3] and by analogy the rule, perhaps, may be extended to employes. The question must, as we believe, depend largely upon the provisions of the statute,[4] and some of the cases heretofore cited are grounded on a statute. Where there is no statute giving a right of action, either expressly or impliedly, to injured employes, the rule, as we think, is that there is no liability, but on this question there is conflict of authority. We suppose that if the employe has knowledge of the fact that the road is not fenced, he must, in any event, under the general rule, be held to assume the risk. Unless so declared by statute there can not, in our opinion, be a liability because of the

[1] Dickson *v.* Omaha, etc., R. Co., 124 Mo. 140, s. c. 25 L. R. A. 320; Quackenbush *v.* Wisconsin, etc., R. Co., 62 Wis. 411; Donnegan *v.* Erhardt, 119 N. Y. 468, s. c. 7 L. R. A. 527; Atchison *v.* Reesman, 60 Fed. R. 370; Magee *v.* North Pacific R. Co., 78 Cal. 430; Blair *v.* Milwaukee, etc., R. Co., 20 Wis. 254; *ante*, § 1192.

[2] Wabash R. Co. *v.* Brown, 5 Ill. App. 590; Fleming *v.* St. Paul, etc., R. Co., 27 Minn. 111; Sweeney *v.* Central Pac. R. Co., 57 Cal. 15; McMillan *v.* Saratoga, etc., R. Co., 20 Barb. 449; Patton *v.* Central, etc., R. Co., 73 Iowa 306; Langlois *v.* Buffalo, etc. R. Co., 19 Barb. 364; Dewey *v.* Chicago, etc., R. Co., 31 Iowa 373; Patton *v.* Central, etc., R. Co., 73 Iowa 306, s. c. 35 N. W. R. 149; Cowan *v.* Union Pac. R. Co., 35 Fed. R. 43.

[3] Buxton *v.* North Eastern, etc., R. Co., L. R. 3 Q. B. 549; Fordeyce *v.* Jackson, 56 Ark. 594; Gulf, etc., R. Co. *v.* Wilson, 79 Tex. 371, s. c. 11 L. R. A. 486; Louisville, etc., R. Co. *v.* Hendricks, 128 Ind. 462. In some of the cases the company has been held liable for a failure to fence to persons who wandered on the track, but we think it doubtful whether those cases are well decided. Keyser *v.* Chicago, etc., R. Co., 56 Mich. 559, s. c. 56 Am. R. 405; Shuettgen *v.* Wisconsin, etc., R. Co., 80 Wis. 498; Isabel *v.* Hannibal, etc., R. Co., 60 Mo. 475. See Singleton *v.* Eastern Counties R. Co., 7 C. B. N. S. 287; Chicago, etc., R. Co. *v.* Grablin, 38 Neb. 90, s. c. 56 N. W. R. 797. It seems to us that there is no such specific duty owing to persons who without invitation, express or implied, go upon a railroad track, as enables them to recover upon the sole ground of a failure to fence the track.

[4] Manson *v.* Eddy, 3 Tex. Civ. App. 148; Cowan *v.* Union, etc., R. Co., 35 Fed. R. 43. See Ward *v.* Bonner, 80 Tex. 168.

bare fact that there is no fence, for the employer is not, as a general rule, liable unless the breach of duty is a negligent one.[1] If this general rule governs, then it is necessary to supplement evidence of the failure to fence by evidence that there was negligence on the part of the company in not constructing and maintaining a fence.

§ 1271. **Bridges.**—Bridges form part of the working place of train men and some other classes of railroad employes, and, generally, the rules which prescribe the duty of the employer as to the safety of the working place apply to bridges,[2] but there is much diversity of opinion upon one phase of the question. It is held by some of the courts that dangers from low bridges are not assumed as risks of the service.[3] Other courts assert a contrary doctrine.[4] The doctrine that dangers from

[1] The general rule is that the employe must "prove affirmatively the fact of negligence, and that it is such a kind of negligence as violates the special and limited duty of an employe." Erie, etc., R. Co. *v.* Smith, 125 Pa. St. 259; Mensch *v.* Pennsylvania, etc., R. Co., 150 Pa. St. 598, s. c. 17 L. R. A. 450; Pennsylvania Co. *v.* Mason, 109 Pa. St. 296; Philadelphia, etc., R. Co. *v.* Hughes, 119 Pa. St. 301; Pittston, etc., Co. *v.* McNulty, 120 Pa. St. 414.

[2] Knahtla *v.* Oregon, etc., R. Co., 21 Ore. 136, s. c. 27 Pac. R. 91; Galveston, etc., R. Co. *v.* Daniels, (Tex. Civ. App.) 28 S. W. R. 711; Texas, etc., R. Co. *v.* Smith, 67 Fed. R. 524; Bogart *v.* Delaware, etc., R. Co., 145 N. Y. 283. Where the employe has knowledge of the dangerous condition of a bridge and without complaint continues in the service, the general rule is, that he assumes the risk. Louisville, etc., R. Co. *v.* Sandford, 117 Ind. 265, 268.

[3] Pennsylvania, etc., R. Co. *v.* Sears, 136 Ind. 460; Chicago, etc., R. Co. *v.* Carpenter, 56 Fed. R. 451; Louisville, etc., R. Co. *v.* Wright, 115 Ind. 378, s. c. 16 N. E. R. 145; St. Louis, etc., R. Co. *v.* Irwin, 37 Kan. 701, s. c. 16 Pac. R. 146; Baltimore, etc., R. Co. *v.* Rowan, 104 Ind. 88, s. c. 3 N. E. R. 627; Chicago, etc., R. Co. *v.* Johnson, 116 Ill. 206, s. c. 4 N. E. R. 381; Flanders *v.* Chicago, etc., R. Co., 51 Minn. 193, s. c. 53 N. W. R. 544; Cincinnati, etc., R. Co. *v.* Sampson, (Ky.) 30 S. W. R. 12. See Darling *v.* New York, etc., R. Co., 17 R. I. 708, s. c. 24 Atl. R. 462.

[4] Gibson *v.* Erie, etc., R. Co., 63 N. Y. 449, s. c. 20 Am. R. 552; Williams *v.* Delaware, etc., R. Co., 116 N. Y. 628, s. c. 22 N. E. R. 1117; Ryan *v.* Long Island, etc., R. Co., 51 Hun 607; Carbine *v.* Bennington, etc., R. Co., 61 Vt. 348, s. c. 17 Atl. R. 491; Louisville, etc., R. Co. *v.* Hall, 87 Ala. 708, s. c. 6 So. R. 277; Jones *v.* Louisville, etc., R. Co., 82 Ky. 610; Wells *v.* Burlington, etc., R. Co., 56 Iowa 520; Robel *v.* Chicago, etc., R. Co., 35 Minn. 84; Stirk *v.* Central, etc., R. Co., 79 Ga. 495, s. c. 5 S. E. R. 105;

low bridges are not risks assumed by employes is an anomalous one, but it is not unfounded in reason. We suppose that the fact that an employe has knowledge of danger from a low bridge is always an important factor in cases where the question of contributory negligence is involved, for while the fact of such knowledge may not of itself establish contributory negligence, it may, in connection with other circumstances, establish such negligence, since the rule is, that care must be proportionate to the known danger. With knowledge of the character of the bridge and the dangers from it, employes must exercise such care as time, opportunity and the like, render proper, or they will be guilty of contributory negligence. Granting that the employe does not assume the risk of danger from low bridges, still, there may be such contributory negligence as will defeat a recovery, for if the employe knows the danger, he is under a duty to exercise care, and this duty requires him to exercise prudence and caution to avoid exposure to the known danger, so that if he voluntarily and without justification goes into a place that exposes him to injury he can not recover.[1] It seems quite clear that there is a

Baylor *v.* Delaware, etc., R. Co., 40 N. J. Law 23, s. c. 29 Am. R. 208; Altee *v.* South Carolina R. Co., 21 S. Car. 550; Baltimore, etc., R. Co. *v.* Stricker, 51 Md. 47, s. c. 34 Am. R. 291; Williamson *v.* Newport, etc., R. Co., 34 W. Va. 657, s. c. 12 L. R. A. 297; Pittsburgh, etc., R. Co. *v.* Sentmeyer, 92 Pa. St. 276, s. c. 37 Am. R. 684. See, Hines *v.* New York, etc., R. Co., 78 Hun 239, s. c. 28 N. Y. Supp. 829. Injury caused by insufficient ventilation of tunnel, no liability. Baltimore, etc., R. Co. *v.* State, 75 Md. 526, s. c. 23 Atl. R. 310; Owen *v.* New York, etc., R. Co., 1 Lans. (N.Y.) 108; Northern, etc., R. Co. *v.* Husson, 101 Pa. St. 1, s.c. 12 Am. & Eng. R.Cas.241.

[1] Schlaff *v.* Louisville, etc., R. Co., 100 Ala. 377, 14 So. R. 105. A brakeman who stands upon the top of a train which is approaching a low bridge is guilty of contributory negligence unless it affirmatively appears that some emergency or some extraordinary circumstances rendered his act in taking such a position excusable. Rock *v.* Retroff Co., 15 N. Y. Supp. 872. See Dukes *v.* Eastern, etc., R. Co., 41 Hun 705, s. c. 4 N. Y. Supp. 562; Devitt *v.* Pacific, etc., R. Co., 50 Mo. 302; Rains *v.* St. Louis, etc., R. Co., 71 Mo. 164, s. c. 36 Am. R. 459; Brossman *v.* Lehigh, etc., R. Co., 113 Pa. St. 490, s. c. 57 Am. R. 479; Sheeler *v.* Chesapeake, 81 Va. 188; Clark *v.* Richmond, etc., R. Co., 78 Va. 709, s. c. 49 Am. R. 394; Wells *v.* Burlington, etc., R. Co., 56 Iowa 520; Hall *v.* Union Pac. R. Co., 5 McCrary (U. S.) 257; Warden *v.* Old Colony, etc., R. Co., 137 Mass. 204; Riley *v.* Connecticut River R. Co., 135 Mass. 292.

breach of the employer's duty where the company knows that its bridges are so low as to endanger the safety of persons it sends out upon its trains to discharge the duties required of them without warning or notice of such danger, but it is somewhat difficult to defend the cases which hold that there is a duty to construct bridges of such a height as to enable employes on trains to pass under them in safety while standing on top of the cars, and that injury from low bridges is not assumed, as one of the risks of the service. The general rule that the employe takes the risk of injury fully known to him[1] would seem to apply to dangers from low bridges.

§1272. **Negligence of employer in failing to keep premises safe—Switch yards.**—The general rule as to the duty of the employer to exercise ordinary care to make and keep working places reasonably safe for use applies to switch yards or yards where trains are made up;[2] so does the rule holding employes to the exercise of care,[3] and so also does the rule concerning the assumption of the risks of the service.[4] Yardmen or other employes whose duties require them to perform services in the yards of the company are entitled to the protection of the rule requiring the master to use ordinary care to make the working place reasonably safe but they are held to assume risks from defects known to them if they continue in the service, except

[1] Kelley *v.* Silver Spring, etc., R.Co., 12 R. I. 112; Dynen *v.* Leach, 26 L. J. N. S. Exch. 221; Seymour *v.* Maddox, 16 Q. B. 326; Senior *v.* Ward, 1 El. & El. 385; Assop *v.* Yates, 2 H. & N. 768; Chicago, etc., R Co. *v.* Jackson, 55 Ill. 492; Ladd *v.* New Bedford, etc., R. Co., 119 Mass. 412; Evansville, etc., R. Co. *v.* Henderson, 134 Ind. 636; Vincennes, etc., R. Co. *v.* White, 124 Ind. 376; Pennsylvania Co. *v.* Brush, 130 Ind. 347; Indianapolis, etc., R. Co. *v.* Watson, 114 Ind. 20.

[2] Southerland *v.* Northern Pac. R. Co., 43 Fed. R. 646; Grant *v.* Union Pacific R. Co., 45 Fed. 673; Randall *v.* Baltimore, etc., R. Co., 109 U. S. 478, s. c. 3 Sup. Ct. R. 322; Chicago, etc., R. Co. *v.* Kneirim, 152 Ill. 458, s. c. 43 Am. St. R. 259.

[3] Peoria, etc., R. Co. *v.* Ross, 55 Ill. App. 638; Crisswell *v.* Montana, etc., R. Co., (Mont.) 42 Pac. R. 767; Crawford *v.* Houston, etc., R. Co., (Tex.) 33 S. W. R. 534; Loring *v.* Kansas City, etc., R. Co., 128 Mo. 349, s. c. 31 S. W. R. 6.

[4] Naylor *v.* New York, etc., R. Co., 33 Fed. R. 801; Caron *v.* Boston, etc., R. Co., 164 Mass. 523, 42 N. E. R. 112; Aerkfetz *v.* Humphreys, 145 U. S. 418, s. c. 12 Sup. Ct. R. 835. See Parker *v.* New York, etc., R. Co., 18 R. I. 773, 30 Atl. R. 849.

in cases where the master promises to repair.[1] It is generally held that the operation of a railroad without blocking the switches is not negligence.[2] There is some conflict of authority upon the question as to the duty of the company, to properly cover ditches and drains in its yards. Some of the cases hold that it is the duty of the company to use reasonable care in covering culverts and ditches,[3] while others assert a somewhat different doctrine.[4] It seems to us that it is the duty of the employer to use reasonable care to cover drains and ditches in yards where trains are made up and employes are required to couple and uncouple cars and to transfer cars from place to place.[5] We do not believe, however, that the duty extends to all places within the yard limits but only to places where the duties of their service require the yard men and other employes to work. The rule which we favor does not, as we

[1] Scidmore *v.* Milwaukee, etc., R. Co., 89 Wis. 188, s. c. 61 N. W. R. 765; McDugan *v.* New York, etc., R. Co., 31 N. Y. Supp. 135; Albert *v.* New York, etc., R. Co., 80 Hun 152, s. c. 29 N. Y. Supp. 1126; Gulf, etc., R. Co. *v.* Hohl, (Tex. Civ. App.) 29 S. W. R. 1131; Sheets *v.* Chicago, etc., R. Co., 139 Ind. 682, s. c. 39 N. E. R. 154. See Linton, etc., Co. *v.* Persons, 11 Ind. App. 264, s. c. 39 N. E. R. 214.

[2] Sheets *v.* Chicago, etc., R. Co., 139 Ind. 682, 39 N. E. R. 154; Missouri, etc., R. Co. *v.* Lewis, 24 Neb. 848, s. c. 40 N. W. R. 401; Hewitt *v.* Flint, etc., R. Co., 67 Mich. 61, s. c. 34 N. W. R. 659; Southern Pacific R. Co. *v.* Seley, 152 U. S. 145, s. c. 14 Sup. Ct. 530, reversing Seley *v.* Southern Pacific R. Co., 6 Utah 319; Lake Shore, etc., R. Co. *v.* McCormick, 74 Ind. 440; McGinnis *v.* Canada, etc., Bridge Co., 49 Mich. 466; Little Rock, etc., R. Co. *v.* Eubanks, 48 Ark. 460, s. c. 3 S. W. R. 808. In Chicago, etc., R. Co. *v.* Lonergan, 118 Ill. 41, s. c. 7 N. E. R. 55, the court seems to hold that the company is not bound to use unblocked switches for the reason that the practice of blocking switches is nothing more than an experiment. The court, however, recognized as authority cases which declare that employers are not bound to discard appliances in use and procure more modern ones, and said: "An employer is not required to change his machinery in order to apply or adopt any new invention, Whart. Negl., 213." See generally, Spencer *v.* New York, etc., R. Co., 67 Hun 196, s. c. 22 N. Y. Supp. 100; Rush *v.* Missouri Pac. R. Co., 36 Kan. 129, s. c. 12 Pac. R. 582; Wilson *v.* Winona, etc., R. Co., 37 Minn. 326, s. c. 33 N. W. R. 908; Mayes *v.* Chicago, etc., R. Co., 63 Iowa 562, s. c. 14 N. W. R. 340.

[3] Franklin *v.* Winona, etc., R. Co., 37 Minn. 409, s. c. 34 N. W. R. 898.

[4] Little Rock, etc., R. Co. *v.* Townsend, 41 Ark. 382.

[5] Gardner *v.* Michigan, etc., R. Co., 150 U. S. 349, denying the doctrine of Gardner *v.* Michigan, etc., R. Co., 58 Mich. 584, s. c. 26 N. W. R. 301.

think, apply to places on the line of the road where switching is not customarily or habitually done, and danger from open drains and ditches at such places are ordinary incidental risks of the service assumed by the employes.[1] Where the employe knows, or is chargeable with knowledge that drains and ditches are uncovered then, under the general rule that employes assume the risks of the service he is deemed to assume the risk of danger from such drains and culverts.[2] The duty of a railroad company to employes engaged in a switch yard was clearly and correctly defined in a recent case by the supreme court of the United States,[3] where it was held that the company discharges its duty if it provides competent co-servants and prescribes such regulations "as experience shows may be best calculated to secure the safety" of employes.

§ 1273. **Machinery and appliances—Master's duty respecting.**—It is the duty of the master to exercise ordinary care to furnish the employes reasonably safe machinery and appliances with which to work.[4] The duty is discharged if the employer exercises ordinary care, although the machinery or appliances may not, in fact, be safe or free from defects.[5] The

[1] Deforest *v.* Jewett, 88 N. Y. 264, s. c. 8 Am. & Eng. R. Cas. 495; Gibson *v.* Erie, etc., R. Co., 63 N. Y. 449; Couch *v.* Charlotte, etc., R. Co., 22 So. Car. 557; Koontz *v.* Chicago, etc., R. Co., 65 Iowa 224, s. c. 21 N. W. R. 577, 18 Am. & Eng. R. Cas. 85.

[2] Spencer *v.* New York, etc., R. Co., 67 Hun 196, s. c. 22 N. Y. Supp. 100.

[3] Central, etc., R. Co. *v.* Keegan, 160 U. S. 259, s. c. 16 Sup. Ct. R. 269, citing and approving Potter *v.* New York, etc., R. Co., 136 N. Y. 77, 32 N. E. R. 603.

[4] Union Pac. R. Co. *v.* O'Brien, 161 U. S. 451, s. c. 16 Sup. Ct. R. 618; Texas, etc., R. Co. *v.* Cox, 145 U. S. 593, s. c. 12 Sup. Ct. R. 905; Gardner *v.* Michigan Cent. R. Co., 150 U. S. 349, s. c. 14 Sup. Ct. R. 140; Union Pac. R. Co. *v.* Daniels, 152 U. S. 684, s. c. 14 Sup. Ct. R. 756; Gulf, etc., Co. *v.* Wells, 81 Tex. 685, s. c. 17 S. W. R. 511; Washington, etc., R. Co. *v.* McDade, 135 U. S. 554; Southern Pacific R. Co. *v.* Seley, 152 U. S. 145, s. c. 14 Sup. Ct. R. 530; Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, s. c. 13 Sup. Ct. R. 914; Chicago, etc., R. Co. *v.* Swett, 45 Ill. 197. See, generally, Texas Central R. Co. *v.* Lyons, (Tex. Civ. App.) 34 S. W. R. 362; Cleveland, etc., R. Co. *v.* Selsor, 55 Ill. App. 685; Krampe *v.* St. Louis, etc., Asso., 59 Mo. App. 277.

[5] Atchison, etc., R. Co. *v.* Napole, 55 Kan. 401, 40 Pac. R. 669; Texas, etc., R. Co. *v.* Bingle, (Tex. Civ. App.) 29 S. W. R. 674; Galveston, etc., R. Co. *v.* Gormley, (Tex.) 27 S. W. R. 1051; Atchison, etc., R. Co. *v.* Winston, (Kan.) 43 Pac. R. 777.

degree of care required is ordinary care, but to reach that degree it must be care reasonably proportionate to the dangers against which the employer is required to provide.[1] But it is error to assert that the highest degree of care is required,[2] for the standard is ordinary care, although in order to determine what constitutes ordinary care in the particular instance, the dangers of the service must be considered. What would be ordinary care under some circumstances might not be ordinary care under other circumstances.

§1274. **Appliances generally used sufficient.**—The general rule is that if the employer uses ordinary care to provide and to keep in reasonably safe condition, appliances of a kind that are in common use, he is not guilty of negligence.[3] If he conforms to the ordinary usages of business and procures such appliances and machinery as are in common use, and exercises reasonable care to keep them in a reasonably safe condition, he is not guilty of negligence, and if not guilty of negligence an injured employe has no right of action against him.[4] The

[1] Washington, etc., Co. *v.* McDade, 135 U. S. 554, s. c. 10 Sup. Ct. R. 1044; Texas, etc., Co. *v.* Thompson, 70 Fed. R. 944; Union Pac. R. Co. *v.* Daniels, 152 U. S. 684, s. c. 14 Sup. Ct. R. 756; Mather *v.* Rillston, 156 U. S. 391, s. c. 15 Sup. Ct. R. 464; Northern Pacific R. Co. *v.* Mares, 123 U. S. 710, s. c. 8 Sup. Ct. R. 321.

[2] Texas Central R. Co. *v.* Lyons, (Tex. Civ. App) 34 S. W. R. 362; Gulf, etc., R. Co. *v.* Wells, 81 Tex. 685, s. c. 17 S. W. R. 511; International, etc., R. Co. *v.* Williams, 82 Tex. 342, s. c. 18 S. W. R. 700.

[3] The Maharjah, 40 Fed. R. 784; Washington, etc., R. Co. *v.* McDade, 135 U. S. 554, s. c. 10 Sup. Ct. R. 1044; Lafflin *v.* Buffalo, etc., R. Co., 106 N. Y. 136, s. c. 12 N. E. R. 599; Michigan, etc., R. Co. *v.* Coleman, 28 Mich. 440; Harley *v.* Buffalo, etc., Co., 142 N. Y. 31, s. c. 36 N. E. R. 813; Whitwam *v.* Wisconsin, etc., Ry. Co., 58 Wis. 408, s. c. 17 N. W. R. 124; Lehigh, etc., Co. *v.* Hayes, 128 Pa. St. 294, s. c. 18 Atl. R. 387; Allison, etc., Co. *v.* McCormick, 118 Pa. St. 519, s. c. 12 Atl. R. 273; Chicago, etc., R. Co. *v.* Du Bois, 56 Ill. App. 181; McCarthy *v.* Boston, etc., Co., 165 Mass. 165, 42 N. E. R. 568; Carey *v.* Boston, etc., R. Co., 158 Mass. 228, s. c. 33 N. E. R. 512; Myers *v.* Hudson Iron Co., 150 Mass. 125, s. c. 22 N. E. R. 631. See, generally, East St. Louis Provision Co. *v.* Hightower, 92 Ill. 139; St. Louis, etc., R. Co. *v.* Needham, 69 Fed. R. 823; Port Royal, etc., R. Co. *v.* Davis, 95 Ga. 292, s. c. 22 S. E. R. 833. But see Martin *v.* California, etc., Ry. Co., 94 Cal. 326, s. c. 29 Pac. R. 645.

[4] Titus *v.* Bradford, etc., R. Co., 136 Pa. St. 618, s. c. 20 Am. St. R. 944; Kehler *v.* Schwenk, 144 Pa. St. 348,

test of liability on the part of the employer is negligence. If there is no negligence there is no liability, and the rule is that where the employer does what is commonly and generally done by persons or corporations engaged in the same general line of business, he is not guilty of actionable negligence.[1]

§ 1275. **Latent defects.**—The general rule is that an employer is not liable to an employe for injury caused by latent defects in appliances or machinery.[2] It is not to be understood, however, that the employer is not under a duty to exercise ordinary care in causing reasonably careful and proper inspections to be made. If the defect is one which an ordinarily careful inspection would reveal it can not be regarded as a latent defect within the rule which exonerates the master from liability in cases of injuries attributable to latent defects,[3] but a defect which reasonably careful inspection will not reveal is a latent defect within the rule.[4]

§ 1276. **Delegation of master's duty.**—The modern decisions

27 Am. St. R. 633; Pennsylvania Co. *v.* Congdon, 134 Ind. 226, s. c. 39 Am. St. R. 251; Georgia, etc., R. Co. *v.* Nelms, 83 Ga. 70, s. c. 20 Am. St. R. 308; Texas, etc., R. Co. *v.* Rhodes, 71 Fed. R. 145; Doyle *v.* White, etc., Co., 35 N. Y. S. 760; Smith *v.* Old Colony, etc., R. Co., 10 R. I. 22. See, generally, Dougan *v.* Champlain Transportation Co., 56 N. Y. 1; Loftus *v.* Union, etc., Co., 84 N. Y. 455; Burke *v.* Wetherbee, 98 N. Y. 562; La Pierre *v.* Chicago, etc., R. Co., 99 Mich. 212, s. c. 58 N. W. R. 60.

[1] Reese *v.* Hershey, 163 Pa. St. 253, s. c. 43 Am. St. R. 795; Bertha, etc., Co. *v.* Martin, (Va.) 22 S. E. R. 869; Vinton *v.* Schaub, 32 Vt. 612; Jones *v.* Malvern, etc., Co., 58 Ark. 125, 23 S. W. R. 679; Delaware, etc., Co. *v.* Nuttall, 119 Pa. St. 149, s. c. 13 Atl. R. 65; Allison, etc., Co. *v.* McCormick, 118 Pa. St. 519, s. c. 12 Atl. R. 273; Louisville, etc., R. Co. *v.* Allen, 78 Ala. 494; Grand Rapids, etc., R. Co. *v.* Huntley, 38 Mich. 537. See Georgia, etc., Co. *v.* Propst, 83 Ala. 518, s. c. 3 So. R. 764; Richmond, etc., R. Co. *v.* Jones, 92 Ala. 218, s. c. 9 So. R. 276.

[2] Moore *v.* Pennsylvania Co., 167 Pa. St. 495, s. c. 31 Atl. R. 734; Mackin *v.* Boston, etc., R. Co., 135 Mass. 201, s. c. 15 Am. & Eng. R. Cas. 196; Fay *v.* Minneapolis, etc., R. Co., 30 Minn. 231, s. c. 11 Am. & Eng. R. Cas. 193; Atchison, etc., R. Co. *v.* Wagner, 33 Kan. 660; Smith *v.* Potter, 46 Mich. 258, s. c. 2 Am. & Eng. R. Cas. 140; Reid *v.* Central, etc., R. Co., 81 Ga. 694.

[3] Dobbin *v.* Richmond, etc., R. Co. 81 N. C. 446.

[4] Chicago, etc., R. Co. *v.* Hagar, 11 Ill. App. 498; Philadelphia, R. Co. *v.* Hughes, 119 Pa. St. 301, s. c. 33 Am. & Eng. R. Cas. 348.

affirm that a master can not escape liability by delegating the duty owing employes.[1] There is now little doubt as to the general rule, but there is doubt as to what constitutes the master's duty. We have heretofore shown what the duty of the master is, and we shall now consider duties that are not those of the master. There are duties which may be delegated, and where duties are rightfully delegated the fellow servant rule applies except where otherwise provided by statute. It may be safely said that if the duty is one that may be delegated the master is not responsible at common law for the negligence of the person to whom the duty is assigned. In other words the right to assign or delegate a duty conclusively implies that the duty is not that of the master in such a sense as to render him responsible for negligence in its performance. There are, it is obvious, many duties which may be intrusted to subordinate employes, and where such a duty is performed by a subordinate employe, generally called a servant, the common master is not liable to the co-employes or fellow servants for the negligence of the servant by whom the duty is performed, unless made so by statute. Duties incident to the running of trains are, as a rule, duties that may be delegated. Thus the duty of opening and closing switches is a duty that may be delegated

[1] Hough *v.* Railroad Co., 100 U. S. 213; Union Pac. R. Co. *v.* Daniels, 152 U. S. 684, s. c. 14 Sup. Ct. R. 756; Gardner *v.* Michigan, etc., R. Co., 150 U. S. 349, s. c. 14 Sup. Ct. R. 140; Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, s. c. 13 Sup. Ct. R. 914; Fuller *v.* Jewett, 80 N.Y. 46; Rogers *v.* Ludlow Manufacturing Co., 144 Mass. 198; Spicer *v.* South Boston Iron Co., 138 Mass. 426; Chicago, etc., R. Co. *v.* Kneirim, 152 Ill. 458, s. c. 39 N. E. R. 454, 43 Am. St. R. 259; Mullin *v.* California, etc., R. Co., 105 Cal. 77, s. c. 38 Pac. R. 535; Indiana, etc., R. Co. *v.* Parker, 100 Ind. 181, and cases cited; Indiana, etc., R.Co.*v.* Snyder, 140 Ind. 647; Northern, etc., R. Co. *v.* Charless, 51 Fed. R. 562, 2 C. C. A. 380; Flike *v.* Boston, etc., R. Co., 53 N. Y. 549; Bowers *v.* Union, etc., R. Co., 4 Utah 215; Morton *v.* Detroit, etc., R. Co., 81 Mich. 423; Gunter *v.* Graniteville, etc., R. Co., 18 So. Car. 262, s. c. 44 Am. R. 573; Hannibal, etc., R. Co. *v.* Fox, 31 Kan. 587, s. c. 15 Am. & Eng. R. Cas. 325; Criswell *v.* Pittsburgh, etc., R. Co., 30 W. Va. 798, s. c. 33 Am. & Eng. R. Cas. 232; Brown *v.* Minneapolis, etc., R. Co., 31 Minn. 553; Moon *v.* Richmond, etc., R. Co., 78 Va. 745, s. c. 17 Am. & Eng. R. Cas. 531; Hankins *v.* New York, etc., R. Co., 142 N. Y. 416, s. c. 25 L. R. A. 396; Slater *v.* Jewett, 85 N. Y. 61, s. c. 39 Am. R. 627.

as it is not in a just sense the duty of the master.[1] The fact that a rule of the company leaves to a conductor a discretion as to the manner in which a train in his charge may be moved over the summit of a heavy grade does not make him a vice-principal, nor is the duty of moving the train that of the company in such a sense that it can not be delegated.[2]

§ 1277. **Employer not bound to abandon appliances because newer ones are in use.**—An employer is not bound to abandon the use of machinery or appliances merely because newer and better ones come into use. If the appliances are in common use and in good repair the employer is not to be deemed negligent because he does not cast them aside and procure newer ones. If there is no negligence on the employer's part there can be no actionable wrong simply because the appliances are not replaced by better and safer ones, although it is within the power of the employer to procure them.[3]

§ 1278. **Inspection—Duty of.**—It is the duty of the employer to exercise reasonable care and diligence in inspecting appliances which the employe is required to use in the performance of the duties of his service.[4] The duty to inspect is,

[1] St. Louis, etc., R. Co. *v.* Needham, 63 Fed. R. 107, s. c. 11 C. C. A. 56, 25 L. R. A. 833. The case cited holds that brakemen and switchmen are fellow servants. The following cases were cited, Randall *v.* Baltimore, etc., R. Co., 109 U. S. 478; Roberts *v.* Chicago, etc., R. Co., 33 Minn. 218; Harvey *v.* New York, etc.,R. Co., 88 N. Y. 481, 484; Slattery *v.* Toledo, etc., R. Co., 23 Ind. 81; Chicago, etc., R. Co. *v.* Henry, 7 Ill. App. 322; Walker *v.* Boston, etc., R. Co., 128 Mass. 8; Miller *v.* Southern Pacific R. Co., 20 Ore. 285; Quebec, etc., Co. *v.* Marchant, 133 U. S. 375; Baltimore, etc., R. Co. *v.* Andrews, 50 Fed. R. 728, s. c. 1 C. C. A. 636, 17 L. R. A. 190; Northern Pacific R. Co. *v.* Hambly, 154 U. S. 349.

[2] Wooden *v.* Western, etc., Co., 147 N. Y. 508, s. c. 42 N. E. R. 199.

[3] Homertake, etc., Co. *v.* Fullerton, 69 Fed. R. 923, 929; Marsh *v.* Chickering, 101 N. Y. 396, s. c. 5 N. E. R. 56; Chicago, etc., R. Co. *v.* Linney, 59 Fed. R. 45, 7 C. C. A. 656; Hodgkins *v.* Eastern R. Co., 119 Mass. 419; Southern Pac. R. Co. *v.* Seley, 152 U. S. 145, s. c. 14 Sup. Ct. R. 535; Sweeney *v.* Berlin, etc., Envelope Co., 101 N. Y. 520, s. c. 5 N. E. R. 358; Walsh *v.* Whiteley, L. R. 21 Q. B. Div. 371; Gilbert *v.* Gould, 144 Mass. 601, s. c. 12 N. E. R. 368; Sullivan *v.* India, etc., R. Co., 113 Mass. 396; Sheets *v.* Chicago, etc., R. Co., 139 Ind. 682, s. c. 39 N. E. R. 154; Lake Shore, etc., R. Co. *v.* McCormick, 74 Ind. 440.

[4] Northern, etc., R. Co. *v.* Herbert,

however, owing only to an employe whose duty requires him to use the appliances, for there is no such duty owing to one who voluntarily goes outside of the duties required of him by the contract of employment and makes use of appliances in another department or intended for use by a different class of employes.[1] There is, it is to be kept in mind, no absolute duty to furnish safe appliances or to keep them in safe condition for use, but there is a duty to exercise reasonable care in that regard.[2] Reasonable care requires that inspections should be made at reasonable intervals of time and that ordinary care should be exercised to secure qualified and competent inspectors.[3] The employer is only required to make reasonable and practicable inspections and is not required to tear appliances or machinery into pieces.[4] If the tests in common use are applied with reasonable care and skill the employer is not guilty of an actionable breach of the duty of inspection.[5] The duty

116 U. S. 642, s. c. 6 Sup. Ct. R. 590; Indiana, etc., R. Co. *v.* Snyder, 140 Ind. 647; Atchison, etc., R. Co. *v.* Wagner, 33 Kan. 660; Johnson *v.* Missouri Pacific R. Co., 96 Mo. 340, s. c. 9 Am. St. R. 351; Fuller *v.* Jewett, 80 N. Y. 46; Brann *v.* Chicago, etc., R. Co., 53 Iowa 595, s. c. 6 N. W. R. 5; Wedgwood *v.* Chicago, etc., R. Co., 41 Wis. 478, s. c. 44 Wis. 44; Bessex *v.* Railway Co., 45 Wis. 482; Little Rock, etc., R. Co. *v.* Leverett, 48 Ark. 333, s. c. 3 Am. St. R. 230; Siela *v.* Hannibal, etc., R. Co., 82 Mo. 430; Nicholds *v.* Chrystal, etc., R. Co., 126 Mo. 55, s. c. 28 S. W. R. 991. There are no rigid rules applicable to the care to be exercised in making inspections except that the care exercised must be ordinary or reasonable. If the process of inspection is that commonly employed, or if it is reasonably adapted to the kinds of appliance requiring inspection, it is sufficient. Allen *v.* Union, etc., R. Co., 7 Utah 239, 26 Pac. R. 297.

[1] Millar *v.* Madison, etc., R. Co., 130 Mo. 517, s. c. 31 S.W. R. 574; Central, etc., R. Co. *v.* Chapman, 96 Ga. 769, s. c. 22 S. E. R. 273; Alabama, etc., R. Co. *v.* Hall, (Ala.) 17 So. R. 176. See East St. Louis, etc., R. Co. *v.* Craven, 52 Ill. App. 415; Jayne *v.* Sebewaing Co., (Mich.) 65 N. W. R. 971.

[2] Texas, etc., R. Co. *v.* Rhodes, 71 Fed. R. 145.

[3] Gibson *v.* Northern, etc., R. Co., 22 Hun 289. It is not necessary that the inspection be continuous for it is sufficient if it be made at reasonable intervals. Krampe *v.* St. Louis, etc., R. Co., 59 Mo. App. 277; Grand Rapids, etc., R. Co. *v.* Huntley, 38 Mich. 537.

[4] 2 Richmond, etc., R. Co. *v.* Elliott, 149 U. S. 266, s. c. 13 Sup. Ct. R. 837; Chicago, etc., R. Co. *v.* DuBois, 56 Ill. App. 181; Indianapolis, etc., R. Co. *v.* Toy, 91 Ill. 474, s. c. 33 Am. R. 57; Smith *v.* Chicago, etc., R. Co., 42 Wis. 520.

[5] Manser *v.* Eastern Counties R. Co.,

to inspect is a continuing one, that is, it requires inspections to be made, with ordinary care and in the mode commonly adopted, at reasonable intervals, since an employer is chargeable with notice of the liability of machinery and appliances to become weakened by age and decay.[1] The duty of inspection extends to working places,[2] cars,[3] engines,[4] and to all appliances of a character which ordinary care requires should be examined and inspected.[5] It is true that some appliances may require inspection oftener than others, but the courts can not lay down specific rules for determining how frequently inspections should be made. The rule for determining the

3 L. T. R. (N. S.) 585; Perry *v.* Michigan Central, etc., R. Co., (Wis.) 65 N. W. R. 608; Fenderson *v.* Atlantic, etc., R. Co., (N. J.) 31 Atl. R. 767; Jones *v.* Malvern, etc., R. Co., 58 Ark. 125, 23 S. W. R. 679; Racine *v.* New York, etc., R. Co., 70 Hun 453, s. c. 24 N. Y. Supp. 388; Murphy *v.* Phillips, 35 L. T. R. (N. S.) 477; Morton *v.* Detroit, etc., R. Co., 81 Mich. 423.

[1] Indiana Car Co. *v.* Parker, 100 Ind. 181, 193; City of Indianapolis *v.* Scott, 72 Ind. 196; Board of Comrs. *v.* Bacon, 96 Ind. 31; Rapho Tp. *v.* Moore, 68 Pa. St. 404; Wabash, etc., R. Co. *v.* Morgan, 132 Ind. 430, 31 N. E. R. 661. See generally as to the duty of inspection, De Graff *v.* New York, etc., Railroad Co., 76 N. Y. 125; Ft. Wayne, etc., R. Co. *v.* Gildersleeve, 33 Mich. 133; Carlson *v.* Phenix Bridge Co., 132 N. Y. 273.

[2] Ohio, etc., R. Co. *v.* Heaton, 137 Ind. 1, s. c. 35 N. E. R. 687; Linton, etc., Co. *v.* Persons, 11 Ind. App. 264, s. c. 39 N. E. R. 214.

[3] Sheedy *v.* Chicago, etc., R. Co., 55 Minn. 357, s. c. 57 N. W. R. 60; Union, etc., R. Co. *v.* Snyder, 152 U. S. 684, s. c. 14 Sup. Ct. R. 756; Brann *v.* Chicago, etc., R. Co., 53 Iowa 595. See, Evans *v.* Chamberlain, 40 S. Car. 104, s. c. 18 S. E. R. 213; Bailey *v.* Rome, etc., R. Co., 139 N. Y. 302, s. c. 34 N. E. R. 918; Beard *v.* Chesapeake, etc., R. Co., 90 Va. 351, 18 S. E. R. 559; Texas, etc., R. Co. *v.* Barrett, 67 Fed. R. 214; Settle *v.* St. Louis, etc., R. Co., 127 Mo. 336, s. c. 30 S. W. R. 125; Rodney *v.* St. Louis, etc., R. Co., 127 Mo. 676, 30 S. W. R. 150.

[4] Coontz *v.* Missouri, etc., R. Co., 121 Mo. 652, s. c. 59 Am. & Eng. R. Cas. 169, 26 S. W. R. 661; O'Mellia *v.* Kansas City, etc., R. Co., 115 Mo. 205; Finley *v.* Richmond, etc., R. Co., 59 Fed. R. 419; Gibson *v.* Minneapolis, etc., R. Co., 55 Minn. 177, 56 N. W. R. 686; Tennessee, etc., R. Co. *v.* Kyle, 93 Ala. 1, s. c. 8 So. R. 764; Southern, etc., R. Co. *v.* Lafferty, 57 Fed. R. 536; Ryan *v.* New York, etc., R. Co., 88 Hun 269, s. c. 34 N. Y. Supp. 665.

[5] Louisville, etc., R. Co. *v.* Campbell, 97 Ala. 147; Kansas City, etc., R. Co. *v.* Ryan, 52 Kan. 637, s. c. 59 Am. & Eng. R. Cas. 136; Lake Erie, etc., R. Co. *v.* McHenry, 10 Ind. App. 525, s. c. 37 N. E. R. 186; Louisville, etc., R. Co. *v.* Hinder, (Ky.) 30 S. W. R. 399. We have not attempted to cite all the cases upon the topics referred to in the text, for the cases are much too numerous for citation.

frequency of inspections is that they must be made as often as ordinary care requires, but what is ordinary care in one class of cases may not be ordinary care in other classes. Conformity to common usage or custom will be ordinary care in regard to the frequency of inspections as it is in regard to other matters concerning the employer's duty.[1]

§ 1279. **Foreign cars—Duty of inspection.**—There is wide diversity of opinion as to the duty of a railroad company to inspect cars received from other companies. Courts of high standing hold that there is a duty to inspect foreign cars, and that danger from such cars is not an ordinary risk of the service assumed by the employe.[2] In other cases the ruling is that the company receiving a foreign car is not under a duty to inspect,[3] while still other cases seem to hold that there is a

[1] Alabama, etc., R. Co. *v.* Arnold, 84 Ala. 159, s. c. 4 So. R. 359; Louisville, etc., R. Co. *v.* Campbell, 97 Ala. 147; Holland *v.* Tenn., etc., R. Co., 91 Ala. 444; Louisville, etc., R. Co. *v.* Hall, 87 Ala. 708, s. c. 39 Am. & Eng. R. Cas. 298; Georgia, etc., Ry. Co. *v.* Propst, 83 Ala. 518; Louisville, etc., R. Co. *v.* Jones, 83 Ala. 376, s. c. 34 Am. & Eng. R. Cas. 417; Galveston, etc., R. Co. *v.* Davis, 4 Tex. Civ. App. 468, s. c. 23 S. W. R. 1019.

[2] Baltimore, etc., R. Co. *v.* Mackey, 157 U. S. 72, s. c. 15 Sup. Ct. R. 491. In the case cited the court adopted as authority the cases of Gottlieb *v.* New York, etc., R. Co., 100 N. Y. 462, s. c. 3 N. E. R. 344; Goodrich *v.* New York, etc., R. Co., 116 N. Y. 398, s. c. 22 N. E. R. 397. The doctrine asserted in Baltimore, etc., R. Co. *v.* Mackey, 157 U. S. 72, is affirmed by other courts. Dooner *v.* Delaware, etc., R. Co., 164 Pa. St. 17, s. c. 10 Am. R. & Corp. R. 264, 30 Atl. R. 269; Mateer *v.* Missouri, etc., R. Co., 105 Mo. 320, s. c. 15 S. W. R. 970; International, etc., R. Co. *v.* Kernan, 78 Tex. 294, s. c. 14 S. W. R. 668; Bomar *v.* Louisiana, etc., R. Co., 42 La. Ann. 983; Missouri, etc., R. Co. *v.* White, 76 Tex. 102, s. c. 13 S. W. R. 65; Texas, etc., R. Co. *v.* O'Fiel, 78 Tex. 486; Jones *v.* New York etc., R. Co., 92 N. Y. 628; Mason *v.* Richmond, etc., Ry. Co., 111 N. Car. 482, s. c. 16 S. E. R. 698; Reynolds *v.* Boston, etc., R. Co., 64 Vt. 66, s. c. 24 Atl. R. 134; Fay *v.* Minneapolis, etc., R. Co., 30 Minn. 231, s. c. 11 Am. & Eng. R. Cas. 193; Louisville, etc., R. Co. *v.* Williams, 95 Ky. 199, 24 S. W. R. 1. In Moon *v.* Northern Pac., etc., R. Co., 46 Minn. 106, s. c. 4 Am. R. & Corp. R. 323, 48 N. W. R. 679, it was held that the company which furnished the car to the company by whom the injured was employed was liable to the servant.

[3] Baldwin *v.* Chicago, etc., R. Co., 50 Iowa 680; Indianapolis, etc., R. Co. *v.* Flanigan, 77 Ill. 365; Michigan, etc., R. Co. *v.* Smithson, 45 Mich. 212; Hathaway *v.* Michigan Cent. R. Co., 51 Mich. 253, s. c. 16 N. W. R. 634; Smith *v.* Potter, 46 Mich. 258, s. c. 9 N. W. R. 273; Whitman *v.* Wisconsin, etc., Ry. Co., 58 Wis. 408, s. c. 17 N. W. R. 124; Cincinnati, etc., R.

duty to conduct an inspection for obvious defects but not for latent ones.[1] It is by no means easy to define the duty of a railroad company in relation to foreign cars because of the conflict of authority as well as because of the difficulty inherent in the subject. If the defects are obvious, then upon the long and well established principle that defects open to observation must be observed by the employe and that risks from such defects are assumed as risks of the service, the employer is not liable, so that it is difficult to support by satisfactory reasoning the doctrine of the cases which hold that the company is negligent if it does not provide against obvious defects in foreign cars. So, too, there is much difficulty in supporting the cases which hold that there is a general duty to inspect, for the well established principle is that an employer is bound to use ordinary care in making inspections and ordinary care depends upon time, means and opportunity to a great extent, and it is a matter of which judicial notice must be taken that the requirements and exigencies of commerce often render it necessary to forward cars without delay. If a car laden with perishable articles is delayed the company is liable in the event that injury to the articles results from the delay. There is much reason for the doctrine that employes are held to have knowledge of the customs and requirements of commerce and must be held to assume the risks arising from obedience to such customs and requirements. We venture the opinion, not, indeed, without hesitation, that the rule most consistent with principle

Co. *v.* McMullen, 117 Ind. 439, 445; Mackin *v.* Boston, etc., R. Co., 135 Mass. 201; Keith *v.* New Haven, etc., R. Co., 140 Mass. 175; Smith *v.* Flint, etc., R. Co., 46 Mich. 258; Railroad Co. *v.* Fitzpatrick, 42 Ohio St. 318; Thyng *v.* Fitchburg, etc., R. Co., 156 Mass. 13; Neutz *v.* Jackson, etc., Co., 139 Ind. 411.

[1] Chicago, etc., R. Co. *v.* Fry, 131 Ind. 319, s. c. 28 N. E. R. 989; Gutridge *v.* Missouri Pacific R. Co., 94 Mo. 468; Missouri Pacific R. Co., *v.* Barber, 44 Kan. 612; Thomas *v.* Missouri Pac. R. Co., 109 Mo. 187, 18 S. W. R. 980, 6 Am. R. & Corp. R. 197. See Texas, etc. R. Co. *v.* Charlton, 60 Tex. 397, s. c. 15 Am. & Eng. R. Cas. 350; Mexican, etc., R. Co. *v.* Shean, (Tex.) 18 S. W. R. 151; Toledo, etc., R. Co. *v.* Asbury, 84 Ill. 429; McMullen *v.* Carnegie Co., 158 Pa. St. 518, s. c. 27 Atl. R. 1043, 23 L. R. A. 448.

is that where there is time and opportunity for inspection then one must be made with ordinary care and skill, but if the exigencies and requirements are such that there is no time or opportunity for inspection a railroad company is not guilty of culpable negligence in failing to inspect. Where there is no defect in the cars received from another company, although buffers may be of unequal height, the company receiving them is not guilty of negligence in using them if the buffers are of a kind commonly used.[1] If the company would not be liable to the employe if the car were its own it can not be liable no matter which one of the conflicting lines of decisions be regarded as expressing the law.

§ 1280. **Employer's duty to promulgate rules.**—One of the duties of a railroad company to its employes is to promulgate rules for the conduct of its business and the government of its employes.[2] The duty to promulgate rules is a personal duty

[1] Northern Pac. R. Co. *v.* Blake, 63 Fed. R. 45, citing Michigan, etc., R. Co. *v.* Smithson, 45 Mich. 212, s. c. 7 N. W. R. 791; Baldwin *v.* Chicago, etc., R. Co., 50 Iowa 680; Indianapolis, etc., R. Co. *v.* Flanigan, 77 Ill. 365; Hathaway *v.* Michigan, etc., R. Co., 51 Mich. 253, s. c. 16 N. W. R. 634; Thomas *v.* Missouri Pac. Railroad Co., 109 Mo. 187, s. c. 18 S. W. R. 980; Kohn *v.* McNulta, 147 U. S. 238, s. c. 13 Sup. Ct. R. 298; Chicago, etc., R. Co. *v.* Linney, 59 Fed. R. 45, 48, 7 C. C. A. 656. In Northern, etc., Pac. R. Co. *v.* Blake, 63 Fed. R. 45, the cases of Louisville, etc., R. Co. *v.* Fawley, 110 Ind. 18, s. c. 9 N. E. R. 594; Missouri Pac. Railway Co. *v.* Callbreath, 66 Tex. 526, 1 S. W. R. 622; Hungerford *v.* Chicago, etc., R. Co., 41 Minn. 444, and Reynolds *v.* Boston, etc., R. Co., 64 Vt. 66, s. c. 24 Atl. R. 134, are distinguished.

[2] Crew *v.* St. Louis, etc., R. Co., 20 Fed. R. 87; Ford *v.* Lake Shore, etc., R. Co., 124 N. Y. 493, s. c. 12 L. R. A. 454; Gulf, etc., R. Co. *v.* Finley, (Tex. Civ. App.) 32 S.W. R. 51; Pennsylvania Co. *v.* Whitcomb, 111 Ind. 212, 219; Vose *v.* Lancashire, etc., R. Co., 2 H. & N. 128; Haynes *v.* East Tennessee, etc., R. Co., 3 Cold. 222; Abel *v.* President, etc., 103 N. Y. 581, s. c. 57 Am. R. 773; Corcoran *v.* Delaware, etc., R. Co., 126 N. Y. 673, s. c. 27 N. E. R. 1022; Lewis *v.* Seifert, 116 Pa. St. 628, s. c. 11 Atl. R. 514; Lake Shore, etc., R. Co. *v.* Lavalley, 36 Ohio St. 221; Cumberland, etc., R. Co. *v.* State, 44 Md. 283; Ford *v.* Fitchburg, etc., R. Co., 110 Mass. 240; Cooper *v.* Central Railway Co., 44 Iowa 134; Kansas, etc., R. Co. *v.* Salmon, 14 Kan. 512; Morgan *v.* Hudson, etc., R. Co., 133 N. Y. 666, s. c. 31 N. E. R. 234; Illinois, etc., R. Co. *v.* Whittemore, 43 Ill. 420; Hough *v.* Railway Co., 100 U. S. 213; Smith *v.* Oxford, etc., R. Co., 42 N. J. L. 467; Chicago, etc., R. Co. *v.* Taylor, 69 Ill. 461, s. c. 18 Am. R. 626.

and can not be delegated, that is, the master can not escape liability to an employe injured because of a failure to promulgate rules by entrusting the duty to an agent or employe. It seems clear on principle that the duty of the employer to promulgate rules and the duty of the employes to obey them are reciprocal and that disobedience should defeat a recovery, unless it is clearly established that the rules were abrogated. As we have elsewhere said there is, as we believe, a tendency in the wrong direction upon this subject insomuch as, according to some of the cases, employes by continued disobedience may practically annul all rules. The employer is under a duty to use reasonable care to establish such rules as will make it reasonably safe for the employes to perform the duties required of them by their contract of service, but if ordinary care is exercised in framing rules there is no actionable breach of duty, although accidents may occur. If the employer adopts such rules as experience shows to be reasonably necessary the duty required by law is discharged, since it is obvious that ordinary care, which is the measure of duty, does not require that rules shall be framed that will meet every emergency or contingency that may arise in railroad service.[1] The fact that the master does not promulgate rules is not of itself sufficient to entitle an employe who is injured in the service of his employer to recover, for it must appear in order to charge the master that the failure to promulgate rules was the proximate cause of the injury, nor will such failure shield the employe from the consequences of his contributory negligence.[2] The employer is not charged with the absolute duty of securing an observance of rules, but is bound to exercise ordinary care and diligence to secure an observance of the rules.[3] The cases are not agreed

[1] Doing *v.* New York, etc., R. Co., 73 Hun 270, s. c. 26 N. Y. Supp. 405; Atchison, etc., R. Co. *v.* Carruthers, (Kan.) 43 Pac. R. 230; Gulf, etc., R. Co. *v.* Finley, (Tex. Civ. App.) 32 S. W. R. 51; Ely *v.* New York, etc., R. Co., 88 Hun 323, s. c. 34 N. Y. Supp. 739; McDugan *v.* New York, etc., R. Co., 31 N. Y. Supp. 135; Kudik *v.* Lehigh, etc., R. Co., 78 Hun 492, 29 N.Y. Supp. 533.

[2] Sheets *v.* Chicago, etc., R. Co., 139 Ind. 682, s. c. 39 N. E. R. 154.

[3] Rutledge *v.* Missouri Pac. R. Co., 123 Mo. 121, s. c. 24 S. W. R. 1053, 27 S. W. R. 327. In all such matters in adopting and enforcing rules the standard is ordinary or reasonable

as to whether the question of the sufficiency and reasonableness of rules is a question of law or of fact, and it is difficult to lay down any general rule that will justly apply to all cases, but we think that ordinarily the question is one of law for the court.[1] There may be cases where the ordinary rule can not be justly applied,[2] but they seldom arise.

§ 1281. **Time-tables or schedules.**—It is, as a general rule, the duty of a railroad company to cause time-tables or schedules to be prepared. This duty rests, as we think, upon the same principle as that upon which the duty to make rules is founded. The duty of the company is to exercise reasonable care in the preparation of such tables or schedules, and for a negligent breach of this duty the company is liable to an employe who has a right to rely upon such schedules or tables, and who is free from contributory fault. But this rule does not, by any means, extend to all employes, for some of them are bound to keep out of the way of extra or wild trains as well as scheduled trains. It is held that the duty to prepare time-schedules is one that can not be delegated.[3] While it is the duty of the railroad company to cause time-tables to be prepared, it is not bound to adhere to them without change, but, on the contrary, it may change them at its discretion. Where, however, changes are made, reasonable notice or warning of

care. Kansas City, etc., R. Co. *v.* Hammond, 58 Ark. 324, s. c. 24 S. W. R. 723; Berrigan *v.* New York, etc., R. Co., 131 N. Y. 582, 30 N. E. R. 57.

[1] Larow *v.* New York, etc., R. Co., 61 Hun 11, s. c. 15 N. Y. Supp. 384; Louisville, etc., R. Co. *v.* Fleming, 14 Lea 128; Tracy *v.* New York, etc., R. Co., 9 Bos. (N. Y.) 396; Old Colony, etc., R. Co. *v.* Tripp, 147 Mass. 35, s. c. 33 Am. & Eng. R. Cas. 488, note; Illinois Cent. R. Co. *v.* Whittemore, 43 Ill. 420; Hoffbauer *v.* Davenport Railway Co., 52 Iowa 342, s. c. 3 N. W. R. 121; Tullis *v.* Hassell, 54 N. Y. Super. Ct. 391. But see, Shepard *v.* Northern, etc., R. Co., 63 Hun 634, s. c. 18 N. Y. Supp. 665; State *v.* Overton, 24 N. J. Law 435; Prather *v.* Richmond, etc., R. Co., 80 Ga. 427; Ford *v.* Lake Shore, etc., R. Co., 124 N. Y. 493, s. c. 26 N. E. R. 1101.

[2] Bass *v.* Chicago, etc., Co., 36 Wis. 450; Day *v.* Owen, 5 Mich. 520; Pittsburgh, etc., R. Co. *v.* Henderson, 37 Ohio St. 549.

[3] Frost *v.* Oregon, etc., R. Co., 69 Fed. R. 936. See Baltimore, etc., R. Co. *v.* Camp, 65 Fed. R. 952, 13 C. C. A. 233.

changes should be given.[1] The employer is not liable for the act of a fellow servant who fails in matters of detail respecting time-tables.[2] An employe who does not conform to the schedule rules is guilty of contributory negligence unless just reason exists for his failure to conform to them.

§ 1282. **Violation of rules by employes.**—It is the duty of the employes of a railroad company to obey the rules of the company, and a failure to obey such rules will defeat a recovery by the injured employe if his injury was the proximate result of a failure to obey the rules of the employer.[3] Courts generally hold that if it is customary to disobey the rules, then

[1] Slater *v.* Jewett, 85 N. Y. 61, s. c. 39 Am. R. 627; Sears *v.* Eastern, etc., R. Co., 14 Allen 433; Gordon *v.* Manchester, etc., R. Co., 52 N. H. 596, s. c. 13 Am. R. 97; Rose *v.* Boston, etc., R. Co., 58 N. Y. 217; Lewis *v.* Seifert, 116 Pa. St. 628.

[2] Authorities preceding note.

[3] Robertson *v.* Cornelson, 34 Fed. R. 716; New Jersey, etc., R. Co. *v.* Young, 49 Fed. R. 723; Russell *v.* Railway Co., 47 Fed. R. 204; Kansas City, etc., R. Co. *v.* Dye, 70 Fed. R. 24; Olson *v.* St. Paul, etc., R. Co., 38 Minn. 117, s. c. 35 N. W. R. 866; Atchison, etc., R. Co. *v.* Reesman, 60 Fed. R. 370, 9 C. C. A. 20; Receivers of International, etc., R. Co. *v.* Moore, 3 Tex. Civ. App. 416, s. c. 22 S. W. R. 272; Richmond, etc., R. Co. *v.* Thomason, 99 Ala. 471, s. c. 12 So. R. 273; Richmond, etc., R. Co. *v.* Free, 97 Ala. 231, s. c. 12 So. R. 294; Mischke *v.* Chicago, etc., R. Co., 56 Ill. App. 472; Louisville, etc., R. Co. *v.* Stutts, 105 Ala. 368, s. c. 17 So. R. 29; Smith *v.* New York, etc., R. Co., 88 Hun 468, s. c. 34 N. Y. Supp. 881; Richmond, etc., R. Co. *v.* Dudley, 90 Va. 304, s. c. 18 S. E. R. 274; McGucken *v.* Western, etc., R. Co., 77 Hun 69; East Tennessee, etc., R. Co. *v.* Kane, 92 Ga. 187, s. c. 18 S. E. R. 18, 22 L. R. A. 315; Gulf, etc., R. Co. *v.* Ryan, 69 Tex. 665, s. c. 7 S. W. R. 83; Pilkinton *v.* Gulf, etc., R. Co., 70 Tex. 226, 7 S. W. R. 805; Louisville, etc., R. Co. *v.* Wilson, 88 Tenn. 316, s. c. 12 S. W. R. 720; Abend *v.* Terre Haute, etc., R. Co., 111 Ill. 202; Quick *v.* Indianapolis, etc., R. Co., 130 Ill. 334, s. c. 22 N. E. R. 709; Darracott *v.* Chesapeake, etc., R. Co., 83 Va. 288, s. c. 2 S. E. R. 511; Sloan *v.* Georgia, etc., R. Co., 86 Ga. 15; Schaub *v.* Hannibal, etc., R. Co., 106 Mo. 74, s. c. 16 S. W. R. 924; Karrer *v.* Detroit, etc., R. Co., 76 Mich. 400, s. c. 43 N. W. R. 370; Davis *v.* Staten Island, etc., R. Co., 37 N. Y. S. 157; Conners *v.* Burlington, etc., R. Co., 74 Iowa 383; Cumpston *v.* Texas, etc., R. Co., (Tex. Civ. App.) 33 S. W. R. 737. See Cameron *v.* New York, etc., R. Co., 145 N. Y. 400, s. c. 40 N. E. R. 1. An agreement to obey the rules of the company and to release it from injuries caused by a violation of the rules, is not a contract exempting the company from liability for its own negligence. Runnell *v.* Richmond, etc., R. Co., 47 Fed. R. 204.

disobedience will not defeat a recovery.[1] This doctrine, in the extent to which it is carried by some of the cases, seems to us to be unsound, for the safety of the public requires obedience to the rules, and so does the duty which an employe undertakes to perform to the public and to co-employes. It may be proper to hold that where there is frequent and long-continued failure to regard the rules, and such failure is known to the superior officers or agents of the company, the inference that they have been entirely abrogated may be just, and if so, then a violation of them will not necessarily bar a recovery; but where the rules have not been abrogated, although often disobeyed, an employe who disobeys them should not, as we believe, be allowed to recover damages from his employer where the violation is the proximate cause of the injury. The question is, as it seems to us, to be determined by ascertaining whether the rules have been abrogated, and not simply by ascertaining whether or not they have been disobeyed in some instances. It has been held that the command of the conductor to go between the cars operates as a waiver of a rule forbidding such an act,[2] but we believe this doctrine to be unsound for the reason that a conductor has no authority to waive or annul an established rule of the service. The true doctrine is that asserted by the cases which hold that rules established by the company can not be waived or annulled by

[1] Northern Pacific R. Co. *v.* Nickels, 50 Fed. R. 718; Barry *v.* Hannibal, etc., R. Co., 98 Mo. 62, s. c. 11 S. W. R. 308; Smith *v.* Memphis, etc., R. Co., 18 Fed. R. 304; Schaub *v.* Railway Co., 106 Mo. 74, s. c., 16 S. W. R. 924; Texas, etc., R. Co. *v.* Leighty, (Tex. Civ. App.) 32 S. W. R. 799; Fish *v.* Illinois, etc., R. Co., (Iowa) 65 N. W. R. 995; Chicago, etc., R. Co. *v.* Flynn, 154 Ill. 448, s. c. 40 N. E. R. 332; Strong *v.* Iowa, etc., R. Co., (Iowa) 62 N. W. R. 799; Northern Pac. R. Co. *v.* Nickels, 50 Fed. R. 718.

[2] Mason *v.* Richmond, etc., R. Co., 111 N. Car. 482, s. c. 53 Am. & Eng. R. Cas. 183, 18 L. R. A. 845, 16 S. E. R. 698. The court held that the conductor was not a fellow-servant but the representative of the company, citing Patton *v.* Western, etc., R. Co., 96 N. Car. 455; Central R. Co. *v.* De Bray, 71 Ga. 406; Boatwright *v.* Northeastern, etc., R. Co., 25 S. Car. 128; Coleman *v.* Wilmington, etc., R. Co., 25 S. Car. 446, s. c. 60 Am. R. 516; Louisville, etc., R. Co. *v.* Brooks, 83 Ky. 129. If it were granted that the conductor is not the fellow-servant of a brakeman, still, with deference to the able court that gave the decision

subordinate agents or servants.[1] Where the injury is not caused by an act done in disobedience of the rules of the company, but is caused by a negligent breach of duty by the company, with which the violation of the rules has no proximate connection, the employe may recover, although he may have violated the rules.[2]

§ 1283. **Duty to warn employe of danger.**—The general rule is that where the danger is an extraordinary one, that is, a danger not ordinarily incident to the service, and the employer has knowledge of such danger, he is guilty of negligence if he fails to warn the employe.[3] Where, however, the danger is

upon which we are commenting, we venture to say the conclusion would not follow, for conductors have no authority to make or unmake the fundamental rules of the service.

[1] Richmond, etc., R. Co. *v.* Finley, 63 Fed. R. 228; Atchison, etc., R. Co. *v.* Reesman, 60 Fed. R. 370; Penn. R. Co. *v.* Langdon, 92 Pa. St. 21; Houston, etc., R. Co. *v.* Moore, 49 Tex. 31; Virginia, etc., R. Co. *v.* Roach, 83 Va. 375, s. c. 5 S. E. R. 175; Shenandoah, etc., R Co. *v.* Lucado, 86 Va. 390, s. c. 10 S. E. R. 422; George, etc., R. Co. *v.* Davis, 92 Ala. 300, 9 So. R. 252; Richmond, etc., R. Co. *v.* Rush, 71 Miss. 987, s. c. 15 So. R. 133..

[2] Dickson *v.* Omaha, etc., R. Co., 124 Mo. 140, s. c. 27 S. W. R. 478; Ford *v.* Fitchburg R. Co., 110 Mass. 240; Clarke *v.* Holmes, 7 H. & N. 937. The failure to obey rules is usually held to defeat a recovery upon the ground that it constitutes contributory negligence, but it seems to us that, in strictness, it is a positive breach of duty and not merely contributory negligence. Rules of service are part of the contract of employment, and the employe undertakes to obey them, so that if he disobeys them he is guilty of a breach of affirmative duty, assumed by him. Pennsylvania Co. *v.* Whitcomb, 111 Ind. 212, 219.

[3] Bannon *v.* Lutz, 158 Pa. St. 166, s. c. 27 Atl. R. 890; Consolidated, etc., R. Co. *v.* Haenni, 146 Ill. 614, s. c. 35 N. E. R. 162; Hunn *v.* Michigan, etc., R. Co., 78 Mich. 513, s. c. 7 L. R. A. 500; Erickson *v.* St. Paul, etc., R. Co., 41 Minn. 500, s. c. 5 L. R. A. 786; Louisville, etc., R. Co. *v.* Wright, 115 Ind. 378, 387; Lebbering *v.* Struthers, 157 Pa. St. 312, s. c. 27 Atl. R. 720; Brennan *v.* Gordon, 118 N. Y. 489, s. c. 8 L. R. A. 818. See, generally, Wolski *v.* Knapp, etc., Co., 90 Wis. 178, s. c. 63 N. W. R. 87; Williams *v.* Walton, 9 Houst. 322, s. c. 32 Atl. R. 726; Mather *v.* Rillston, 156 U. S. 391, s. c. 15 Sup. Ct. R. 464; Salem Stone Co. *v.* Griffin, 139 Ind. 141, s. c. 38 N. E. R. 411; Burke *v.* Anderson, 69 Fed. R. 814; Fort Smith, etc., Co. *v.* Slover, 58 Ark. 168, s. c. 24 S. W. R. 106; Elledge *v.* National, etc., Co., 100 Calf. 282, s. c. 34 Pac. R. 852; Northwestern, etc., Co. *v.* Danielson, 57 Fed. R. 915; Barnes *v.* Rembarz, 150 Ill. 192, s. c. 37 N. E. R. 239; Missouri, etc., R. Co. *v.* Walker, (Tex.) 26 S. W. R. 513; Craven *v.* Smith, 89 Wis. 119, s. c. 61 N. W. R. 317.

obvious to a person of ordinary intelligence and one that can be known and appreciated by a person who exercises ordinary prudence and care,[1] or where it is not an extraordinary peril but is one incident to the service, there is no duty to give warning unless the person employed has not reached the years of discretion. Where the danger is open to the observation of a person of ordinary intelligence the general rule is that the employer is not guilty of negligence in failing to give the employe warning of such danger, since the risk is assumed by the employe.[2] The rule just stated applies to one who solicits and accepts employment as a brakeman, although he informs the company that he has had no experience in that capacity.[3] Where a danger arises from the use of the working place or appliances and is caused by changing their condition or character and the new or increased danger is known to the employer but not to the employe, and is not open to his observation, it is the duty of the employer to give the employe warning.[4] It has been held that where an employe is ordered from his usual position to one of more danger it is the duty of the employer to warn him of the dangers of the position to which he is ordered,[5] but, as we believe, this

[1] Hathaway *v.* Illinois, etc., R. Co., (Iowa) 60 N. W. R. 651; Junior *v.* Missouri, etc., Co., 127 Mo. 79, s. c. 29 S. W. R. 988; Myers *v.* DePauw Co., 138 Ind. 590, s. c. 38 N. E. R. 37; Railsback *v.* Wayne, etc., Co., 10 Ind. App. 622, s. c. 38 N. E. R. 221; Yeager *v.* Burlington, etc., R. Co., (Iowa) 61 N. W. R. 215; Nugent *v.* Kauffman Co., 131 Mo. 241, s. c. 33 S. W. R. 428; Burns *v.* Washburn, 160 Mass. 457, s. c. 36 N. E. R. 199. See, generally, Siddall *v.* Pacific Mills Co., 162 Mass. 378, s. c. 38 N. E. R. 969; Western Union Tel. Co. *v.* McMullen, (N. J.) 33 Atl. R. 384; Pratt *v.* Prouty, 153 Mass. 333, s. c. 26 N. E. R. 1002; Ciriack *v.* Merchants', etc., 146 Mass. 182, s. c. 15 N. E. R. 579; Ford *v.* Anderson, 139 Pa. St. 261, s. c. 21 Atl. R. 18; Rock *v.* Indian Orchard Mills Co., 142 Mass. 522, s. c. 8 N. E. R. 401; Burns *v.* Pethcal, 75 Hun 437, s. c. 27 N. Y. Supp. 499.

[2] Findlay *v.* Russell Wheel, etc., Co., (Mich.) 66 N. W. R. 50; Jennings *v.* Tacoma, etc., R. Co., 7 Wash. 275, s. c. 34 Pac. R. 937.

[3] McDermott *v.* Atchison, etc., R. Co., (Kan.) 43 Pac. R. 248. But see Illinois Cent. R. Co. *v.* Price, 72 Miss. 862, s. c. 18 So. R. 415.

[4] Bjbjian *v.* Woonsocket, etc., Co., 164 Mass. 214, s. c. 41 N. E. R. 265. The decision in Louisville, etc., R. Co. *v.* Binion, (Ala.) 18 So. R. 75, in some respects goes further than the weight of authority warrants. See Michael *v.* Roanoke, etc., Works, 90 Va. 492, s. c. 19 S. E. R. 261.

[5] Quinn *v.* Johnson, etc., Co., 9 Houst. 338, s. c. 32 Atl. R. 858.

doctrine can only apply where the employe is ordered into a position essentially different from that to which he was assigned by his contract of service. The duty to give warning does not, as a rule, exist where the employe is old enough to comprehend the dangers of the service and is familiar with the appliances with which he is required to work,[1] but where there is a change in the condition of the working place or appliances augmenting the danger, and that fact is known to the employer and not to the employe, then it is the duty of the master, if there be reasonable opportunity to do so, to give notice to the employe of such danger.[2] If the servant obtains knowledge of the dangers from a fellow-servant he can not recover against the master upon the sole ground that the master failed to instruct or warn him.[3] Some of the courts hold that it is the duty of the employer to warn the employe of latent dangers,[4] and some very broad statements are made in the opinions of the courts. The doctrine is one to be carefully qualified and limited, for it will not do to say that there is a duty to warn employes of all latent dangers, for in every line of business where complicated or powerful machinery is used there are latent dangers incident to the service, and of such dangers it is not the duty of the employer to warn the employe; but if the latent danger is not incident to the service and is known to the employer and not to the employe it is the duty of the former to exercise reasonable care and diligence to give the latter notice. Children and adults do not stand upon the same footing, and the duty of the employer is not so narrow and

[1] Dougherty *v.* West Superior, etc., Co., 88 Wis. 343, s. c. 60 N. W. R. 274; Bellows *v.* Pennsylvania, etc., Co., 157 Pa. St. 51, s. c. 27 Atl. R. 685; Ogley *v.* Miles, 139 N. Y. 458, s. c. 34 N. E. R. 1059; Crown *v.* Orr, 140 N. Y. 450, s. c. 35 N. E. R. 648; Mackin *v.* Alaska, etc., Co., 100 Mich. 276, s. c. 58 N. W. R. 999; Keats *v.* National, etc., Co., 65 Fed. R. 940; Hoyle *v.* Excelsior, etc., Co., 95 Ga. 34, s. c. 21 S. E. R. 1001.

[2] The duty to give notice in such cases is not an absolute duty, but is one requiring the exercise of reasonable care and diligence. If reasonable care and diligence are used then the master can not be deemed guilty of negligence.

[3] Truntle *v.* North Star, etc., Co., 57 Minn. 52, s. c. 58 N. W. R. 832.

[4] Smith *v.* Peninsular Car Works, 60 Mich. 501; Holland *v.* Tennessee, etc., R. Co., 91 Ala. 444, s. c. 12 L. R. A. 232.

limited where children of tender years are employed as it is where adults or persons who have reached the years of discretion are taken into his service. But even as to children the duty to warn and instruct is not an absolute one,[1] for if reasonable care and diligence are exercised the employer's duty is performed, but what is reasonable care and diligence depends in a great degree upon the age of the child, the dangers of the service and like matters. We can not enter into a discussion of the general subject of the employer's duty to children whom he takes into his service, nor can we undertake to cite all of the cases upon the subject, but must content ourselves with citing a few of the great number.[2] One who studies the cases will find great confusion and hopeless conflict. The duty to warn and instruct is a personal duty of the master, and he can not escape the consequences of a failure to perform it by delegating it to an agent or servant.[3] It is not necessary that warning be given in express words, for it may be conveyed in any mode which fairly and reasonably directs the employe's attention to the danger.[4]

[1] Pratt *v.* Prouty, 153 Mass. 333, s. c. 26 N. E. R. 1002; Tinkham *v.* Sawyer, 153 Mass. 485, s. c. 27 N. E. R. 6; Armstrong *v.* Forg, 162 Mass. 544, s. c. 39 N. E. R. 190; Stuart *v.* West End Co., 163 Mass. 391; Luebke *v.* Berlin, etc., Works, 88 Wis. 442, s. c. 43 Am. St. R. 913; Schliermann *v.* Hammond, etc., Co., 32 N. Y. Supp. 748.

[2] Wallace *v.* Standard Oil Co., 66 Fed. R. 260; DeGraff *v.* New York, etc., R. Co., 76 N. Y. 125; Coullard *v.* Tecumseh, etc., 151 Mass. 85, s. c. 23 N. E. R. 731; Railroad Co. *v.* Fort, 17 Wall. 553; Neilson *v.* Hillside, etc., Co., 168 Pa. St. 256, s. c. 31 Atl. R. 1091; Yeager *v.* Burlington, etc., Co., (Iowa) 61 N. W. R. 215; Louisville, etc., R. Co. *v.* Frawley, 110 Ind. 18; McIntosh *v.* Missouri, etc., R. Co., 58 Mo. App. 281; Casey *v.* Chicago, etc., R. Co., 90 Wis. 113, s. c. 62 N. W. R. 624; Mullin *v.* California, etc., Co., 105 Cal. 77, s. c. 38 Pac. R. 535; McGinnis *v.* Canada, etc., R. Co., 49 Mich. 466, s. c. 13 N. W. R. 819; Cleveland, etc., Co. *v.* Corrigan, 46 Ohio St. 283, s. c. 3 L. R. A. 385; Ciriack *v.* Merchants', etc., Co., 151 Mass. 152, s. c. 6 L. R. A. 733; Tagg *v.* McGeorge, 155 Pa. St. 368, s. c. 26 Atl. R. 671; Rummel *v.* Dilworth, 131 Pa. St. 509, s. c. 19 Atl. R. 345; Chopin *v.* Badger, etc., Co., 83 Wis. 192, s. c. 53 N. W. R. 452; Wynne *v.* Conklin, 86 Ga. 40, s. c. 12 S. E. R. 183; Gilbert *v.* Guild, 144 Mass. 601, s. c. 12 N. E. R. 368; Steiler *v.* Hart, 65 Mich. 644, s. c. 32 N. W. R. 875; Atlanta, etc., R. Co. *v.* Smith, 94 Ga. 107, s. c. 20 S. E. R. 763; Ferguson *v.* Smith, 36 N. Y. S. 415; Bibb, etc., Co. *v.* Taylor, 95 Ga. 615, s. c. 23 S. E. R. 188; Turner *v.* Norfolk, etc., R. Co., (W. Va.) 22 S. E. R. 83.

[3] Pullman, etc., Co. *v.* Laack, 143 Ill. 242, s. c. 18 L. R. A. 215.

[4] Louisville, etc., R. Co. *v.* Boland, 96 Ala. 626, s. c. 18 L. R. A. 260.

§ 1284. **Duty to employ competent servants.**—The company's duty to employes is to exercise ordinary care in securing the services of competent co-employes.[1] It is not bound, however, as is sometimes said, to employ competent fellow servants, but it is bound to use reasonable care in employing fellow servants.[2] If reasonable care is exercised there is no breach of duty, although it may turn out that the fellow servant was in fact incompetent. Where special knowledge and skill are required in order to qualify an employe to properly discharge the duties of the position assigned him then it is the duty of the employer to exercise ordinary care to secure the services of persons reasonably well qualified in skill, knowledge or experience for the position, but where the duties of the position do not require special skill, experience or knowledge, the employer in employing unskilled or inexperienced persons is not necessarily guilty of negligence.[3]

[1] Lawler *v.* Androscoggin, etc., R. Co., 62 Me. 463; Moss *v.* Pacific R. Co., 49 Mo. 167; Baulec *v.* New York, etc., R. Co., 59 N. Y. 356; Chicago, etc., R. Co. *v.* Moranda, 108 Ill. 576; Huntingdon, etc., R. Co. *v.* Decker, 84 Pa. St. 419; Chicago, etc., R. Co. *v.* Harney, 28 Ind. 28; Evansville, etc., R. Co. *v.* Guyton, 115 Ind. 450, s. c. 17 N. E. R. 101; Keith *v.* New Haven, etc., Ry. Co., 140 Mass. 175, s. c. 3 N. E. R. 28; Peaslee *v.* Fitchburg Ry. Co., 152 Mass. 155, s. c. 25 N. E. R. 71; Mad River, etc., R. Co. *v.* Barber, 5 Ohio St. 541; Hughes *v.* Baltimore, etc., R. Co., 164 Pa. St. 178, s. c. 44 Am. St. R. 597; Campbell *v.* Cook, 86 Tex. 630, 40 Am. St. R. 878; Baltimore, etc., R. Co. *v.* Neal, 65 Md. 438, s. c. 5 Atl. R. 338; Baltimore, etc., R. Co. *v.* Henthorne, 73 Fed. R. 634.

[2] Bertha, etc., Co. *v.* Martin, (Va.) 22 S. E. R. 869. In Baulec *v.* New York, etc., R. Co., 59 N. Y. 356, it was said: "It is equally well settled that when reasonable precautions and efforts to procure safe and skillful servants are used and without fault, one is employed through whose incompetency damages occurs to a fellow servant, the master is not liable." Citing Laning *v.* New York, etc., R. Co., 49 N. Y. 521; Wright *v.* New York, etc., R. Co., 25 N. Y. 562; Tarrant *v.* Webb, 18 C. B. 797; Ormond *v.* Holland, El. Bl. &. El. 102.

[3] Holland *v.* Tennessee, etc., R. Co., 91 Ala. 444, s. c. 12 L. R. A. 232; Mobile, etc., R. Co. *v.* Thomas, 42 Ala. 672; Smoot *v.* Mobile, etc., R. Co., 67 Ala. 13; Tyson *v.* South, etc., R. Co., 61 Ala. 554; Mobile, etc., R. Co. *v.* Smith, 59 Ala. 245. In the first of the cases cited the rule that conformity to usage and custom repels the inference of negligence is recognized and upon that point the court cited, Louisville, etc., R. Co. *v.* Allen, 78 Ala. 494; Georgia, etc., R. Co. *v.* Propst, 83 Ala. 518; Alabama, etc., R. Co. *v.* Arnold, 84 Ala. 159.

§ 1285. **Presumption of competency of employe.**—The fact that a person old enough to comprehend the dangers of the service in which he seeks to engage applies for employment authorizes the employer, so far as the rights of the employe himself are concerned, to assume that he is qualified to perform the duties of the position for which he makes application. The rule we have stated is, however, a general one. There may, perhaps, be positions of unusual danger which it would be negligence on the part of the master to permit a servant to occupy without some inquiry into his experience or competency. But in railroad service there are few positions of that nature and the general rule must be that which we have stated. We are speaking, we add to prevent misunderstanding of our meaning, of cases where the servant is seeking to fasten a liability upon the master, and not of cases where the master is sought to be held liable by third persons. A railroad company is under no obligation to examine an applicant for employment as to his fitness and qualification for the position he seeks, except perhaps where the applicant is a child of tender years.[1] The cases hold that unless the age of the applicant is such as to convey information of inexperience or incapacity the presumption is that he is competent to perform the duties of the position for which he applies.[2] It is held, and justly, that one who represents that he is competent to discharge the duties of a brakeman can not recover for injuries received by him in coupling cars, when such injury was attributable to his lack of skill and knowledge.[3]

§ 1286. **Burden of proof where incompetency of fellow servant is alleged.**—The presumption is that the employer exercised reasonable care in employing fellow servants, and that presumption until overthrown stands as a *prima facie*

[1] O'Neal *v.* Chicago, etc., R. Co., 132 Ind. 110, 112; Pittsburgh, etc., R. Co. *v.* Adams, 105 Ind. 151, 166, s. c. 5 N. E. R. 187.

[2] Dysinger *v.* Cincinnati, etc., Ry. Co., 93 Mich. 646, s. c. 53 N. W. R. 825; Alexander *v.* Louisville, etc., R. Co., 83 Ky. 589; Mayes *v.* Chicago, etc., Ry. Co., 63 Iowa 562, s. c. 14 N. W. R. 340, 19 N. W. R. 680. See Lyttle *v.* Chicago, etc., R. Co., 84 Mich. 289, s. c. 47 N. W. R. 571.

[3] Stanley *v.* Chicago, etc., R. Co., 101 Mich. 202, s. c. 59 N. W. R. 393.

case.[1] Negligence is not presumed except in very rare instances and in cases of a peculiar character.[2] It follows from these well known principles that the burden of proving negligence in employing fellow servants is upon the plaintiff and in the absence of such proof there can be no recovery.[3]

§ 1287. **Trains to be provided with a sufficient crew.**—It is the duty of a railroad company to exercise ordinary care and diligence to provide its trains with a sufficient number of persons to operate them with reasonable safety. The company by the contract of hiring impliedly undertakes that it will exercise ordinary care to provide an adequate number of persons to prevent the employes engaged in running the train from being exposed to unusual or extraordinary hazards.[4] If ordi-

[1] Louisville, etc., R. Co. *v.* Thompson, 107 Ind. 442; Bates *v.* Pickett, 5 Ind. 22; Old National Bank *v.* Findley, 131 Ind. 225, 229.

[2] Colorado, etc., R. Co. *v.* Ogden, 3 Colo. 499; Mobile, etc., R. Co. *v.* Thomas, 42 Ala. 672; State *v.* Philadelphia, etc., R. Co., 60 Md. 555; Baltimore, etc., R. Co. *v.* Bahrs, 28 Md. 647; Foy *v.* Philadelphia, etc., R. Co., 47 Md. 76; Baltimore, etc., R. Co. *v* State, 54 Md. 648; Toledo, etc., R. Co. *v.* Brannagan, 75 Ind. 490; Brazil, etc., R. Co. *v.* Young, 117 Ind. 520, 524; Wood Master and Servant, (2nd ed.) 768, § 382; Bailey's Master's Liability for Injuries to Servants, 507, 508.

[3] In Hermann *v.* Port Blakely, etc., Co., 71 Fed. R. 853, it was said: "No negligence on the part of the company in employing and selecting the particular individual was shown, and so far as that feature of the case is concerned, it may be taken as conceded that he was competent. The legal presumption is that he was competent, and that the master discharged the duty to the libelant in that respect, no proof to the contrary having been submitted." Beasley *v.* San Jose Fruit Packing Co., 92 Cal. 388, s. c. 28 Pac. R. 485; Drake *v.* New York, etc., R. Co., 80 Hun 490, 30 N. Y. Supp. 671; Potter *v.* New York, etc., R Co., 136 N. Y. 77, s. c. 32 N. E. R. 603; Ohio, etc., R. Co. *v.* Dunn, 138 Ind. 18, s. c. 36 N. E. R. 702; Summerhays *v.* Kansas City, etc., R. Co., 2 Colo. 484; Evansville, etc., R. Co. *v.* Tohill, 143 Ind. 49, s. c. 41 N. E. R. 709; Davis *v.* Detroit, etc., R. Co., 20 Mich. 105; Wright *v.* New York, etc., R. Co., 25 N. Y. 562; Gilman *v.* Eastern, etc., R. Co., 10 Allen 233; Rose *v.* Boston, etc., R. Co., 58 N. Y. 217; Geoghegan *v.* Atlas, etc., Co., 146 N. Y. 369, s. c. 40 N. E. R. 507; Bailey's Master's Liability for Injuries to Servants, 55, 56. See, also, O'Neil *v.* O'Leary, 164 Mass. 387, s. c. 41 N. E. R. 662; Kindel *v.* Hall, (Colo. App.) 44 Pac. R. 781; Denver, etc., R. Co. *v.* Driscoll, 12 Colo. 520, s. c. 21 Pac. R. 708; Murray *v.* Denver, etc., R. Co., 11 Colo. 124, s. c. 17 Pac. R. 484; Colorado, etc., Iron Co. *v.* Lamb, 6 Colo. App. 255, s. c. 40 Pac. R. 251.

[4] Johnson *v.* Ashland, etc., R. Co., 71 Wis. 553, s. c. 5 Am. St. R. 243, 37 N. W. R. 826; Jones *v.* Old Do-

nary care is exercised the company is not liable since negligence is the test of liability and if ordinary care is exercised there can be no negligence. Where the company conforms to the usages and customs that commonly prevail it discharges its duty for there is no negligence where an employer does what is generally done by others in the same line of business. There is not, as the language of some of the books seems to indicate, an absolute duty to provide an adequate force of train men, for the employer is not an insurer, nor is he held to a higher degree of care than ordinary or reasonable care.

§ 1288. **Assumption of risks of service—General doctrine.**—One who enters the service of a railroad company assumes all the ordinary risks of such service.[1] He assumes such risks as are ordinarily incident to the service, not merely such as are necessarily incident to the service he enters.[2] He does not assume extraordinary risks caused by a negligent breach of duty on the part of the employer.[3] He has a right to expect

minion, etc., R. Co., 82 Va. 140, s. c. 3 Am. St. R. 92; Flike *v.* Boston, etc., R. Co., 53 N. Y. 549; Pennsylvania, etc., R. Co. *v.* McCaffrey, 139 Ind. 430, 439; Booth *v.* Boston, etc., R. Co., 73 N. Y. 38, s. c. 29 Am. R. 97; Mad River, etc., R. Co. *v.* Barber, 5 Ohio St. 541, s. c. 67 Am. Dec. 312; Bailey's Master's Liability to Servants, 68; Patterson's Railway Accident Law, § 297; Moak's Underhill on Torts, 47.

[1] Gravelle *v.* Minneapolis, etc., R. Co., 10 Fed. R. 711; Thompson *v.* Chicago, etc., R. Co., 14 Fed. R. 564; Bohn, etc., Co. *v.* Erickson, 55 Fed. R. 943; Woodworth *v.* St. Paul, etc., R. Co., 18 Fed. R. 282; Southern Pacific R. Co. *v.* Seley, 152 U. S. 145; Davidson *v.* Southern Pacific R. Co., 44 Fed. R. 476; Gulf, etc., R. Co. *v.* Hohl, (Texas) 29 S. W. R. 1131; International, etc., R. Co. *v.* Arias, (Texas) 30 S. W. R. 446; Paland *v.* Chicago, etc., R. Co., 44 La. Ann. 1003, s. c. 11 So. R. 707; Kohn *v.* McNulta, 147 U. S. 238, s. c. 13 Sup. Ct. R. 298; Union, etc., R. Co. *v.* Daniels, 152 U. S. 684; O'Neal *v.* Chicago, etc., R. Co., 132 Ind. 110, s. c. 31 N. E. R. 609; Carlson *v.* Oregon, etc., R. Co., 21 Ore. 450, s. c. 28 Pac. R. 497; Clark *v.* St. Paul, etc., R Co., 28 Minn. 128, s. c. 9 N. W. R. 581; Kelley *v.* Silver Spring, etc., R. Co., 12 R. I. 112; Nashville, etc., R. Co. *v.* Elliott, 1 Cold. (Tenn.) 611; Noyes *v.* Smith, 28 Vt. 59; Seymour *v.* Maddox, 16 Q. B. 326; Ryan *v.* Canada, etc., R. Co., 10 Ont. R. 745; Easton *v.* Houston, etc., R. Co., 39 Fed. R. 65; Tobey *v.* Burlington, etc., R. Co., (Iowa) 62 N. W. R. 761.

[2] Texas, etc., R. Co. *v.* Smith, 67 Fed. R. 524; Missouri, etc., R. Co. *v.* Wood, (Tex.) 35 S. W. R. 879. Risks such as "commonly attend the business" are assumed. Gulf, etc., R. Co. *v.* Kizziah, 86 Texas 81, s. c. 23 S. W. R. 578.

[3] Dumas *v.* Stone, 65 Vt. 442, 25 Atl.

that the employer will exercise ordinary care, but no right to expect that the employer will use a higher degree of care.[1] He assumes, as a general rule, all risks from defects in premises or appliances which are known to him, or are open and obvious to observation.[2] Where the employe and employer stand on common ground, with equal means of knowledge, ordinary risks of the service are assumed by the employe.[3] It has been justly said in speaking of the master's duty to furnish safe machinery and appliances that: "It is not the absolute duty of an employer to see that the instruments and machinery are safe. The limit of his duty is reasonable care and pre-

R. 1097; Anglin *v.* Texas, etc., R. Co., 60 Fed. R. 553; Warn *v.* New York, etc., R. Co., 80 Hun 71; Southern, etc., R. Co. *v.* Burke, 60 Fed. R. 704; Davis *v.* New York, etc., R. Co., 159 Mass. 532, s. c. 34 N. E. R. 1070; Consolidated, etc., R. Co. *v.* Haenni, 146 Ill 614, s. c. 35 N. E. R. 162; Bannon *v.* Lutz, 158 Pa. St. 166, s. c. 27 Atl. R. 890.

[1] Buckley *v.* Gould, etc., R. Co., 14 Fed. R. 833; Johnson *v.* Armour, 18 Fed. R. 490; Southern Pacific R. Co. *v.* Seley, 152 U. S. 145, s. c. 14 Sup. Ct. R. 530; Baltimore, etc., R. Co. *v.* Mackey, 157 U. S. 72, s. c. 15 Sup. Ct. R. 491; Central, etc., R. Co. *v.* Keegan, 160 U. S. 259, s. c. 16 Sup. Ct. R. 269; Potter *v.* New York, etc., R. Co., 136 N. Y. 77, s. c. 32 N. E. R. 603; Nutt *v.* Southern, etc., R. Co., 25 Ore. 291, s. c. 35 Pac. R. 653; La Pierre *v.* Chicago, etc., R. Co., 99 Mich. 212, s. c. 58 N. W. R. 60; Atchison, etc., R. Co. *v.* Alsdurf, 47 Ill. App. 200; Galveston, etc., R. Co. *v.* Goodwin, (Texas) 26 S. W. R. 1007; McNeil *v.* New York, etc., R. Co., 71 Hun 24. Knowledge of employe as a bar to a recovery. Walsh *v.* Whiteley, L. R. 21 Q. B. Div. 371; Schroeder *v.* Michigan Car Co., 56 Mich. 132, s. c. 22 N. W. R. 220; Appel *v.* Buffalo, etc., R. Co., 111 N. Y. 550, s. c. 19 N. E. R. 93; Tuttle *v.* Detroit, etc., R. Co., 122 U. S. 189, s. c. 7 Sup. Ct. R. 1166; Randall *v.* Baltimore, etc., R. Co., 109 U. S. 478; Washington, etc., R. Co. *v.* McDade, 135 U. S. 554. It is error to unqualifiedly instruct the jury that the employer contracts not to expose the employe to other risks than those necessarily incident to the service. Per Toulmen, J., in Texas, etc., R. Co. *v.* Smith, 67 Fed. R. 524, citing Texas, etc., R. Co. *v.* Minnick, 57 Fed. R. 362.

[2] Batterson *v.* Chicago, etc., R. Co., 53 Mich. 125, s. c. 18 N. W. R. 584; Carpenter *v.* Mexican, etc., R. Co., 39 Fed. R. 315; Gulf, etc., R. Co. *v.* Schwabbe, 1 Tex. Civ. App. 573, s. c. 21 S. W. R. 706; Warmington *v.* Atchison, etc., R. Co., 46 Mo. App. 159; Goff *v.* Norfolk, etc., R. Co., 36 Fed. R. 299; Tuttle *v.* Detroit, etc., R. Co., 122 U. S. 189, s. c. 7 Sup. Ct. R. 1166.

[3] Big Creek, etc., Co. *v.* Wolf, 138 Ind. 496, s. c. 38 N. E. R. 52; Vincennes, etc., Co. *v.* White, 124 Ind. 376; Swanson *v.* City of Lafayette, 134 Ind. 625; East St. Louis, etc., R. Co. *v.* Shannon, 52 Ill. App. 420; Ames *v.* Lake Shore, etc., R. Co., 135 Ind. 363, s. c. 35 N. E. R. 117.

caution in that respect.'"[1] Where the employe is excusably ignorant of the facts on which the risk depends, he does not, as a rule, assume it,[2] but it is otherwise where he has knowledge of all the material facts.[3] The employe can not be held to assume a risk unless he had time and opportunity to acquire knowledge of the defect which created the danger.[4] While the general rule is that the servant assumes the ordinary risks of the service into which he voluntarily enters, he does not assume the risks arising from a breach of the duty of the master. Negligence on the part of the master in the performance of the duty which he owes his employes creates, as a rule, an extraordinary risk and such a risk is not assumed by the employe,[5] except where with notice of the breach of duty and the attendant danger he remains in the service, or, with such knowledge, makes no complaint or objection.[6]

§ 1289. Assumption of risks—Employer's methods of conducting business.—An employe can not control the employer's

[1] Brewer J., in Canter *v.* Colorado, etc., R. Co., 35 Fed. R. 41.

[2] Breen *v.* Field, 157 Mass. 277, s. c. 31 N. E. R. 1075; Murphy *v.* Wabash, etc., R. Co., 115 Mo. 111, s. c. 21 S. W. R. 862; Evansville, etc., R. Co. *v.* Maddux, 134 Ind. 571, s. c. 33 N. E. R. 345. The case last cited goes very far; perhaps too far. See, also, Philadelphia, etc., R. Co. *v.* Huber, 128 Pa. St. 63, s. c. 18 Atl. R. 334.

[3] King *v.* Ford River, etc., Co., 93 Mich. 172, s. c. 53 N. W. R. 10; Craver *v.* Christian, 36 Minn, 413, s. c. 31 N. W. R. 457.

[4] Sherman *v.* Chicago, etc., R. Co., 34 Minn. 259, s. c. 25 N. W. R. 593. See Barbo *v.* Bassett, 35 Minn. 485, s. c. 29 N. W. R. 198.

[5] Union, etc., R. Co. *v.* Daniels, 152 U. S. 684; Davis *v.* Central, etc., R. Co., 55 Vt. 84 s. c. 11 Am. & Eng. R. Cas. 173; Cumberland, etc., R. Co. *v.* State, 44 Md. 283; Trask *v.* California, etc., R. Co., 63 Cal. 96; Chicago, etc., R. Co. *v.* Avery, 109 Ill. 314; Union Pac. R. Co. *v.* Fort, 17 Wall. 553; Anderson *v.* Bennett, 16 Ore. 515, s. c. 19 Pac. R. 765; Torians *v.* Richmond, etc., R. Co., 84 Va. 192, s. c. 4 S. E. R. 339; Solomon R. Co. *v.* Jones, 30 Kan. 601, s. c. 15 Am. & Eng. R. Cas. 201; Dobbin *v.* Richmond, etc., R. Co., 81 N. C. 446; Ford *v.* Fitchburg, etc., R. Co., 110 Mass. 240, s. c. 14 Am. R. 598; Brann *v.* Chicago, etc., R. Co., 53 Iowa 595, s. c. 36 Am. R. 243. The English cases assert a different doctrine. Wilson *v.* Merry, L. R., 1 H. L. Sc. App. 326; Waller *v.* Southeastern, etc., R. Co., 2 H. & C. 102; Feltham *v.* England L. R., 2 Q. B. 33; Wigmore *v.* Jay, 5 Exch. 354. See Johnson *v.* Boston, etc., Co., 135 Mass. 209.

[6] Anthony *v.* Leeret, 105 N. Y. 591; Cunningham *v.* Merrimac, etc., Co., 163 Mass. 89, s. c. 39 N. E. R. 774; Birmingham *v.* Pettit, (D. C.) 21 Wash. L. R. 115.

business nor prescribe the methods of conducting it. The employer is not liable to the employe for personal injuries received by him although the employer might have adopted a safer method of conducting business.[1] The employe assumes the risks, "ordinarily incidental to his employer's business and to the employer's known manner of having it performed."[2] The rule stated charges the employe with risks arising from the mode of running trains, of changing the time of trains, of moving locomotives, cars and the like.[3] An illustration of the rule is supplied by a case in which it was held that the company was not liable to a switchman who was injured because it failed to light the yard in which it required him to perform his duties.[4]

§ 1290. **Risks of service—Illustrative cases.**—A watchman at a roundhouse, whose duty requires him to move or assist in moving into the roundhouse engines without steam or the power to move themselves, can not recover for injuries sustained in moving into the roundhouse such an engine where the dangers of the work are open to observation.[5] A switchman who undertakes to couple cars, having knowledge of the

[1] Naylor *v.* Chicago, etc., R. Co., 53 Wis. 661, s. c. 11 N. W. R. 24, 5 Am. & Eng. R. Cas. 460; Hewitt *v.* Flint, etc., R. Co., 67 Mich. 61, s. c. 31 Am. & Eng. R. Cas. 249, 34 N. W. R. 659; Kelley *v.* Chicago, etc., R. Co., 53 Wis. 74, s. c. 5 Am. & Eng. R. Cas. 469; Stephenson *v.* Duncan, 73 Wis. 404, s. c. 41 N.W. R. 337; Hughes *v.* Winona, etc., R. Co., 27 Minn. 137, s. c. 6 N. W. R. 553; Bengston *v.* Chicago, etc., R. Co., 47 Minn. 486, s. c. 50 N. W. R. 531.

[2] Texas, etc., R. Co. *v.* Minnick, 61 Fed. R. 635, 638.

[3] Kuhns *v.* Wisconsin, etc., R. Co., 70 Iowa 561; Kennedy *v.* Pennsylvania, etc., R. Co., 1 Mon. (Pa.) 271, s. c. 17 Atl. R. 7; Larson *v.* St. Paul R. Co., 43 Minn. 423, s. c. 45 N. W. R. 722; Jolly *v.* Detroit, etc., R. Co., 93 Mich. 370, s. c. 53 N. W. R. 526; Olson *v.* St. Paul R. Co., 38 Minn. 117, s. c. 35 N.W. R. 866; Whitmore *v.* Boston, etc., R. Co., 150 Mass. 477, s. c. 23 N. E. R. 220; Jackson *v.* Missouri Pac. R. Co., 104 Mo. 448, s. c. 16 S. W. R. 413; Fordyce *v.* Lowman, 57 Ark. 160, s. c. 20 S.W. R. 1090; Naylor *v.* New York, etc., R. Co., 33 Fed. R. 801; Caron *v.* Boston, etc., R. Co., 164 Mass. 523, s. c. 42 N. E. R. 112. See generally, Abbot *v.* McCadden, 81 Wis. 563, s. c. 51 N. W. R. 1079.

[4] Grant *v.* Union Pacific R. Co., 45 Fed. R. 673.

[5] Anglin *v.* Texas, etc., R. Co., 60 Fed. R. 553. See Skidmore *v.* West Virginia, etc., R. Co., (W. Va.) 23 S. E. R. 713.

defective condition of the track, assumes the risk and can not hold the employer liable.[1] An employe who does work in the line of his duty upon a bridge which is obviously a temporary and insecure structure, assumes the risk as an incident of his service.[2] It has been held that if an employe engaged in assisting other employes to hoist timbers on a bridge has knowledge that there is not a sufficient number of persons to do the work with reasonable safety, he can not recover from the employer for injuries caused by the failure to provide a sufficient force of men to do the work.[3] A switchman injured by reason of a draw-head of a locomotive being so short as to leave too small a space between the locomotive and cars to enable him to perform his duty in coupling a locomotive to a car, can not recover for injuries received in attempting to perform such duty if the insufficiency of the draw-bar was visible to him.[4] Employes who undertake to throw mail-bags onto moving trains, assume the ordinary risks of such service,[5] and the same rule applies to persons employed to work at stations where mail-bags are thrown from trains.[6] A track-walker can not maintain an action for an injury caused by coal falling from a passing locomotive.[7] Where a brakeman has knowledge of the manner in which a car is loaded, and that there is danger, he assumes the risk of injury.[8] A freight handler who knows

[1] Little Rock, etc., R. Co. *v.* Moseley, 56 Fed. R. 1009. If, however, he does not know or is not chargeable with knowledge of the effect, he does not assume the risk, but he must know if ordinary care and diligence would enable him to know. Secord *v.* Chicago, etc., R. Co., (Mich.) 65 N. W. R. 550.

[2] McGrath *v.* Texas, etc., R. Co., 60 Fed. R. 555.

[3] Texas, etc., R. Co. *v.* Rogers, 57 Fed. R. 378.

[4] Brooks *v.* Northern Pac. R. Co., 47 Fed. R. 687.

[5] Coolbroth *v.* Maine, etc., R. Co., 77 Me. 165, s. c. 21 Am. & Eng. R. Cas. 599, citing Yeaton *v.* Boston, etc., R. Co., 135 Mass. 418, s. c. 15 Am. & Eng. R. Cas. 253; Hathaway *v.* Michigan, etc., R. Co., 51 Mich. 253, s. c. 12 Am. & Eng. R. Cas. 249.

[6] Muster *v.* Chicago, etc., R. Co., 61 Wis. 325, s. c. 18 Am. & Eng. R. Cas. 113, distinguishing Kirst *v.* Milwaukee, etc., R. Co., 46 Wis. 489; Cummings *v.* National etc., Co., 60 Wis. 603, s. c. 18 N. W. R. 742, 20 N. W. R. 665; Scott *v.* London Docks Co., 3 Hurl. & C. 596.

[7] Schultz *v.* Chicago, etc., R. Co., 67 Wis. 616, s. c. 28 Am. & Eng. R. Cas. 404.

[8] Sisco *v.* Lehigh, etc., R. Co., 145 N. Y. 296, s. c. 39 N. E. R. 958. But see Dewey *v.* Detroit, etc., R. Co., 97

that the fastenings of a car door are unsafe, assumes the risk of injury from such defect.[1] A trackman assumes the risk of injury from wild trains.[2] Brakemen assume risks from jerking motions of the train, and the like,[3] but where the engineer of the train is incompetent, and known to the company to be incompetent, a different rule applies.[4] Where a workman engaged in repairing a bridge is injured by a wedge flying out of a piece of timber, the employer is not liable.[5] The authorities require the conclusion that the employe assumes all the risks of the service in which he voluntarily engages, except such as arise from negligence on the part of the employer, so that in whatever form the question may arise, the general rule must be that risks of the service shall not be increased or caused by the employer's negligence, but risks not increased or caused by the employer's negligence are risks of the service which the employe assumes.[6] The test is not danger but negligence on the part of the employer.

Mich. 329, s. c. 56 N. W. R. 756, 38 Central L. J. 31; Atchison, etc., R. Co. *v.* Seeley, 54 Kan. 21, s. c. 37 Pac. R. 104.

[1] Cassady *v.* Boston, etc., R. Co., 164 Mass. 168, s. c. 41 N. E. R. 129.

[2] Shepard *v.* Boston, etc., R. Co., 158 Mass. 174, s. c. 33 N. E. R. 508; Lynch *v.* Boston, etc., R. Co., 159 Mass. 536, s. c. 34 N. E. R. 1072; Sullivan *v.* Fitchburg, etc., R. Co., 161 Mass. 125 36 N. E. R. 751. See Ring *v.* Missouri, etc., R. Co., 112 Mo. 220, s. c. 20 S. W. R. 436.

[3] Davis *v.* Baltimore, etc., R. Co., 152 Pa. St. 314, s. c. 25 Atl. R. 498, s. c. 53 Am. & Eng. R. Cas. 372; Fordyce *v.* Lowman, 57 Ark. 160, s. c. 20 S. W. R. 1090.

[4] Cincinnati, etc., R. Co. *v.* Madden, 134 Ind. 462, s. c. 34 N. E. R. 227. The correct basis for the decision in the case cited is that the master was guilty of a negligent breach of duty in employing an incompetent engineer, for had the engineer been competent, risk from his negligence would have been assumed by the plaintiff. If the employe knew of an engineer's incompetency there could be no recovery. Gulf, etc., Co. *v.* Schwabbe, 1 Tex. Civ. App. 573, s. c. 21 S. W. R. 706; Paland *v.* Chicago, etc., R, Co., 44 La. Ann. 1003, s. c. 11 So. R. 707.

[5] Bedford, etc., R. Co. *v.* Brown, (Ind.) 42 N. E. R. 359. See Bonnet *v.* Galveston, etc., R. Co. (Tex.) 33 S. W. R. 334.

[6] Bradbury *v.* Kingston, etc., R. Co., 157 Pa. St. 231, s. c. 27 Atl. R. 400; Anglin *v.* Texas, etc., R. Co., 60 Fed. R. 553; Chicago, etc., Co. *v.* Sobkowiak, 45 Ill. App. 317, s. c. 148 Ill. 573, 36 N. E. R. 573; Day *v.* Cleveland, etc., R. Co., 137 Ind. 206, s. c. 36 N. E. R. 854; McGrath *v.* Texas, etc., R. Co., 60 Fed. R. 555; Rutherford *v.* Chicago, etc., R. Co., 57 Minn. 237, 59 N. W. R. 302; Lynch *v.* Chicago, etc., R. Co., 8 Ind. App, 516, s. c. 36 N. E.

§ 1291. Duty of employe to acquaint himself with employer's business methods.—The general rule is that an employe must exercise ordinary care and diligence to obtain knowledge of the business methods of the employer. Where there are means and opportunities of knowledge of the employer's methods and customs knowledge may be presumed. Where there is a duty to know and a negligent failure to perform that duty the employe can not maintain an action against the employer for the recovery of damages for personal injuries except in very rare and unusual cases.[1]

§ 1292. Duty of employe in regard to competency of co-employes.—Within reasonable limits an employe has a right to act upon the presumption that the employer has exercised reasonable care in selecting and employing competent co-employes,[2]

R. 44; Lanson *v.* Truesdale, (Minn.) 62 N. W. R. 546; Peterson *v.* Sherry, etc., Co., 90 Wis. 83, s. c. 62 N. W. R. 948; Connelly *v.* Hamilton, etc., R. Co., 163 Mass. 156, s. c. 39 N. E. R. 787; McPhee *v.* Scully, 163 Mass. 216, s. c. 39 N. E. R. 1007; Smart *v.* Louisiana, etc., Co., 47 La. Ann. 869; s. c. 17 So. R. 346; Kerns *v.* Chicago, etc., R. Co., (Iowa) 62 N. W. R. 692; Craven *v.* Smith, 89 Wis. 119, s. c. 61 N. W. R. 317; Missouri, etc., R. Co. *v.* Hamilton, (Tex. Civ. App.) 30 S. W. R. 679; Grand Trunk, etc., R. Co. *v.* Tennant, 66 Fed. R. 922; Allen *v.* Logan City, 10 Utah 279, s. c. 37 Pac. R. 496; Diamond, etc., Co. *v.* De Hority, 143 Ind. 381, s. c. 40 N. E. R. 681; Louisville, etc., R. Co. *v.* Stutts, 105 Ala. 368, 17 So. R. 29.

[1] Hewitt *v.* Flint, etc., R. Co., 67 Mich. 61, s. c. 34 N. W. R. 659, 31 Am. & Eng. R. Cas. 249. See, generally, as to duty of employe to secure knowledge. Bohn Manufacturing Co. *v.* Erickson, 56 Fed. 943, 946, 5 C. C. A. 341; Northwestern Fuel Co. *v.* Danielson, 57 Fed. R. 915; Chicago, etc., R. Co. *v.* Linney, 59 Fed. R. 45, 47; Johnson *v.* Oakes, 70 Fed. R. 566; Gulf, etc., R. Co. *v.* Wittig, (Tex.) 35 S. W. R. 859; Salem, etc., Co. *v.* Hobbs, (Ind.) 42 N. E. R. 1022; Evansville, etc., R. Co. *v.* Duel, 134 Ind. 539; s. c. 33 N. E. R. 355; Louisville, etc., R. Co. *v.* Corps, 124 Ind. 427, s. c. 24 N. E. R. 1046; Evansville, etc., R. Co. *v.* Henderson, 142 Ind. 596, s. c. 42 N. E. R. 216.

[2] Chicago, etc., R. Co. *v.* Beatty, 13 Ind. App. 604, s. c. 40 N. E. R. 753, citing Indiana, etc., R. *v.* Dailey, 110 Ind. 75, s. c. 10 N. E. R. 631; Lake Shore, etc., R. Co. *v.* Stupak, 108 Ind. 1, s. c. 8 N. E. R. 630; Chicago, etc., R. Co. *v.* Champion, 9 Ind. App. 510, s. c. 36 N. E. R. 221, 37 N. E. R. 21. Some of the statements in the cases cited from the Indiana Appellate Court reports are, in many respects, very broad, and are opposed to the decisions of the Supreme Court of Indiana. Ohio, etc., R. Co. *v.* Dunn, 138 Ind. 18, s. c. 36 N. E. R. 702. And see cases cited in dissenting opinion in Chicago, etc., R. Co. *v.* Champion, 9 Ind. App. 510, 531.

but this right does not extend so far as to dispense with the exercise of reasonable care and diligence on the part of the employe. The duty of the employer is to use ordinary care to select and secure the services of competent co-employes, but the duty does not go so far as to make the employer absolutely answerable for the competency of co-employes. The presumption, therefore, upon which an employe has a right to act is that the employer exercised reasonable care in selecting co-employes, and he can not absolutely assume that the co-employes are competent. If the injured employe can not show that the employer did not exercise ordinary care in selecting and securing the services of competent co-employes, or that after knowledge of incompetency the employer retained the incompetent person, there can be no recovery upon the ground of negligence in employing fellow-servants.[1] Nor can there be a recovery against the employer in such a case if the employe has knowledge of the incompetency of his fellow-servant and does not exercise the diligence and care which a person of ordinary prudence possessing such knowledge would exercise under like circumstances. It is, indeed, the general rule that where an employe has knowledge of the incompetency of a co-employe and still remains in the employer's service he assumes all risk of injury from the acts of such incompetent co-employe.[2] An em-

[1] Campbell *v.* Wing, 5 Tex. Civ. App. 431, s. c. 24 S. W. R. 360; Moss *v.* Pacific Railroad Co., 49 Mo. 167; Davis *v.* Detroit, etc., R. Co., 20 Mich. 105; Whaalan *v.* Mad River, etc., R. Co., 8 Ohio St. 249; Huffman *v.* Chicago, etc., R. Co., 78 Mo. 50; Kersey *v.* Kansas City, etc., R. Co., 79 Mo. 362; East Tennessee, etc., R. Co. *v.* Gurley, 12 Lea 46; Baulec *v.* New York, etc., R. Co., 59 N. Y. 356.

[2] Consolidated, etc., Co. *v.* Clay, 51 Ohio St. 542, s. c. 38 N. E. R. 610; St. Louis, etc., Co. *v.* Kenyon, 57 Ill. App. 640; Hatt *v.* Nay, 144 Mass. 186, s. c. 10 N. E. R. 807; Assop *v.* Yates, 2 H. & N. 768; Hayden *v.* Smithville Manufacturing Co., 29 Conn. 548; Richmond, etc., R. Co. *v.* Worley, 92 Ga. 84, s. c. 18 S. E. R. 361, Kansas Pac. R. Co. *v.* Peavey, 34 Kan. 472; United States, etc., Co. *v.* Wilder, 116 Ill. 100, s. c. 5 N. E. R. 92; McCharles *v.* Horn, etc., Co., 10 Utah 470, s. c. 37 Pac. 733; Laning *v.* New York, etc., R. Co., 49 N. Y. 521; Latremouille *v.* Bennington, etc., R. Co., 63 Vt. 336; Skip *v.* Eastern, etc., R. Co., 24 Eng. L. & Eq. R. 396; Mad River, etc., R. Co. *v.* Barber, 5 Ohio St. 541; Bassett *v.* Norwich, etc., R. Co., 9 Law Reporter (N. S.) 551; McQueen *v.* Central, etc., R. Co., 30 Kan. 689; Lake Shore, etc., R. Co. *v.* Knittal, 33 Ohio St. 468; Jackson *v.* Kansas City, etc., R. Co., 31 Kan. 761, s. c. 3 Pac. R. 501. See

ploye owes his employer a duty in this regard, for the duty growing out of the contract of service is not solely on the part of the employer. The duty which the employe owes the employer requires that he should not pass unnoticed and without objection the incompetency of co-employes in cases where he has knowledge of such incompetency.[1] In cases where the employer is a railroad company charged with the duty of carrying persons and property and where great care is exacted of the company public policy demands of employes that they themselves should exercise reasonable care to ascertain the competency of co-employes, and, if they discover that such co-employes are incompetent, use reasonable care and diligence to make it known to the employer.[2]

§ 1293. **Employe bound to use ordinary care to remedy defects.**—An employe who can readily and easily remedy a defect in an appliance is bound to do so. He is not bound to exercise more than ordinary care, but that degree of care it is his duty to exercise. He must, in some instances, in order to

Long *v.* Coronado, etc., R. Co., 96 Calf. 269, s. c. 31 Pac. R. 170; Williams *v.* Missouri Pac. R. Co., 109 Mo. 475, s. c. 18 S. W. R. 1098; Mexican, etc., R. Co. *v.* Jackson, (Texas Civ. App.) 32 S. W. R. 320. The principle is the same as that which rules in cases where employes have knowledge of defects in appliances, and in such cases it is settled that ordinary knowledge will defeat a recovery by the employe. Victor, etc., Co. *v.* Muir, 20 Colo. 320, s. c. 46 Am. St. R. 299; Breckenridge, etc., Co. *v.* Hicks, 94 Ky. 362, s.c. 42 Am. St. R. 361; Harker *v.* Burlington, etc., R. Co., 88 Iowa 409, s. c. 45 Am. St. R. 242; Titus *v.* Bradford, etc., R. Co., 136 Pa. St. 618, s. c. 20 Am. St. R. 944; Taylor, etc., R. Co. *v.* Taylor, 79 Tex. 104, s. c. 23 Am. St. R. 316. The doctrine of assumption of risks by the employe is elsewhere considered, and the cases there cited show the effect of knowledge.

[1] St. Louis, etc., Co. *v.* Kenyon, 57 Ill. App. 640; Hunt *v.* Lowell, etc., Co., 1 Allen 343; Wharton on Negligence (2d ed.) § 236, citing Indianapolis, etc., R. Co. *v.* Carr, 35 Ind. 510; Baltimore, etc., R. Co. *v.* State, 33 Md. 542; Brothers *v.* Cartter, 52 Mo. 372; McCharles *v.* Horn, etc., Co., 10 Utah 470, s. c. 37 Pac. R. 733. In Pennsylvania Co. *v.* McCaffrey, 139 Ind. 430, s. c. 29 L. R. A. 104, it is held that the employe is not bound to report matters of which the employer has knowledge. It is to be said of the case just cited that it is an extreme one upon several points and can not be regarded as sound upon some of the points decided. Truman *v.* Rudolph, 22 Ont. App. 250.

[2] Toledo, etc., R. Co. *v.* Pennsylvania Co., 54 Fed. R. 746, s. c. 19 L. R. A. 395.

successfully insist that the master has not performed his duty, affirmatively show that he has taken reasonable measures to remedy defects which are known to him. The failure to take such measures is ordinarily regarded as contributory negligence, but we are inclined to think that it may be justly held that where the defect is a temporary one, easily remedied, the company can not be regarded as guilty of negligence from the mere fact that such an appliance is furnished the employe.[1]

§ 1294. **Duty of employe to acquaint himself with rules of employer.**—The weight of authority, so far as the number of decisions can be regarded as constituting the weight, is that the employer in order to make a rule available must affirmatively show that it was brought to the employe's knowledge.[2] There is, however, conflict upon this question for well reasoned cases affirm that it is the duty of the employe to acquaint himself with the rules established by the employer.[3] Our opinion is that the true doctrine is that the employe is under a duty to exercise ordinary care to ascertain the rules of the service in which he engages. It is settled law that it is the duty of the employer to promulgate rules, and, this being true, it is the reciprocal duty of the employe to ascertain what those rules are, for he is bound to know what the law requires of the employer and hence is put upon inquiry, and, according to elementary principles, is chargeable with a knowledge of the facts to which a reasonable inquiry would lead. The employe has, indeed, a

[1] Meador *v.* Lake Shore, etc., R. Co., 138 Ind. 290, s. c. 37 N. E. R. 721.

[2] Louisville, etc., R. Co. *v.* Utz, 133 Ind. 265, s. c. 32 N. E. R. 881; Atchison, etc., R. Co. *v.* Plunkett, 25 Kan. 188; Conners *v.* Burlington, etc., R. Co., 87 Iowa 147, s. c. 53 N.W. R. 1092; LeCroy *v.* New York, etc., R. Co., 10 N. Y. Supp. 382; Covey *v.* Hannibal, etc., R. Co., 27 Mo. App. 170; Central, etc., R. Co. *v.* Ryles, 84 Ga. 420; Carroll *v.* East Tennessee, etc., R. Co., 82 Ga. 452.

[3] Pilkinton *v.* Gulf, etc., Ry. Co., 70 Tex. 226, s. c. 7 S.W. R. 805; Alexander *v.* Louisville, etc., R. Co., 83 Ky. 589; Agawam Bank *v.* Strever, 18 N.Y. 502; LaCroy *v.* New York, etc., R. Co., 132 N. Y. 570, s. c. 30 N. E. R. 391; Wilson *v.* Michigan, etc., R. Co., 94 Mich. 20, s. c. 53 N. W. 797; Slater *v.* Jewett, 85 N. Y. 61. See Helm *v.* Louisville, etc., R. Co., (Ky.) 33 S. W. R. 396; Central, etc., R. Co. *v.* Keegan, 160 U. S. 259, s. c. 16 Sup. Ct. R. 269; Parker *v.* Georgia, etc., R. Co., 83 Ga. 539, s. c. 10 S. E. R. 233.

right to rely upon the employer's using ordinary care and diligence to enforce the rules, and surely the employe ought to be held bound to make a reasonably diligent effort to ascertain the nature of the rules of the service. It is also firmly settled law that it is the employe's duty to exercise ordinary care to obtain knowledge of the employer's business methods and the most important element of that duty is to ascertain what rules the employer has adopted for the conduct and control of his business. If the employe does not know what the rules are it is difficult to understand how he can have a right to rely on them, and it is not less difficult to understand why the duty as to rules is unilateral and not mutual. It seems quite clear to us, we say with all deference to the courts that hold a different doctrine, that the employe is bound to know that it is the employer's duty to adopt rules, and, knowing that, he is bound to make reasonably careful and diligent inquiry to ascertain what rules have been adopted. The employer can not, as we think, successfully insist that the employe must inform himself as to the rules unless the employer uses reasonable care to make the rules readily accessible to the employe, but if they are readily accessible the employe should be presumed to have knowledge of them.[1] It is held that where there is a conflict of evidence as to whether the employe had knowledge of the rules the question is one of fact for the jury.[2]

§ 1295. **Promise to repair.**—The general rule is that where the employer promises the employe to remedy a defect in the machinery or appliances or to make safe an unsafe working place the employe is not in fault in relying upon the promise and continuing in the service for a reasonable length of time

[1] Shenandoah, etc., R. Co. *v.* Lucado, 86 Va. 390; Pennsylvania R. Co. *v.* Langdon, 92 Pa. St. 21; Alcorn *v.* Chicago, etc., R. Co., 108 Mo. 81, 16 S. W. R. 229; Norfolk, etc., R. Co. *v.* Williams, 89 Va. 165, 15 S. E. R. 522. Where there is no publication of the rule the employe is not affected by it, unless he had actual knowledge of its existence and contents. Fay *v.* Minneapolis, etc., Ry. Co., 30 Minn. 231, s. c. 15 N. W. R. 241.

[2] Louisville, etc., R. Co. *v.* Watson, 90 Ala. 68, s. c. 8 So. R. 249. See Wooden *v.* Western, etc., R. Co., 18 N. Y. Supp. 768; Byrnes *v.* New York, etc., R. Co., 71 Hun 209, s. c. 24 N. Y. Supp. 517.

although he has full knowledge of defects.[1] We suppose, however, that if the danger from the defects is so great and so clearly apparent that no reasonable person would incur it, the employe who knowingly and voluntarily incurs it after time for deliberation can not recover for injuries he may sustain because of such defects.[2] A distinction is made by the courts between cases where the implement or tool is one of which an ordinary person may have full knowledge and the use of which requires no peculiar skill or care and cases where the appliances are such as require peculiar skill and care in their use.[3] The cases affirm that, in order to make the employer liable, there must be a promise and the employe must have relied upon it.[4]

§ 1296. **Brakemen—Assumption of risks by.**—A person who accepts service as a brakeman on a railroad train assumes

[1] Homestake, etc., Co. *v.* Fullerton, 69 Fed. R. 923, citing Hough *v.* Railway Co., 100 U. S. 213; Clarke *v.* Holmes, 7 Hurl. & N. 937; Gowen *v.* Harley, 56 Fed. R. 973; Laning *v.* New York, etc., R. Co., 49 N. Y. 521; Stephenson *v.* Duncan, 73 Wis. 404, s. c. 41 N. W. R. 337; Patterson *v.* Pittsburgh, etc., R. Co., 76 Pa. St. 389; Greenleaf *v.* Dubuque, etc., R. Co., 33 Iowa 52; Indianapolis, etc., R. Co. *v.* Watson, 114 Ind. 20, s. c. 14 N. E. R. 721; Greene *v.* Minneapolis, etc., R. Co., 31 Minn. 248, s. c. 17 N. W. R. 378; New Jersey, etc., R. Co. *v.* Young, 49 Fed. R. 723, 1 C. C. A. 428; Rothenberger *v.* Northwestern, etc., Milling Co., 57 Minn. 461, s. c. 59 N. W. R. 531. See, also, Corcoran *v.* Milwaukee, etc., R. Co., 81 Wis. 191, s. c. 51 N. W. R. 328; Lyttle *v.* Chicago, etc., Ry. Co., 84 Mich. 289, s. c. 47 N. W. R. 571; Manufacturing Co. *v.* Morrissey, 40 Ohio St. 148; Conroy *v.* Vulcan Iron Works, 62 Mo. 35; Kroy *v.* Chicago, etc., R. Co., 32 Iowa 357; LeClair *v.* First Div., etc., R. Co., 20 Minn. 9.

[2] Bailey Master's Liability for Injuries to Servants, 211, 212.

[3] Marsh *v.* Chickering, 101 N. Y. 396, s. c. 5 N. E. R. 56; Corcoran *v.* Milwaukee, etc., R. Co., 81 Wis. 191, s. c. 51 N. W. R. 328; Gowen *v.* Harley, 56 Fed. R. 973, 982. In the case last cited it was said, speaking of the rule that a promise to repair relieves the employe, that: "It has no application to a case where the service required is simple manual labor, without tools or machinery, and where no such tools or appliances are necessary to the performance of the work with reasonable safety." Citing among other cases, Tuttle *v.* Detroit, etc., R. Co., 122 U. S. 189, s. c. 7 Sup. Ct. R. 1166; Richards *v.* Rough, 53 Mich. 212, 216, s. c. 18 N. W. R. 785.

[4] Sweeney *v.* Berlin, etc., R. Co., 101 N. Y. 520, s. c. 5 N. E. R. 358. See, generally, Prentiss *v.* Kent, etc., R. Co., 63 Mich. 478, s. c. 30 N. W. R. 109; Fort Wayne, etc., R. Co. *v.* Gildersleeve, 33 Mich. 133; Manufactur- Co. *v.* Morrissey, 40 Ohio St. 148.

the ordinary risks of the service into which he enters. He does not assume extraordinary risks unless he has knowledge of them and after knowledge continues in the service of the company. The general rules governing the assumption of risks apply to brakemen on railroad trains and in this place we shall not restate those rules, but will refer to cases illustrating their application. Where a brakeman has knowledge of the location and existence of a cattle-guard, danger arising from it is assumed as a risk of the service.[1] It is held that where a brakeman has knowledge that a track has not been ballasted and he voluntarily continues in the service after acquiring such knowledge he can not recover for injuries caused by a failure to ballast the track.[2] The rule that where an employe without objection continues in the service after he has full knowledge of the danger applies to brakemen as well as to other employes.[3] Thus where a brakeman knows that it is the custom of the engineers to leave the engine in charge of firemen when switching is done, he is presumed to assume the risk arising from that method of conducting business, unless he proves that the fireman was incompetent and his incompetency was known to the employer.[4] The rule that where

[1] Peoria, etc., R. Co. *v.* Puckett, 52 Ill. App. 222; McKee *v.* Chicago, etc., R. Co., 83 Iowa 616, s. c. 50 N. W. R. 209, 13 L. R. A. 817. See, generally, Watts *v.* Hart, 7 Wash. 178, s. c. 34 Pac. R. 423, 771; Cole *v.* Rome, etc., R. Co., 72 Hun 467, s. c. 25 N. Y. Supp. 276; Sullivan *v.* Fitchburg, etc., R. Co., 161 Mass. 125, s. c. 36 N. E. R. 751; Rock *v.* Retsoff, etc., Co., 15 N. Y. Supp. 872. See, San Antonio, etc., R. Co. *v.* Parr, (Tex. Civ. App.) 26 S. W. R. 861. The general rule asserted by the weight of authority is that a brakeman assumes risks from dangers of the service open to observation. Howey *v.* Lake Shore, etc., R. Co., 34 N. Y. Supp. 1089, 13 Misc. R. 641; Albert *v.* New York, etc., R. Co., 80 Hun 152, s. c. 29 N. Y. Supp. 1126; McDugan *v.* New York, etc., R. Co., 31 N. Y. Supp. 135; Manning *v.* Chicago, etc., R. Co., (Mich.) 63 N. W. R. 312; Gulf, etc., R. Co. *v.* Jackson, 65 Fed. R. 48; Indianapolis, etc., R. Co. *v.* Ott, 11 Ind. App. 564, s. c. 35 N. E. R. 517; Lynch *v.* Chicago, etc., R. Co., 8 Ind. App. 516, s. c. 36 N. E. R. 44; Burnell *v.* West Side, etc., R. Co., 87 Wis. 387, s. c. 58 N. W. R. 772.

[2] O'Neal *v.* Chicago, etc., R. Co., 132 Ind. 110, s. c. 31 N. E. R. 669.

[3] Gulf, etc., R. Co. *v.* Jackson, 65 Fed. R. 48; Little Rock R. Co. *v.* Moseley, 56 Fed. R. 1009, 1012, 6 C. C. A. 225; Southern, etc., Ry. Co. *v.* Drake, (Kan.) 35 Pac. R. 825; Atchison R. Co. *v.* Schroeder, 47 Kan. 315. s. c. 27 Pac. R. 965.

[4] Louisville, etc., R. Co. *v.* Kelly, 63 Fed. R. 407, 11 C. C. A. 260. It was

defects are known to the employe it is his duty to give notice or make complaint to the employer applies to brakemen as well as to other employes[1] engaged in running or making up trains.[2] In accordance with the general rule, it has been held that one who undertakes to couple cars, with knowledge of the fact that the train is not manned by a sufficient crew, assumes the risks.[3] There is some conflict of opinion as to how far the duty of the employer extends in the matter of keeping couplings, bumpers and the like, in a reasonably safe condition for use. There is, however, little or no conflict as to the duty of the employer to exercise reasonable care to provide safe couplings and bumpers and keep them in a reasonably safe

said by Woods, J., that: "Railroad companies are certainly not required to employ skilled engineers as firemen, and, if it is the prevailing custom of engineers to leave the firemen in charge of their engines when switching or similar work is to be done, then it is to be presumed that brakemen, when they engage or continue in their employment with the knowledge of the custom, assume the additional hazard which the custom involves, and can be entitled to compensation from the company for injury caused by a fireman's incompetent management of an engine only when his fitness was below what ought to be required of firemen, and when the fact of unfitness was known, or ought reasonably to have been known, to the master mechanic, or other like representative, of the company." This ruling is in harmony with the general rule that an employe assumes the risks of the master's business methods. *Ante*, §§ 1291, 1294.

[1] Southern, etc., R. Co. *v.* Seley, 152 U. S. 145, s. c. 14 Sup. Ct. R. 530; Galveston, etc., R. Co. *v.* Eckols, 7 Tex. Civ. App. 429, 26 S.W. R. 1117; Richmond, etc., R. Co. *v.* Worley, 92 Ga. 84, s. c. 8 S. E. R. 361; South Florida, etc., R. Co. *v.* Weese, 32 Fla. 212, s. c. 13 So. R. 436. See, Nicholaus *v.* Chicago, etc., R. Co., 90 Iowa 85, 57 N. W. R. 694.

[2] The duty to make complaint rests upon employes generally. Coal and Mining Co. *v.* Clay, 51 Ohio 542, s. c. 38 N. E. R. 610, 25 L. R. A. 848; Coal and Car Co. *v.* Norman, 49 Ohio St. 598; McCharles *v.* Horn, etc., Co., 10 Utah 470, s. c. 37 Pac. R. 733; Jungnitsch *v.* Michigan, etc., R. Co., (Mich.) 63 N. W. R. 296; Cunningham *v.* Merrimac, etc., Co., 774; Lineoski *v.* Susquehanna, etc., Co., 163 Mass. 89, s. c. 39 N. E. R. Co., 157 Pa. St. 153, s. c. 27 Atl. R. 577; Goodridge *v.* Washington, etc., Co., 160 Mass. 234, s. c. 35 N. E. R. 484; Kaare *v.* Troy, etc., Co., 139 N. Y. 369, s. c. 34 N. E. R. 901; *ante*, § 1292. But see Northern, etc., R. Co. *v.* Babcock, 154 U. S. 190, s. c. 14 Sup. Ct. R. 978. Where the employer knows of the defect it is not, under the statutory rule in some jurisdictions, incumbent on the employe to make complaint. Truman *v.* Rudolph, 22 Ont. App. 250.

[3] Richmond, etc., R. Co. *v.* Mitchell, 92 Ga. 77, s. c. 18 S. E. R. 290.

condition for use by brakemen and other employes whose duty it is to couple cars, nor is there substantial or well-founded disagreement as to the rule, that brakemen assume the risks of defects in such appliances where they have knowledge of the defects.[1] We can see no reason why the general rules do not apply in full force and vigor to such cases. There may possibly be cases to which the general rules do not apply[2] but they are very rare and of a peculiar and exceptional character. There is much conflict as to the application of the general rules to bumpers and couplings of cars and as to how far the master's duty to brakemen in respect to such appliances extends. So far as we have discovered, no well reasoned case denies the general rule as to the degree of care required of the employer in regard to the appliances, nor the general rule respecting the assumption of the risks of service by employes. Some of the cases, however, while not in terms denying the general rules extend the obligation of the employer beyond just limits and erroneously limit the rule regarding the assumption of risks. We can not undertake to comment upon the cases, nor, indeed, to enter into a full discussion of the subject. We refer to some of the very great number of cases upon the subject[3] and leave the subject with the statement

[1] Northern, etc., R. Co. *v.* Blake, 63 Fed. R. 45, 11 C. C. A. 93; VanWinkle *v.* Chicago, etc., R. Co., (Iowa) 61 N. W. R. 929; Goodes *v.* Boston, etc., R. Co., 162 Mass. 287, s. c. 38 N. E. R. 500. See, Illinois, etc., R. Co. *v.* Harris, 53 Ill. App. 592; Bennett *v.* Greenwich, etc., R. Co., 84 Hun 216, s. c. 32 N. Y. Supp. 457; Lucco *v.* New York, etc., R. Co., 87 Hun 612, s. c. 34 N. Y. Supp. 277; Shadd *v.* Georgia, etc., R. Co., 116 N. C. 968, s. c. 21 S. E. R. 554; Truman *v.* Rudolph, 22 Ont. App. 250; Missouri, etc., R. Co. *v.* Baxter, 42 Neb. 793, s. c. 60 N. W. R. 1044.

[2] Strong *v.* Iowa, etc., R. Co., (Iowa) 62 N. W. R. 799.

[3] Hatter *v.* Illinois, etc., R. Co., 69 Miss. 642; Ellis *v.* New York, etc., R. Co., 95 N. Y. 546, s. c. 17 Am. & Eng. Cas. 641; St. Louis, etc., R. Co. *v.* Higgins, 44 Ark. 293; Toledo, etc., R. Co. *v.* Black, 88 Ill. 112; Hulett *v.* St. Louis, etc., Railway Co., 67 Mo. 239; Brewer *v.* Flint, etc., Railway Co., 56 Mich. 620, s. c. 23 N. W. R. 440; Houston, etc., R. Co. *v.* Barrager, (Tex.) 14 S. W. R. 242; Lake Erie, etc., R. Co. *v.* Everett, 86 Ind. 229, s. c. 11 Am. & Eng. R. Cas. 221; Louisville, etc., R. Co. *v.* Foley, 94 Ky. 220, s. c. 21 S. W. R. 866; Indianapolis, etc., R. Co. *v.* Flanigan, 77 Ill. 365; Muldowney *v.* Illinois, etc., Railway Co., 36 Iowa 462; Williams *v.* Central Railway Co., 43 Iowa 396; Toledo, etc., R. Co. *v.*

that in our opinion the employer's duty is to use ordinary care in providing reasonably safe bumpers and coupling appliances, and in keeping them in a reasonably safe condition and that the general rules as to the assumption of risks, the effect of knowledge on the part of the employe, the knowledge or absence of knowledge on the part of the employer, and the failure of the employe to make complaint apply to such appliances as bumpers and couplings.[1] We may say in passing that we do not here speak of the distinction made by many of the authorities between foreign cars and cars owned by the employer. The employer owes to brakemen on its trains the duty of exercising ordinary care in

Asbury, 84 Ill. 429; Russell *v.* Minneapolis, etc., Railway Co., 32 Minn. 230, s. c. 20 N. W. R. 147; LeClair *v.* First Div., etc., Railway Co., 20 Minn. 9; Hawk *v.* Pennsylvania Railway Co., (Pa. St.) 11 Atl. R. 459; Goltz *v.* Milwaukee, etc., Railway Co., 76 Wis. 136; Denver, etc., R. Co. *v.* Simpson, 16 Col. 55, s. c. 26 Pac. R. 339; Donohue *v.* Brooklyn, etc., R. Co., 14 N.Y. Supp. 639; Whitwam *v.* Wisconsin, etc., Ry. Co., 58 Wis. 408, s. c. 17 N. W. R. 124; Fort Wayne, etc., R. Co. *v.* Gildersleeve, 33 Mich. 133; Mason *v.* Richmond, etc., R. Co., 111 N. Car. 482, s. c. 16 S. E. R. 698, 18 L. R. A. 845, 53 Am. & Eng. R. Cas. 183; Fordyce *v.* Yarborough, 1 Tex. Civ. App. 260, s. c. 21 S. W. R. 421; Kohn *v.* McNulta, 147 U. S. 238, s. c. 13 Sup. Ct. R. 298; Crutchfield *v.* Richmond Railway Co., 78 N. C. 300; Lawless *v.* Connecticut, etc., Railway Co., 136 Mass. 1; Pennsylvania Co. *v.* Long, 94 Ind. 250; Welch *v.* New York, etc., Railroad Co., 17 N. Y. S. 342, 63 Hun 625; Russell *v.* Minneapolis, etc., Railway Co., 32 Minn. 230, s. c. 20 N. W. R. 147. See, Browne *v.* New York, etc., R. Co., 158 Mass. 247, s. c. 33 N. E. R. 650; Muirhead *v.* Hannibal, etc., R. Co., 103 Mo. 251, s. c. 15 S. W. R. 530; Sabine, etc., R. Co. *v.* Ewing, 1 Tex. Civ. App. 531, s. c. 21 S. W. R. 700; Louisville, etc., R. Co. *v.* Law, (Ky.) 21 S. W. R. 648; East Tennessee, etc., R. Co. *v.* Turvaville, 97 Ala. 122, s. c. 12 So. R. 63; Illinois, etc., R. Co. *v.* Bowles, 71 Miss. 994, 1003, s. c. 15 So. R. 138; McLaren *v.* Williston, 48 Minn. 299, s. c. 51 N. W. R. 373; Gibson *v.* Pacific Railway Co., 46 Mo. 163; Hathaway *v.* Michigan, etc., Railway Co., 51 Mich. 253; Brooks *v.* Northern Pac. Railway Co., 47 Fed. R. 687; Bennett *v.* Northern Pac. Railway Co., 2 N. Dak. 112, 49 N. W. R. 408; Day *v.* Toledo, etc., Railway Co., 42 Mich. 523 s. c. 4 N. W. R. 203.

[1] It is settled law that an employe assumes the risks of the customs and methods of business and the hazards incident to it, (*ante*, § 1292) and it seems to us that he must be held to know that couplings are different, cars are of unequal height and the like, and to contract with reference to such matters. If, as is well settled, an employer is not bound to discard machinery and appliances, the employe must be held to enter service knowing this, and hence to impliedly agree that difference in cars, couplers and similar equipment exist and that dangers therefrom are incident to railroad service.

providing and keeping in a reasonably safe condition brakes and similar appliances, but the rules as to the assumption of risks, knowledge of defects, and like general rules apply to brakes and similar appliances with which trains are equipped, and with which brakemen are required to work.[1] The mere fact that a brake is defective or out of repair is not sufficient to charge the employer with liability,[2] for the general rule that the test of liability is negligence and that the occurrence of an accident does not of itself establish negligence applies to such cases. The rule that an employer is not liable for latent defects not discoverable by the exercise of ordinary care applies to such equipments as brakes.[3] As upon many other questions the authorities are in conflict upon the question whether brakemen assume the risks of injury from the sudden starting or jerking of trains.[4] We can see no substantial reason why

[1] Chicago, etc., R. Co. *v.* Bragonier, 119 Ill. 51; Illinois Cent. R. Co. *v.* Jewell, 46 Ill. 99, s. c. 92 Am. Dec. 240; Bailey *v.* Rome, etc., R. Co., 139 N. Y. 302, s. c. 34 N. E. R. 918; Beard *v.* Chesapeake, etc., R. Co., 90 Va. 351, s. c. 18 S. E. R. 559; Galveston, etc., R. Co. *v.* Templeton, 38 Tex. 42, 25 S.W. R. 135, 26 S.W. R. 1066; Northern Pacific R.Co. *v.* Charless, 51 Fed. R. 562; Hayden *v.* Platt, 84 Hun 487, s. c. 32 N. Y. Supp. 1144; Eddy *v.* Prentice, 8 Tex. Civ. App. 58, 27 S.W. R. 1063. See Rehm *v.* Pennsylvania, etc., R. Co., 164 Pa. St. 91, s. c. 30 Atl. R. 356; Louisville, etc., R. Co. *v.* Binion, 98 Ala. 570, s. c. 14 So. R. 619. In Chicago, etc., R. Co. *v.* Kneirim, 152 Ill. 458, s. c. 39 N. E. R. 324, 43 Am. St. R. 259, it is held that a switchman in a yard is not chargeable with knowledge of defects in the brakes of a car. The court cited Chicago, etc., R. Co. *v.* Jackson, 55 Ill. 492, s. c. 8 Am. R. 661. See, generally, Paine *v.* Eastern, etc., R. Co., (Wis.) 64 N. W. R. 1005.

[2] Mixter *v.* Imperial, etc., R. Co., 152 Pa. St. 395, s. c. 25 Atl. R. 587; Haskins *v.* New York, etc., R. Co., 79 Hun 159, s. c. 29 N. Y. Supp. 274; McCray *v.* Galveston, etc., R. Co., (Tex. Civ. App.) 32 S. W. R. 548.

[3] Louisville, etc., R. Co. *v.* Campbell, 97 Ala. 147, s. c. 12 So. R. 574.

[4] Davis *v.* Baltimore, etc., R. Co., 152 Pa. St. 314, s. c. 25 Atl. R. 498, 53 Am. & Eng. R. Cas. 372; Kansas City, etc., R. Co. *v.* Murray, 55 Kan. 336, 40 Pac. R. 646; Louisville, etc., R. Co. *v.* Woods, 105 Ala. 561, 17 So. R. 41. For other decisions respecting liability to brakemen, see, Fordyce *v.* Culver, 2 Tex. Civ. App. 569, s. c. 22 S. W. R. 237; Carey *v.* Boston, etc., R. Co., 158 Mass. 228, s. c. 33 N. E. R. 512; Knox *v.* New York, etc., R. Co., 69 Hun 93, s. c. 23 N. Y. Supp. 198; Ashman *v.* Flint, etc., R. Co., 90 Mich. 567, s. c. 51 N. W. R. 645; Irvine *v.* Flint, etc., R. Co., 89 Mich. 416, s. c. 50 N. W. R. 1008; Kansas City, etc., R. Co. *v.* Murray, 55 Kan. 336, 40 Pac. R. 646; McNeil *v.* New York, etc., R. Co., 71 Hun 24, s. c. 24 N. Y. Supp. 616; Peoria, etc., R. Co. Puckett, 42 Ill. App. 642.

the risk from this cause should not be regarded as an ordinary risk of the service. As elsewhere shown, it is the duty of the railroad company to use ordinary care to keep its road-bed and track in a reasonably safe condition, and this duty is owing to brakemen as well as to other trainmen, but even if defects do exist and do cause an injury the company is not liable unless it is affirmatively shown that it was guilty of negligence.[1] Where brakemen are required to get on and off trains at stations it is the duty of the company to exercise ordinary care to keep platforms in a reasonably safe condition, and risks from defective platforms are not assumed unless the defects are known to the employe.[2]

§ 1297. **Engineers and firemen—Assumption of risks.**—The established principle that the test of an employer's liability is not danger, but negligence, applies to enginemen, and so does the general rule of the assumption of risks by employes. The rule that requires reasonably careful inspections, made at reasonable intervals and with ordinary care, applies to the class above named as well as to other employes. The fact that an engine requires, in the exercise of reasonable care, that inspection be made oftener than inspections of some other appliances, does not change the rule that ordinary care is the standard of duty, nor does the danger of the service change the rule as to the employe's assumption of all the ordinary risks of the service. It is true that the danger from the use of engines may make a higher degree of care necessary than is necessary in regard to some other appliances, but it is not true, as has been sometimes loosely said, that more than ordinary care is required in keeping engines safe for use, although it is true that in order to constititute ordinary care the care must be reasonably proportionate to the known danger. It may be said, generally, that enginemen assume the ordinary risks of the service, including risks from defects in road-beds and tracks and in engines and appliances, as well as dangers of the service of which

[1] McGowan *v.* Chicago, etc., R. Co., (Wis.) 64 N. W. R. 891.

[2] Brown *v.* Ohio, etc., R. Co., 138 Ind. 648, s. c. 37 N. E. R. 717.

they have knowledge in cases where they continue in the service after the acquisition of such knowledge.[1] Enginemen do not, however, assume the risks of extraordinary dangers attributable to a breach of duty on the part of the company,[2] nor are they chargeable with the risks of service where they do not know and could not, in the exercise of ordinary care, know of the danger, caused by the employer's negligence.[3] The general rule is that enginemen assume the risks incident to the employer's methods of business;[4] and there is, indeed, no valid reason why they should be excepted from that rule. It

[1] Gulf, etc., Co. *v.* Harriett, 80 Tex. 73, s. c. 15 S. W. R. 556; Drake *v.* Union Pacific R. Co., 2 Ida. 453, s. c. 21 Pac. R. 560; Texas, etc., R. Co. *v.* McKee, (Tex. Civ. App.) 29 S. W. R. 544; Fordyce *v.* Edwards, 60 Ark. 438, s. c. 30 S. W. R. 758; Thain *v.* Old Colony, etc., R. Co., 161 Mass. 353, s. c. 37 N. E. R. 309; Texas, etc., R. Co. *v.* Minnick, 61 Fed. R. 635; Scott *v.* Darby, etc., Co., 90 Iowa 689, s. c. 57 N. W. R. 619; Derr *v.* Lehigh, etc., R. Co., 158 Pa. St. 365, s. c. 27 Atl. R. 1002; East Tennessee, etc., R. Co. *v.* Head, 92 Ga. 723, s. c. 18 S. E. R. 976; Southern, etc., R. Co. *v.* Leasch, (Tex. Civ. App.) 21 S. W. R. 563; Manson *v.* Eddy, 3 Tex. Civ. App. 148, s. c. 22 S. W. R. 66; Bellows *v.* Pennsylvania, etc., R. Co., 157 Pa. St. 51, 27 Atl. R. 685; Helfrich *v.* Ogden City R. Co., 7 Utah 186, 26 Pac. R. 295; Nelson *v.* Central, etc., R. Co., 88 Ga. 225, s. c. 14 S. E. R. 210; Kuhns *v.* Wisconsin, etc., R. Co., 70 Iowa 561, s. c. 31 N. W. R. 868. See, generally, Sweeney *v.* Minneapolis, etc., R. Co., 33 Minn. 153, s. c. 22 Am. & Eng. R. Cas. 302; Rodgers *v.* Central, etc., R. Co., 67 Cal. 607, s. c. 22 Am. & Eng. R. Cas. 305, note; Memphis, etc., R. Co. *v.* Thomas, 51 Miss. 637; Illinois, etc., R. Co. *v.* Patterson, 69 Ill. 650, s. c. 93 Ill. 290; Norfolk, etc., R. Co. *v.* Williams, 89 Va. 165, s. c. 15 S. E. R. 522; Johnson *v.* Galveston, etc., R. Co., (Tex. Civ. App.), 30 S. W. R. 95.

[2] Union Pac. R. Co. *v.* O'Brien, 49 Fed. R. 538; Town *v.* Michigan, etc., R. Co., 84 Mich. 214, s. c. 47 N. W. R. 665; Missouri, etc., R. Co. *v.* Henry, 75 Tex. 220, s. c. 12 S. W. R. 828. See, generally, Texas, etc., R. Co. *v.* Johnson, 76 Tex. 421, s. c. 13 S. W. R. 463, 42 Am. & Eng. R. Cas. 7; McFee *v.* Vicksburg, etc., R. Co., 42 La. Ann. 790, s. c. 7 So. R. 720; Henry *v.* Wabash, etc., R. Co., 109 Mo. 488, s. c. 19 S. W. R. 239. It has been held that negligence can not be imputed to a fireman for a failure to secure compliance with the company's rules by the engineer. New Jersey, etc., R. Co. *v.* Young, 49 Fed. R. 723.

[3] St. Louis, etc., R. Co. *v.* McLain, 80 Tex. 85, s. c. 15 S. W. R. 789. If there was knowledge of the defect, the rule stated in text would not apply. Green *v.* Cross, 79 Tex. 130, s. c. 15 S. W. R. 220; Fancher *v.* New York, etc., R. Co., 75 Hun 350, s. c. 27 N. Y. Supp. 62.

[4] Illinois Cent. R. Co. *v.* Neer, 31 Ill. App. 126; Sutherland *v.* Troy, etc., R. Co., 125 N. Y. 737, s. c. 26 N. E. R. 609; France *v.* Rome, etc., R. Co., 88 Hun 318, s. c. 34 N. Y. Supp. 408.

has been held that where a railroad company sends one of its locomotives and its engineer in charge of it to do work on the track of another company, it is not liable for injuries to the engineer caused by defects in the track of the company for which the work is done.[1] The fact that an accident happened is not, of itself, sufficient to charge the employer, for negligence must also be shown.[2] Thus, where an employe working on an engine was injured in an accident caused by a defective rail, and the track had been inspected about two weeks prior to the accident, the employer is not liable, because not guilty of negligence.[3] Where there is evidence that the risk was one assumed by an engineman, and there is no conflict, it is the duty of the court to direct a verdict for the defendant.[4] En-

[1] Dunlap *v.* Richmond, etc., R.Co., 81 Ga. 136, s. c. 7 S. E. R. 283. As to competency of an engineer, see Holland *v.* Southern, etc., R. Co., 100 Cal. 240, s.c. 34 Pac. R. 616; Mexican, etc., R. Co. *v.* Mussette, 86 Tex. 708, s. c. 26 S. W. R. 1075, 24 L. R. A. 642; Missouri, etc., R. Co. *v.* Patton, (Tex. Civ. App.) 25 S. W. R. 339; Galveston, etc., R. Co. *v.* Eckols, 7 Tex. Civ. App. 429, s. c. 26 S. W. R. 1117.

[2] Mire *v.* East Louisiana R. Co., 42 La. Ann. 385, 7 So. R. 473; Chicago, etc., R. Co. *v.* Dunn, 23 Ill. App. 148; Gulf, etc., R. Co. *v.* Pettis, 69 Tex. 689, s. c. 7 S. W. R. 93; Galveston, etc., R. Co. *v.* Goodwin, (Tex. Civ. App.) 26 S. W. R. 1007.

[3] Burrell *v.* Gowen, 134 Pa. St. 527, s. c. 19 Atl. R. 678. See, also, Illinois, etc., R. Co. *v.* Quirk, 51 Ill. App. 607; Ragon *v.* Toledo, etc., R. Co., 97 Mich. 265, s. c. 56 N. W. R. 612. If an injury to an engineman results from the act of a fellow-servant, the company is not liable. Illinois, etc., R. Co. *v.* Jones, (Miss.) 16 So. R. 300. But if negligence of employer is the proximate cause, the employe may recover, although a fellow-servant was also negligent. Clyde *v.* Richmond, etc., R. Co., 59 Fed. R. 394. See Texas, etc., R. Co. *v.* Patton, 61 Fed. R. 259; Campbell *v.* Wing, 5 Tex. Civ. App. 431, s. c. 24 S. W. R. 360; Engelhardt *v.* Delaware, etc., R. Co., 78 Hun 588, s. c. 29 N. Y. Supp. 425; Cole *v.* Rome, etc., R. Co., 72 Hun 467, s. c. 25 N. Y. Supp. 276.

[4] Southern, etc., R. Co. *v.* Johnson, 69 Fed. R. 559, citing many cases upon the question of the duty of the court to direct a verdict, and upon the question of the assumption of risks, among them Buzzell *v.* Loconia Manuf. Co., 48 Me. 113; Fitzgerald *v.* Connecticut, etc., Paper Co., 155 Mass. 155, s. c. 29 N. E. R. 464; Mundle *v.* Hill Manuf. Co., 86 Me. 400, 403, s. c. 30 Atl. R. 16; Judkins *v.* Maine, etc., R. Co., 80 Me. 417, s. c. 14 Atl. R. 735; Crown *v.* Orr, 140 N. Y. 450, s. c. 35 N. E. R. 648; Sweeney *v.* Central, etc., R. Co., 57 Cal. 15. The court also quoted with approval from Short *v.* New Orleans, etc., R. Co., 69 Miss. 848, 13 So. R. 826, the following: "The deceased was killed, and no one knows how. That is not enough to subject the railroad company to liability. Negligence must

ginemen who remain at their posts in order to protect persons on their trains are not guilty of a breach of duty.[1]

§ 1298. **Dangers from running of trains.—Section men or trackmen.**—Ordinarily section men or trackmen assume the risk incident to the running of trains, whether extra trains or trains running on schedule time.[2] The class of employes named are bound to know that regular trains may be delayed and pass at uncertain intervals and that wild or extra trains may be sent over the road and they assume the risks of danger therefrom,[3] except in cases where by some act or conduct the

be shown." See, also, Chandler *v.* New York, etc., R. Co., 159 Mass. 589, s. c. 35 N. E. R. 89; Redmond *v.* Delta Lumber Co., 96 Mich. 545, s. c. 55 N. W. R. 1004.

[1] Pennsylvania R. Co. *v.* Roney, 89 Ind. 453, s. c. 46 Am. R. 173; Cottrill *v.* Chicago, etc., R. Co., 47 Wis. 634, s. c. 32 Am. R. 796. As to contributory negligence of enginemen, see Illinois Cent. R.Co.*v.* Murphy, 52 Ill. App. 65; Lake Shore, etc., R. Co. *v.* Wilson, 11 Ind. App. 488, s. c. 38 N. E. R. 343; Pennsylvania Co. *v.* Hammond, 1 Ohio Dec. 298; Chicago, etc., R. *v.* Flynn, 54 Ill. App. 387; Fritz *v.* Missouri, etc., R. Co., (Tex. Civ. App.) 30 S. W. R. 85; Robinson *v.* West Va., etc., R. Co., 40 W. Va. 583, s. c. 21 S. E. R. 727; Haas *v.* Chicago, etc., R. Co., 90 Iowa 259, s. c. 57 N. W. R. 894; Devine *v.* Savannah, etc., R. Co., 89 Ga. 541, s. c. 15 S. E. R. 781: Nattress *v.* Philadelphia, etc., R. Co., 150 Pa. St. 527, s. c. 24 Atl. R. 753; Louisville, etc., R. Co. *v.* Hurt, 101 Ala. 34, s. c. 13 So. R. 130.

[2] Pennsylvania Co. *v.* Wachter, 60 Md. 395; Railway Co. *v.* Leech, 41 Ohio St. 388; Baltimore, etc., Co. *v.* Stricker, 51 Md. 47; Olson *v.* St. Paul, etc., R. Co., 38 Minn. 117, s. c. 33 Am. & Eng. R. Cas. 386; Woodley *v.* Metropolitan R. Co., L. R., 2 Exch. Div. 384; McGrath *v.* New York, etc., R. Co., 14 R. I. 357, s. c. 18 Am. & Eng. R. Cas. 5; International, etc., R. Co. *v.* Hester, 64 Tex. 401; Larson *v.* St. Paul, etc., R. Co., 43 Minn. 423, s. c. 45 N. W. R. 722; McGrath *v.* New York, etc., R. Co., 14 R. I. 357; Northern, etc., R. Co. *v.* Hambly, 154 U. S. 349, s. c. 14 Sup. Ct. R. 983; Kansas etc., R. Co. *v.* Dye, 70 Fed. R. 24; Kansas, etc., R. Co. *v.* Waters, 70 Fed. R. 28. See, generally, Cooney *v.* Great Northern, etc., R. Co., 9 Wash. 292, s. c. 37 Pac. R. 438; International, etc., R. Co. *v.* Arias, (Tex. Civ. App.) 30 S. W. R. 446; Gulf, etc., R. Co. *v.* Jackson, 65 Fed. R. 48; Elliot *v.* Chicago, etc., R. Co., 5 Dak. 523, s. c. 3 L. R. A. 363. See, generally, Appel *v.* Buffalo, etc., R. Co., 111 N. Y. 550, s. c. 19 N. E. R. 93; Couch *v.* Charlotte, etc., R. Co., 22 So. Car. 557; Rush *v.* Missouri Pac. R. Co., 36 Kan. 129, s. c. 12 Pac. R. 582. Some of the statements in Pennsylvania Co. *v.* McCaffrey, 139 Ind. 430, s. c. 38 N. E. R. 67, are erroneous because the court lost sight of the distinction between the assumption of risks and contributory negligence.

[3] Hinz *v.* Chicago, etc., R.Co., (Wis.) 66 N. W. R. 718; Pennsylvania R. Co. *v.* Wachter, 60 Md. 395.

employer has impliedly or expressly represented that no wild or extra trains shall imperil the safety of such employes. Where, by special order, an employe is assigned to special work at a particular place the employer is bound to exercise ordinary care to prevent injury to the employe, and ordinary care under such circumstances requires that the employer should take precautions to prevent injury to the employe at the particular place. Thus, where an employe is by special order required to do work outside of his ordinary line of employment at a particular place on the track it is incumbent on the employer not to run wild or extra trains over such place without some warning to the employe, but this duty does not extend to a place not designated in the special order.[1] It has been held that trackmen on a hand-car have a right to act upon the assumption that employes in control of an approaching train will heed a signal to stop,[2] but the case referred to is based principally upon a case[3] that has been virtually overruled.[4]

§ 1299. **Injuries from explosions.**—It is incumbent upon an injured employe who seeks to recover for an injury caused by the explosion of the boiler of a locomotive engine to affirmatively show that the explosion was the proximate result of negligence on the part of the employer. It can not be inferred from the mere fact that there was an explosion that the em-

[1] Cincinnati, etc., R. Co. *v.* Long, 112 Ind. 166, s. c. 31 Am. & Eng. R. Cas. 138. The liability of the employer in such a case as that cited does not rest upon the mere fact of assignment to a special duty by a special order, but upon the fact that having assigned the employe to a special duty at a particular place the employer impliedly undertook that the place should not be made unsafe by wild trains. See North Chicago, etc., Co. *v.* Johnson, 114 Ill. 57; Abbitt *v.* Lake Erie, etc., R. Co., (Ind.) 40 N. E. R. 40; Hawley *v.* Chicago, etc., R. Co., 71 Iowa 717, s. c. 29 N. W. R. 787.

[2] Howard *v.* Delaware, etc., R. Co., 40 Fed. R. 195. See Davis *v.* Central, etc., R. Co., 55 Vt. 84; Hard *v.* Vermont, etc., R. Co., 32 Vt. 473.

[3] Chicago, etc., R. Co. *v.* Ross, 112 U. S. 377, s. c. 5 Sup. Ct. R. 184.

[4] Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, s. c. 13 Sup. Ct. R. 914; Northern, etc., R. Co. *v.* Hambly, 154 U. S. 349, s. c. 14 Sup. Ct. R. 983; Deavers *v.* Spencer, 70 Fed. R. 480; Thom *v.* Pittard, 62 Fed. 232, 10 C. C. A. 352; Texas, etc., R. Co. *v.* Rogers, 57 Fed. R. 378.

ployer was guilty of negligence.[1] There must be substantive evidence of negligence, for negligence can not be presumed nor can the existence of negligence be left to conjecture.[2] It is not necessary, however, to establish negligence by direct or positive evidence, but there must be evidence of such facts or circumstances as by fair and reasonable inference authorizes the conclusion that the employer was negligent. The existence of negligence can not, however, be established by forced, unnatural or unreasonable inferences. The general rule is that negligence must be proved by the plaintiff as part of his case, for it can not be presumed,[3] and there is no reason why this rule should not apply to cases of injury resulting from the explosion of locomotive boilers. Where the explosion is the proximate result of the employer's failure to exercise ordinary care in procuring a reasonably safe locomotive, or the failure to exercise ordinary care in keeping it in a reasonably safe condition, an action may be maintained by an employe who is free from contributory fault, and who did not know of the unsafe

[1] Racine *v.* New York, etc., R. Co., 70 Hun 453, s. c. 24 N. Y. Supp. 388. Discovery of a defect after the occurrence of an accident is not sufficient evidence of negligence. Indianapolis, etc., R. Co. *v.* Toy, 91 Ill. 474, s. c. 33 Am. R. 57; Perry *v.* Michigan, etc., R. Co., (Mich.) 65 N. W. R. 608; Robinson *v.* Charles Wright Co., 94 Mich. 283, s. c. 53 N. W. R. 938; Toomey *v.* Eureka, etc., Steel Works, 89 Mich. 249, s. c. 50 N. W. R. 850. See, generally, Fuller *v.* Jewett, 80 N. Y. 46; Kirkpatrick *v.* New York, etc., R. Co., 79 N. Y. 240. Stevenson *v.* Jewett, 16 Hun 210. It may be that where defects found after the occurrence show clearly that they existed before the accident and were such that a reasonably careful inspection would have revealed them the employer is liable, but the fact that defects did exist will not establish a liability, for much more is required to make the employer liable.

[2] Brunner *v.* Blaisdell, 170 Pa. St. 25, s. c. 32 Atl. R. 607; Hudson *v.* Rome, etc., R. Co., 145 N. Y. 408, s. c. 40 N. E. R. 8.

[3] Ford *v.* Anderson, 139 Pa. St. 261, s. c. 21 Atl. R. 18; Fenderson *v.* Atlantic City R. Co., 56 N. J. Law 708, s. c. 31 Atl. R. 767; Bahr *v.* Lombard, 53 N. J. Law 233, s. c. 21 Atl. R. 190, 23 Atl. R. 167; Sherman *v.* Menominee, etc., Co., 77 Wis. 14, s. c. 45 N. W. R. 1079; Lehman *v.* City of Brooklyn, 29 Barb. 234; Trapnell *v.* City of Red Oak Junction, 76 Iowa 744, s. c. 39 N. W. R. 884; Sorenson *v.* Menasha, etc., R. Co., 56 Wis. 338, s. c. Payne *v.* Forty-second St., etc., Railroad Co., 40 N. Y. Super. Ct. 8; Stager *v.* Ridge Avenue, etc., R. Co., 119 Pa. St. 70, s. c. 12 Atl. R. 821; Perry *v.* Michigan, etc., R. Co., (Mich) 65 N. W. R. 608; *ante*, § 1286; *post*, § 1309.

condition of the locomotive.[1] The duty of the employer so far as regards inspection is to use ordinary care and to employ the mode of inspection ordinarily and generally in use by railroad companies, but this duty does not require the employer to dismantle the engine or take it apart.[2]

§ 1300. **Injuries from collisions.**—We think that principle and authority warrant the conclusion that a railroad company is not liable at common law for injuries resulting to its employes engaged in operating its trains caused by its trains coming into collision through the fault of the employes in charge of one or both of the trains.[3] If, however, the collision is

[1] Pennsylvania, etc., R. Co. *v.* Mason, 109 Pa. St. 296, s. c. 58 Am. R. 722; Ford *v.* Fitchburg, etc., R. Co., 110 Mass. 240; Noyes *v.* Smith, 28 Vt. 59; Keegan *v.* Western, etc., R. Co., 8 N. Y. 175. See, generally, Chicago, etc., R. Co. *v.* Rung, 104 Ill. 641, s. c. 11 Am. & Eng. R. Cas. 218; Atchison, etc., R. Co. *v.* Holt, 29 Kan. 149, s. c. 11 Am. & Eng. R. Cas. 206; Greene *v.* Minneapolis, etc., R. Co., 31 Minn. 248. For cases of injuries from defective engines, Cone *v.* Delaware, etc., R. Co., 81 N. Y. 206; Ford *v.* Fitchburg R.Co., 110 Mass. 240.

[2] Clyde *v.* Richmond, etc., R. Co., 65 Fed. R. 482; Richmond, etc., R. Co. *v.* Elliott, 149 U. S. 266, s. c. 13 Sup. Ct. R. 837; Louisville, etc., R. Co. *v.* Allen, 78 Ala. 494, s. c. 28 Am. & Eng. R. Cas. 514.

[3] Van Avery *v.* Union Pac. R. Co., 35 Fed. R. 40; Easton *v.* Houston, etc., R. Co., 32 Fed. R. 893; Fowler *v.* Chicago, etc., R. Co., 61 Wis. 159, s. c. 17 Am. & Eng. R. Cas. 536; Pease *v.* Chicago, etc., R. Co., 61 Wis. 163, s. c. 20 N. W. R. 908, 17 Am. & Eng. R. Cas. 327; Jordan *v.* Wells, 3 Woods (U. S. C. C.) 527; Nashville, etc., R. Co. *v.* Handman, 13 Lea (Tenn.) 423; Ragsdale *v.* Memphis, etc., R. Co., 3 Baxter (Tenn.) 426; Bull *v.* Mobile, etc., R.Co., 67 Ala. 206; Murray *v.* South Carolina R. Co., 1 McMullen (S. Car.) 385; Gulf, etc., R. Co. *v.* Blohn, 73 Tex. 637, s. c. 11 S. W. R. 867; Henry *v.* Lake Shore, etc., R. Co. 49 Mich. 495; Paulmier *v.* Erie, etc., R. Co., 34 N. J. L. 157; Hutchinson *v.* York, etc., R. Co., 5 Exch. 343; Relyea *v.* Kansas City, etc., R. Co., 112 Mo. 86, s. c. 20 S. W. R. 480, 53 Am. & Eng. R. Cas. 578. See Manville *v.* Cleveland, etc., R. Co., 11 Ohio St. 417; Kentucky, etc., R. Co. *v.* Ackley, 87 Ky. 278, s. c. 8 S. W. R. 691. In Birmingham, etc., R. Co. *v.* Jacobs, 101 Ala. 149, s. c. 13 So. R. 408, 55 Am. & Eng. R. Cas. 299, it was held that an engineer of a train injured because of the failure of the engineer of another train to stop as the statute requires before crossing could recover. See Chicago, etc., R. Co. *v.* McLallen, 84 Ill. 109. We do not here consider the question of concurrent negligence, but we may say that if the negligence is what has been called "the promoting cause of the injury," namely that of a fellow-servant, there can be no recovery. Memphis, etc., R. Co. *v.* Thomas, 51 Miss. 637; Gilman *v.* Eastern, etc., R. Co., 10 Allen 233; King *v.* Boston, etc., R.

caused by a negligent breach of a duty resting on the company then the company is liable to injured employes who are free from contributory fault. Whether the company is liable depends upon whether the negligence is that of the company or that of a fellow servant. If the negligence is that of the employer, or, which in legal contemplation is the same thing, that of a vice principal, the employe if not guilty of contributory negligence may recover damages for the injuries sustained.[1] It is held in accordance with the general rule that there is no presumption of negligence, and that the fact that a collision occurs is not *prima facie* evidence that the company was negligent.[2] Where a collision is the result of an accident and not of negligence there can be no recovery.[3] If the plaintiff is guilty of contributory negligence there can be no recovery.[4] In a recent case the court in a well reasoned opinion applied the doctrine of proximate cause to the case of a collision and held that although the company was guilty of negligence in failing to supply one of the engines with a proper headlight there was no liability for the reason that the defect in the headlight was not the proximate cause of the injury.[5]

§ 1301. **Cars negligently loaded.**—There is a diversity of

Co., 9 Cush. 112; Hayes *v.* Western, etc., R. Co., 3 Cush. 270; New Orleans, etc., R. Co. *v.* Hughes, 49 Miss. 258.

[1] Nary *v.* New York, etc., R. Co., 55 Hun 612, 125 N.Y. 759; Lowery *v.* Manhattan, etc., R. Co., 99 N. Y. 158; Bossout *v.* Rome, etc., R. Co., 57 Hun 589, 126 N.Y. 646, 10 N. Y. Supp. 602; North Chicago, etc., R. Co. *v.* Johnson, 114 Ill. 57. In Vose *v.* Lancashire, etc., R. Co., 2 Hurlst. & N. 728, it was held that the employer was liable because it had neglected to provide proper rules. See Ryan *v.* New York, etc., R. Co., 35 N. Y. 210; Whittaker *v.* Delaware, etc., R. Co., 126 N. Y. 544, s. c. 27 N. E. R. 1042; Lake Shore, etc., R. Co. *v.* Hundt, 140 Ill. 525, s. c. 30 N. E. R. 458.

[2] Smith *v.* Missouri, etc., R. Co., 113 Mo. 70, s. c. 20 S. W. R. 896.

[3] Toner *v.* Chicago, etc., R. Co., 69 Wis. 188, s. c. 31 N. W. R. 104, 33 N. W. R. 433, 31 Am. & Eng. R. Cas. 320. See Hulehan *v.* Green Bay, etc., R. Co., 68 Wis. 520.

[4] Hall *v.* Chicago, etc., R. Co., 46 Minn. 439, s. c. 49 N. W. R. 239; Kansas City, etc., R. Co. *v.* McDonald, 51 Fed. R. 178; Cottrill *v.* Chicago, etc., R. Co., 47 Wis. 634, s. c. 3 N. W. R. 376.

[5] New York, etc., R. Co. *v.* Perriguey, 138 Ind. 414. See, also, Pennsylvania, etc., R. Co. *v.* Congdon, 134 Ind. 226.

opinion upon the question whether a railroad company is liable to employes for injuries resulting from the negligent loading of cars. Some of the cases hold that there is a liability upon the ground that it is the duty of the employer to furnish a safe working place and appliances.[1] It seems to us that this doctrine can not be defended. The improper or insecure loading of a car is not a defect in the working place, machinery or appliances, but is the improper use of machinery and appliances. There is a difference between the careless or negligent use of machinery and appliances and defects in the machinery or appliances themselves, and the general rule is that where the injury is caused by the careless or improper use of machinery or appliances the employer is not liable.[2] It is a departure from principle to hold that the loading of cars is the furnishing of a working place, or that the manner of loading is to be regarded as a defect in the machinery or appliances. In our opinion the manner of loading a car pertains to the operation of the road, and not to the working place or to the machinery or appliances, and that the employer is not liable unless it be affirmatively proved that there was negligence on his part in employing servants or agents. We believe that the cases which deny that the employer

[1] Houston, etc., R. Co. *v.* Kelly, (Tex.) 34 S. W. R. 809; Haugh *v.* Chicago, etc., Ry. Co., 73 Iowa 66, s. c. 35 N. W. R. 116. See Dewey *v.* Detroit, etc., R. Co., 97 Mich. 329, s. c. 52 N. W. R. 942, 56 N. W. R. 756, 22 L. R. A. 292. The dissenting opinion of McGrath, J., in Dewey *v.* Detroit, etc., R. Co., 97 Mich. 329, seems to us to be against principle and authority, but it clearly states the grounds upon which at the original hearing, the company was held liable. See Dewey *v.* Detroit, etc., R. Co., 97 Mich. 343, 16 L. R. A. 342.

[2] In Pease *v.* Chicago, etc., R. Co., 61 Wis. 163, the distinction between the different classes of cases is well drawn. A clear discrimination is made in Duffy *v.* Upton, 113 Mass. 544. See, also, Reading Iron Works *v.* Devine, 109 Pa. St. 246; Bergstrom *v.* Staples, 82 Mich. 654; Ell *v.* Northern, etc., R. Co., 1 N. Dak. 336, s. c. 12 L. R. A. 97. See, generally, Howard *v.* Denver, etc., R. Co. 26 Fed. R. 837; Lindvall *v.* Woods, 41 Minn. 212, s. c. 4 L. R. A. 793; Quinn *v.* New Jersey, etc., Co., 23 Fed. R. 363; Mealman *v.* Union Pac. R. Co., 37 Fed. R. 189. It seems quite clear that where the appliances are safe and the use of them causes the accident the proximate cause is the act of a co-employe and not that of the employer.

is liable assert the true doctrine.[1] It can not be justly said that the improper loading of a car is a defect in the working place or machinery, inasmuch as the loading is the use of a place or of machinery and is not in any sense the omission or failure to provide against danger in the machinery or working place. If those employed to load the car exercise care no accident can occur because of negligence in that regard, but if there is negligence on the part of employes an accident may result although the car and all appliances may be sound and free from defects. It is obvious, therefore, that the cause of an injury where it results from improper loading is solely attributable to the act of persons in the service of the company in making use of machinery and appliances furnished them. We believe the true rule to be that where the negligence is in the use of appliances and not in the appliances themselves the employer is not liable.[2]

§ 1302. **Dangerous service.**—Although the service may be dangerous the employe assumes all the ordinary hazards of such service.[3] The right of an employe to recover damages from the employer for personal injuries does not depend upon the dangerous character of the service he enters but depends

[1] Callaway *v.* Allen, 64 Fed. R. 297, 12 C. C. A. 114; Jacksonville, etc., R. Co. *v.* Galvin, 29 Fla. 636, s. c. 16 L. R. A. 337; Toledo, etc., R. Co. *v.* Black, 88 Ill. 112; Northern, etc., R. Co. *v.* Husson, 101 Pa. St. 1, s. c. 47 Am. R. 690; Dewey *v.* Detroit, etc., R. Co., 97 Mich. 329, s. c. 56 N. W. R. 756, 22 L. R. A. 292; Brice *v.* Railway Co., (Ky.) 9 S. W. R. 288; Scott *v.* Oregon, etc., Navigation Co., 14 Ore. 211, s. c. 13 Pac. R. 98; Mexican, can, etc., R. Co. *v.* Shean, (Tex.) 18 S. W. R. 151. See, generally, Atchison, etc., R. Co. *v.* Plunkett, 25 Kan. 188; Brown *v.* Atchison, etc., R. Co., 31 Kan. 1; Day *v.* Toledo, etc., R. Co., 42 Mich. 523. See, generally, Soderman *v.* Kemp, 145 N. Y. 427, s. c. 40 N. E. R. 212; Geoghegan *v.* Atlas, etc., R. Co., 146 N. Y. 369, s. c. 40 N. E. R. 507; Hartman *v.* Kloeppinger, 9 Ohio C. C. 433; Beesley *v.* Wheeler, 103 Mich. 196, s. c. 61 N. W. R. 348, 27 L. R. A. 266.

[2] Callaway *v.* Allen, 64 Fed. R. 297; Pease *v.* Chicago, etc., R. Co., 61 Wis. 163; Duffy *v.* Upton, 113 Mass. 544; Reading Iron Works *v.* Devine, 109 Pa. St. 246; Bergstrom *v.* Staples, 82 Mich. 654; Kehoe *v.* Allen, 92 Mich. 464, s. c. 52 N. W. R. 740.

[3] Connelly *v.* Hamilton, etc., R. Co., 163 Mass. 156, s. c. 39 N. E R. 787; Finalyson *v.* Utica, etc., R. Co., 67 Fed. R. 507; Clark *v.* Liston, 54 Ill. App. 578.

upon the failure of the employer to exercise ordinary care. No matter how hazardous the nature of the service all risk from the perils ordinarily incident to it are assumed by the person who voluntarily enters it.[1] An employe who has knowledge of the appliances in use by the employer assumes the risk ordinarily incident to their use and can not rightfully ask that the employer shall change them although their use may subject the employe to danger.[2] Where the nature of the work upon which the employe is engaged is such as of itself makes the working place unsafe the employe assumes the risk.[3] The test of duty is not the hazardous nature of the service in which the servant engages, for, as we have said, the servant assumes all ordinary risks incident to the service no matter how hazardous it may be. If the care exercised by the employer is ordinary care, considering the nature of the service, then the duty of the master is performed although the service may be one of the most hazardous nature.[4]

[1] Northern, etc., R. Co. *v.* Husson, 101 Pa. St. 1; Sweet *v.* Ohio, etc., Co., 78 Wis. 127, s. c. 47 N. W. R. 182; Coombs *v.* New Bedford, etc., R. Co., 102 Mass. 572; Swoboda *v.* Ward, 40 Mich. 420.

[2] Hodgkins *v.* Railroad Co., 119 Mass. 419, (quoted from in Southern Pacific R. Co. *v.* Seley, 152 U. S. 145, s. c. 14 Sup. Ct. R. 530); Sweeney *v.* Berlin, etc., Envelope Co., 101 N. Y. 520, s. c. 5 N. E. R. 358; Walsh *v.* Whiteley, 21 Q. B. Div. 371; Gilbert *v.* Gould, 144 Mass. 601, s. c. 12 N. E. R. 368; Sullivan *v.* India, etc., Co., 113 Mass. 398.

[3] Gulf, etc., R. Co. *v.* Jackson, 65 Fed. R. 48. In the case cited it was said: "It frequently happens that men are employed to tear down buildings or other structures or to repair them after they have become insecure, or it may be that the work undertaken by the employe is of a kind that is calculated to render the premises or place of place of performance for the time being to some extent insecure. In cases such as these the servant undoubtedly assumes the increased hazard growing out of the defective or insecure condition of the place where he is required to exercise his calling." The court cited Carlson *v.* Oregon, etc., R. Co., 21 Ore. 450, s. c. 28 Pac. R. 497; Armour *v.* Hahn, 111 U. S. 313, s. c. 4 Sup. Ct. R. 433. In the case last above cited the court said: "The obligation of a master to provide reasonably safe places and structures for his servants to work upon does not impose upon him the duty, as towards them of keeping a building, which they are employed in erecting in a safe condition at every moment of their work, so far as its safety depends upon the performance of that work by them and their fellows."

[4] Stewart *v.* Ohio River, etc., R. Co., 40 W. Va. 188, s. c. 20 S. E. R. 922.

§ 1303. **Performing work outside of scope of the contract of employment.—Permissive privilege.**—In order to make a party liable in the capacity of an employer for injuries resulting from negligence the plaintiff must affirmatively prove that at the time of the injury he was acting within the line of his duty as an employe.[1] If the time when and place where the injury is received are not within the scope of the contract of employment the relation of master and servant can not be justly said to exist, and no recovery can be had against a defendant in the character or capacity of a master or employer. We do not say that where there is negligence on one side and freedom from negligence on the other there may not be a recovery if legal grounds for a recovery exist, but we do say that even though there may be negligence on the one side and none on the other there can in no event be a recovery upon the theory that there was a breach of the specific duty which an employer owes to the employe unless it is affirmatively shown that the injury was received while the plaintiff was performing service for the master under the contract of employment. That there is a breach of some duty does not warrant a finding against a party in the capacity of an employer. Where one employed to do a designated kind of work or to work at a particular place voluntarily undertakes to do some other work or goes to a place different from that assigned him by the contract of employment he can not successfully insist that he is within the protection of the rule that the master must exercise ordinary care to protect him against injury.[2] The fact that the plaintiff is at some times and some places the employe of a railroad company does not entitle him to hold the company liable in the capacity of an employer when he goes into a place to which the duties of his service do not require him to go.[3] If

[1] *Ante*, § 1267. The rule is that one who enjoys a permissive privilege does so with all the concomitant perils.

[2] Kentucky, etc., R. Co. *v.* Jameson, (Ky.) 20 S. W. R. 258; Wise *v.* Ackerman, 76 Md. 375, s. c. 25 Atl. R. 424; Baltimore, etc., Co. *v.* Baugh, 149 U. S. 368, 13 Sup. Ct. R. 914; Knox *v.* Pioneer, etc., Co., 90 Tenn. 546, s. c. 18 S. W. R. 255.

[3] Brown *v.* Byroads, 47 Ind. 435; Pittsburgh, etc., R. Co. *v.* Adams, 105 Ind. 151; Baird *v.* Pettit, 70 Pa. St. 477; Washburn *v.* Nashville, etc., R.

he goes into a place on the master's premises when he has no duty whatever at such a place he enjoys a mere permissive privilege and, at best, is a mere licensee, and if there be any liability to him it is only for a breach of the duty which an owner of premises owes to a licensee.[1] Upon the principle that an employer is not liable to an employe who voluntarily does work outside of the duties of the service required of him by his contract of service it is held that there is no liability to an employe who works with a machine which he was not required to use, or uses a machine for a purpose for which it was not intended by the employer.[2] If the employe is, at the time of the injury, reasonably within the line of his duty he is within the rule that the employer is bound to exercise ordinary care to prevent injury to him because of defects in the working place or appliances,[3] but he can not be justly said to be within the line of his duty when he is doing an act solely for his own

Co., 3 Head (Tenn.) 638; Cowhill *v.* Roberts, 71 Hun 127, 24 N. Y. Supp. 533; Evans *v.* American, etc., Co., 42 Fed. R. 519; Baltimore, etc., R. Co. *v.* State, 33 Md. 542; Church *v.* Chicago, etc., R. Co., 50 Minn. 218, s. c. 52 N. W. R. 647; Sullivan *v.* Waters, 14 Irish N. C. L. R. 460; Robert's Duty and Liability of Employers, 448.

[1] Wright *v.* Rawson, 52 Iowa 329, s. c. 35 Am. R. 275; Gilshannon *v.* Stony Brook, etc., R. Co., 10 Cush. 228.

[2] Jayne *v.* Sebewaing, etc., Co., (Mich.) 65 N. W. R. 972; Teetsil *v.* Summons, 34 N. Y. S. 972; Central, etc., R. Co. *v.* Chapman, 96 Ga. 769, s. c. 22 S. E. R. 273; White *v.* Wittemann, etc., Co., 131 N.Y. 631, s.c. 30 N. E. R. 236; Guenther *v.* Lockhart, 16 N. Y. Supp. 717; Leistritz *v.* American, etc., Co., 154 Mass. 382, s. c. 28 N. E. R. 294, Felch *v.* Allen, 98 Mass. 572. See Houston, etc., R. Co. *v.* Myers, 55 Tex. 110; White *v.* Sharp, 27 Hun 94. The case of Graham *v.* Chicago, etc., R. Co., 62 Fed. R. 896, illustrates the general rule that where the employe makes use of an appliance for a purpose different from that for which it was intended he can not hold the employer responsible.

[3] Walbert *v.* Trexler, 156 Pa. St. 112, s. c. 27 Atl. R. 65; Evansville, etc., R. Co. *v.* Maddux, 134 Ind. 571, s. c. 33 N. E. R. 345; McCloherty *v.* Gale, etc., Co., 19 Ont. App. 117. See Parkinson Sugar Co. *v.* Riley, 50 Kan. 401, s. c. 31 Pac. R. 1090; Ryan *v.* Fowler, 24 N. Y. 410. See McElligott *v.* Randolph, 61 Conn. 157, s. c. 22 Atl. R. 1094; Ewald *v.* Chicago, etc., R. Co., 70 Wis. 420, s. c. 36 N. W. R. 12 and 591. See Patnode *v.* Warren, etc., Mills, 157 Mass. 283, s. c. 32 N. E. R. 161; Cleveland, etc., R. Co. *v.* Martin, 13 Ind. App. 485, s. c. 41 N E. R. 1051. The opinion in the case last cited contains some statements that are clearly erroneous, for where an employe voluntarily and for his own convenience goes into a place of danger he is not in the line of his duty, for to such a place the contract of employment does not extend.

convenience.[1] Some of the cases rest the rule that the master is not liable for injuries to a servant where the servant voluntarily goes into a place of danger into which his contract of service does not require him to go upon the ground of contributory negligence,[2] but it seems to us that the rule rests upon the principle that the master's specific duty does not embrace places into which the employe goes solely for his own convenience.

§ 1304. **Work outside of the ordinary line of duty—Special orders.**—There is much conflict upon the question of the liability of the employer in cases where the employe is required by the employer to perform work outside of the line of duty which he was engaged to perform. Courts of high authority hold that the fact that a servant is required to perform service outside of his line of duty does not, of itself, make the employer liable to the employe for injuries received while engaged in such work, for the reason that he is held to assume the risks of such service.[3] Other courts hold that if the employer re-

[1] Kauffman *v.* Maier, 94 Calf. 269, s. c. 29 Pac. R. 481; Knox *v.* Pioneer, etc., Co., 90 Tenn. 546, s. c. 18 S. W. R. 255; Wink *v.* Weiler, 41 Ill. App. 336. See Baird *v.* Pettit, 70 Pa. St. 477, and authorities note.

[2] Cahill *v.* Hilton, 106 N. Y. 512, s. c. 13 N. E. R. 339; Sammon *v.* New York, etc., Co., 38 N. Y. Sup. Ct. 414; Bunt *v.* Sierra, etc., Co., 24 Fed. R. 847; Sears *v.* Central, etc., R. Co., 53 Ga. 630; Pittsburgh, etc., R. Co. *v.* Sentmeier, 92 Pa. St. 276; Rains *v.* St. Louis, etc., R. Co., 71 Mo. 164; Pennsylvania Co. *v.* Lynch, 90 Ill. 333; Union Pac. Railway Co. *v.* Estes, 37 Kan. 715, 16 Pac. R. 131. It is doubtless true that where an employe unnecessarily goes into a place of danger he is guilty of negligence, but even if the place into which he goes for his own convenience and not to serve his employer is not dangerous he can not recover for he is not there as an employe, so that the specific duty of an employer to an employe is not owing to him.

[3] Hogan *v.* Northern Pac. R. Co., 53 Fed. R. 519, (distinguishing Miller *v.* Union Pac. Railroad Co., 17 Fed. R. 67; Gilmore *v.* Northern Pac. Railroad Co., 18 Fed. R. 866; Chicago, etc., R. Co. *v.* Bayfield, 37 Mich. 205; Jones *v.* Lake Shore, R. Co., 49 Mich. 573, s. c. 14 N. W. R. 551); Leary *v.* Boston Railroad Co., 139 Mass. 580, s. c. 2 N. E. R. 115; Cole *v.* Chicago, etc., Ry. Co., 71 Wis. 114, s. c. 37 N. W. R. 84; Alabama, etc., R. Co. *v.* Hall, 105 Ala. 599, s. c. 17 So. R. 176; Millar *v.* Madison Co., 130 Mo. 517, s. c. 31 S. W. R. 574; Brown *v.* Oregon, etc., R. Co., 24 Ore. 315, s. c. 33 Pac. R. 557; Cole *v.* Chicago, etc., R., 71 Wis. 114, s. c. 37 N. W. R. 84. See Dougherty *v.* West Superior, etc., R. Co., 88 Wis. 343, s. c. 60 N. W. R. 274.

quires the servant to do work outside the scope of his employment, and the servant is injured while engaged in such work, the master is liable.[1] Still other cases hold that where there is a special order the employe assumes only such risks of the position to which he is ordered as are obvious.[2] It seems to us that the employer can not justly be held liable upon the mere fact that he orders the servant to do work outside of the scope of his employment, but that if the employe knows, or is bound to know, that such work is of a different nature and of a more dangerous character than that which the servant was engaged to perform, and that the servant has not such knowledge, experience or skill as enables him to safely perform the work, he, the employer, is liable to the servant for injuries sustained if there is no contributory negligence. If, however, the servant undertakes such service and has knowledge of its dangers, or is chargeable with knowledge of such dangers, and there is no negligence on the part of the employer as to giving warning, or the like, we can not perceive upon what principle he can be held liable, although he gave a special order.[3] It is held by some of the courts that although the danger of obeying an order is obvious, yet if the employe is impelled to obey by fear of losing his place, it will not preclude a recovery,[4] but other cases with better reason hold a contrary doctrine.[5] The

[1] Gilmore *v.* Union Pac. Railway Co., 18 Fed. R. 866, 870; Cincinnati, etc., R. Co. *v.* Madden, 134 Ind. 462, s. c. 34 N. E. R. 227. See Strong *v.* Iowa, etc., R. Co., (Iowa) s. c. 62 N. W. R. 799.

[2] Walker *v.* Lake Shore, etc., R. Co., 104 Mich. 606, s. c. 62 N. W. R. 1032; Halliburton *v.* Wabash R. Co., 58 Mo. App. 27; City of Lebanon *v.* McCoy, 12 Ind. App. 500, s. c. 40 N. E. R. 700; Fox *v.* Chicago, etc., R. Co., 86 Iowa 368, s. c. 53 N. W. R. 259, s. c. 17 L. R. A. 289, 53 Am. & Eng. R. Cas. 430.

[3] Baltimore, etc., R. Co. *v.* Stricker, 51 Md. 47; Mary Lee, etc., Co. *v.* Chambliss, 97 Ala. 171, s. c. 11 So. R. 897, 53 Am. & Eng. R. Cas. 254; Paule *v.* Florence, etc., Co., 80 Wis. 350, s. c. 50 N. W. R. 189; Cole *v.* Chicago, etc., R. Co., 71 Wis. 114, s. c. 37 N. W. R. 84; Thompson *v.* Chicago, etc., Co., 14 Fed. R. 564. See Bradshaw *v.* Louisville, etc., R. Co., (Ky.) 21 S. W. R. 346; Mann *v.* Oriental, etc., Works, 11 R. I. 152.

[4] Fogus *v.* Chicago, etc., R. Co., 50 Mo. App. 250.

[5] Leary *v.* Boston, etc., R. Co., 139 Mass. 580, s. c. 2 N. E. R. 115; Atchison *v.* Schroeder, 47 Kan. 315, s. c. 27 Pac. R. 965; Prentiss *v.* Kent, etc., Co., 63 Mich. 478, s. c. 30 N. W. R.

fact that an employe is acting under a positive order does not absolve him from the duty to exercise ordinary care,[1] but we suppose that the nature of the order may, of itself, be important in determining whether there was or was not contributory negligence.

§ 1305. **Volunteers.**—A person can not make himself the employe of a railroad company by his own act, for the relation of master and servant can not exist in such a sense as to create the duty of employer to employe without the express or implied assent of both parties. No one can intrude himself into the service of another person independently of the latter person's consent or acquiesence. It follows from this that one who without any employment, or any request, express or implied, from a railroad company assumes to enter the service of the company can not create the relation of master and servant. If that relation does not exist one who assumes to perform service for the company must be regarded as a mere volunteer without any right whatever to insist that the company owes him a duty as master or employer. Duty can not exist where there is no relation between the parties creating it. The overwhelming weight of authority sustains the doctrine that a volunteer can not charge a railroad company with the duty of an employer.[2] If there is authority to employ the persons who

109; Sweeney *v.* Berlin, etc., R. Co., 101 N. Y. 520, s. c. 5 N. E. R. 358. See Wiggins Ferry Co. *v.* Heilig, 43 Ill. App. 238; Cole *v.* Chicago, etc., Ry. Co., 71 Wis. 114, s. c. 37 N. W. R. 84.

[1] Smith *v.* St. Paul, etc., R. Co., 51 Minn. 86, s. c. 52 N. W. R. 1068.

[2] Flower *v.* Pennsylvania R. Co., 69 Pa. St. 210, s. c. 8 Am. R. 251; New Orleans, etc., R. Co. *v.* Harrison, 48 Miss. 112, s. c. 12 Am. R. 356; Church *v.* Chicago, etc., R. Co., 50 Minn. 218; Osborne *v.* Knox, etc., R. Co., 68 Me. 49, s. c. 28 Am. R. 16; New Orleans, etc., R. Co. *v.* Harrison, 48 Miss. 112, s. c. 12 Am. R. 356; Wischam *v.* Rickards, 136 Pa. St. 109, s. c. 10 L. R. A. 97; Sherman *v.* Hannibal & St. Joseph, etc., R. Co., 72 Mo. 62; Everhart *v.* Terre Haute, etc., R. Co., 78 Ind. 292, s. c. 41 Am. R. 567; McDaniel *v.* Highland, etc., R. Co., 90 Ala. 64, s.c. 8 So. R. 41; Sparks *v.* East Tennessee R. Co., 82 Ga. 156, s. c. 8 S. E. R. 424; Atchison, etc., Ry. Co. *v.* Lindley, 42 Kan. 714, s. c. 22 Pac. R. 703; Texas, etc., R. Co. *v.* Skinner, 4 Tex. 661, s. c. 23 S. W. R. 1001; Keating *v.* Michigan, etc., R. Co., 97 Mich. 154, s. c. 56 N. W. R. 346; Mayton *v.* Texas, etc., R. Co., 63 Texas 77, s. c. 51 Am. R. 637; Gulf, etc., R. Co. *v.* Dawkins, 77 Tex. 288, s. c. 3 Am. R. & Corp. R. 75. But see Althorf *v.* Wolfe, 22

undertake to render service then the general rule will not apply.[1] Ordinarily, trainmen have no authority to employ servants for the company. There may be cases where the circumstances are such as to confer authority but such cases are exceedingly rare. Some of the cases hold that where there is mutuality, that is, where the person who assumes to act for another has business with the person for whom he assumes to act, the rule in regard to volunteers does not apply.[2] We very much incline to doubt the soundness of the cases referred to; at all events we do not believe it possible for one person to make himself the servant of another, nor do we believe that it can be held that a railroad company invites one for whom it undertakes to transport goods to assume the hazards of performing service for it.[3] Certainly it is going to great lengths to hold that a person without knowledge or experience may intrude himself into a position of danger such as are all positions which are connected with the movement of railroad trains and the like and thus create a duty to protect him in the position of danger. Such a person can not be presumed to have knowledge of the meaning of signals, the mode of shunting cars or like matters, and it is putting an unjust and unreasonable burden on the company to hold that it owes him a duty as an employer. We do not say, nor mean to say, that under

N. Y. 355; Street R. Co. *v.* Bolton, 43 Ohio St. 224, 54 Am. R. 803; Bonner *v.* Bryant, 79 Tex. 540, s. c. 23 Am. St. R. 361; Johnson *v.* Ashland, etc., Co., 71 Wis. 553, s. c. 5 Am. St. R. 243; In Rhodes *v.* Georgia, etc., R. Co., 84 Ga. 320, s. c. 20 Am. St. R. 362, the general rule is recognized but held, erroneously as we think, not to apply to a lad thirteen years of age.

[1] Central, etc., R. Co. *v.* Texas, etc., R. Co., 32 Fed. R. 448; Sloan *v.* Central, etc., Ry. Co., 62 Iowa 728, s. c. 16 N. W. R. 331; Georgia, etc., Ry. Co. *v.* Propst, 83 Ala. 518, s. c. 3 So. R. 764; Fox *v.* Chicago, etc., R. Co., 86 Iowa 368, s. c. 53 N. W. R. 259, 17 L. R. A. 289; Bradley *v.* New York, etc., R. Co., 62 N. Y. 99.

[2] Wright *v.* London, etc.,R. Co., L. R. 1 Q. B. Div. 252; Holmes *v.* North Eastern, etc., R. Co., L. R. 4 Exch. 254, L. R. 6 Exch. 123; Street Railway *v.* Bolton, 43 Ohio 224, s. c. 54 Am. R. 803; Welch *v.* Maine Central, etc., R. Co., 86 Me. 552, s. c. 30 Atl. R. 116, 25 L. R. A. 658, 10 Am. R. & Corp. R. 293.

[3] Potter *v.* Faulkner, 1 Best & S. 800; Degg *v.* Midland R. Co., 1 H. & N. 773; Cleveland etc., R. Co. *v.* Stephenson, 139 Ind. 641; Welch *v.* Maine, etc., R. Co., 86 Me. 552.

such circumstances no duty at all is owing from the company; on the contrary, we say that there is a duty, but that it is not that of an employer. The duty and the only duty, as a rule, is to refrain from doing the intruder any wilful injury.[1]

§ 1306. **Concurrent negligence.**—Where a railroad company is guilty of a negligent breach of the duty of an employer and such breach of duty is the proximate cause of an injury to an employe the company is not exonerated from liability, although the negligence of a co-employe may have concurred with that of the company in producing the injury.[2] If the employer is negligent the injured employe can not recover unless the negligence of the employer was the proximate cause of the injury, for if the negligence of another employe was the cause of the injury there is not concurring negligence in such a sense as to impose a liability upon the employer.[3] The general rule is affirmed with substantial agreement by the adjudged cases, but in applying it there is some conflict and much confusion owing to the fact that the courts have in some instances failed to discriminate between proximate and remote causes, but we can not go into this phase of the subject for it would carry us too far afield.

§ 1307. **The rule as to the master's knowledge of defects.**—The rule sustained by the weight of authority is that the master is not liable to the employe unless he had knowledge or

[1] Evarts *v.* St. Paul, etc., R. Co., 56 Minn. 141, s. c. 45 Am. St. R. 460.

[2] Terre Haute, etc., R. Co. *v.* Mansberger, 65 Fed. 196, 12 C. C. A. 574; Ohio, etc., R. Co. *v.* Stein, 140 Ind. 61, s. c. 39 N. E. R. 246; Cayzer *v.* Taylor, 10 Gray 274; Farmers', etc., Co. *v.* Toledo, etc., R. Co., 67 Fed. R. 73; Cincinnati, etc., R. Co. *v.* Clark, 57 Fed. R. 125, 6 C. C. A. 281; Norfolk, etc,, R. Co. *v.* Phelps, 90 Va. 665, s. c. 19 S. E. R. 652; Grand Trunk, etc., R. Co. *v.* Cummings, 106 U. S. 700, 1 Sup. Ct. R. 493; Pittsburgh, etc., R. Co. *v.* Henderson, 37 Ohio St. 549; Harriman *v.* Railway Co., 45 Ohio St. 11, s. c. 12 N. E. R. 451; Cowan *v.* Chicago, etc., Ry. Co., 80 Wis. 284, s. c. 50 N. W. R. 180; Bryant *v.* New York, etc., R. Co., 81 Hun 164, s. c. 30 N. Y. Supp. 737; Howe *v.* St. Clair, 8 Tex. Civ. App. 101, s. c. 27 S. W. R. 800; International, etc., R. Co. *v.* Sipole, (Tex. Civ. App.) 29 S. W. R. 686; Gulf, etc., R. Co. *v.* Warner, (Tex. Civ. App.) 36 S. W. R. 118.

[3] New York, etc., R. Co. *v.* Perriguey, 138 Ind. 414, s. c. 37 N. E. R. 976.

was chargeable with knowledge of the defects which were the proximate cause of the employe's injury.[1] It is not necessary that it should be affirmatively shown that the employer had actual knowledge of defects. If the facts are such as make it his duty to have knowledge, then he will be held to possess it.[2] But in order to charge the employer with knowledge the evidence must show, in cases where actual knowledge is not proved, that he was guilty of negligence in not securing knowledge. Here, as elsewhere in the law of master and servant, the liability of the former exists only where he is guilty of negligence.

§ 1308. **Test of the employer's liability.**—The mere fact that after the occurrence of an accident defects are discovered in the machinery or appliances is not sufficient to fasten a liability upon the employer.[3] The duty of the employer is to

[1] Griffiths *v.* London, etc., Co., L. R. 13 Q. B. D. 259; Laning *v.* New York, etc., R. Co., 49 N. Y. 521, s. c. 10 Am. R. 417; Riley *v.* State Line, etc., Co., 29 La. Ann. 791, s. c. 29 Am. R. 349; Erskine *v.* Chino, etc., Co., 71 Fed. R. 270; Mixter *v.* Imperial, etc., Co., 152 Pa. St. 395, s. c. 25 Atl. R. 587; Louisville, etc., R. Co. *v.* Campbell, 97 Ala. 147, s. c. 12 So. R. 574; Richardson *v.* Cooper, 88 Ill. 270. In Buzzell *v.* Laconia, etc., Co., 48 Me. 113, s. c. 77 Am. Dec. 212, it was said: "The declaration should allege that the insufficiency of the bridge was unknown to the plaintiff and that it was known to the defendant." See *post*, § 1311. Hart *v.* Naumburg, 123 N. Y. 641, s. c. 25 N. E. R. 385.

[2] Clarke *v.* Holmes, 7 H. & N. 937; Bean *v.* Oceanic Co., 24 Fed. R. 124; Noyes *v.* Smith, 28 Vt. 59, 63; Hutchinson *v.* York, etc., Ry. Co., 5 Exch. 343; Schooner "Norway" *v.* Jensen, 52 Ill. 373; Wabash, etc., R. Co. *v.* Moran, 13 Ill. App. 72; Gutridge *v.* Missouri, etc., Ry. Co., 105 Mo. 520, s. c. 16 S. W. R. 943; Hayden *v.* Smithville, etc., Co., 29 Conn. 548; Carruthers *v.* Chicago, etc., R. Co., 55 Kan. 600, s. c. 40 Pac. R. 915; Romona, etc., Co. *v.* Phillips, 11 Ind. App. 118, s. c. 39 N. E. R. 96.

[3] Indianapolis, etc., R. Co. *v.* Toy, 91 Ill. 474, s. c. 33 Am. R. 57; Racine *v.* New York, etc., R. Co., 70 Hun 453, s. c. 24 N. Y. Supp. 388. The general rule is that no presumption of negligence arises from the occurrence of an accident. Colorado, etc., Co. *v.* Ogden, 3 Colo. 499; Mobile, etc., R. Co. *v.* Thomas, 42 Ala. 672; State *v.* Philadelphia, etc., Co., 60 Md. 555; Baltimore, etc., R. Co. *v.* Bahrs, 28 Md. 647; State *v.* Phila., etc., R. Co., 47 Md. 76; Baltimore, etc., R. Co. *v.* State, 54 Md. 648; Toledo, etc., R. Co. *v.* Brannagan, 75 Ind. 490; Indiana, etc., R. Co. *v.* Greene, 106 Ind. 279; Gilman *v.* Eastern, etc., R. Co., 10 Allen 233.

exercise ordinary and reasonable care to provide and keep reasonably safe machinery and appliances, but he is not an insurer, so that he can not be held liable unless it is affirmatively shown that he was guilty of negligence. The test of liability, therefore, is the presence or absence of negligence. If there is no negligence there can be no liability, although there may be defects and the defects may be the proximate cause of the injury. Where reasonable care is exercised in buying machinery and appliances and inspections are made by competent inspectors in a reasonably careful and skillful manner there is no liability, although defects may in fact exist, unless there is, after knowledge, a failure to repair.[1] It is settled law that an employer is not liable unless the defects were known to him or were such as in the exercise of ordinary care he was bound to know, and it necessarily results from this settled rule that there can be no liability where there is reasonable care and skill exercised in providing, inspecting and repairing machinery and appliances.

§ 1309. **Evidence of employer's negligence.**—The employe who seeks a recovery for personal injury has the burden of proving a negligent breach of duty on the part of the employer. The evidence must establish negligence and show a breach of the "limited and specific duty of an employer to the employe."[2] It is not necessary, of course, that the evidence

[1] Chicago, etc., R. Co. *v.* DuBois, 56 Ill. App. 181; East St. Louis Provision Co. *v.* Hightower, 92 Ill. 139. See Jones *v.* Malvern, etc., Co., 58 Ark. 125, 23 S.W. R. 679; Hawley *v.* Northern, etc., R. Co., 82 N. Y. 370; Mehan *v.* Syracuse, etc., R. Co., 73 N.Y. 585.

[2] Erie, etc., R. Co. *v.* Smith, 125 Pa. St. 259; Mensch *v.* Pennsylvania, etc., R. Co., 150 Pa. St. 598, s. c. 17 L. R. A. 450; Pittston, etc., Co. *v.* McNulty, 120 Pa. St. 414; Pennsylvania, etc., Co. *v.* Mason, 109 Pa. St. 296; Philadelphia, etc., R. Co. *v.* Hughes, 119 Pa. St. 301; Conrad *v.* Gray, (Ala.) 19 So. R. 398; Bruner *v.* Blaisdell, 170 Pa. St. 25, s. c. 32 Atl. R. 607; Perry *v.* Michigan Central R. Co., (Mich.) 65 N. W. R. 608; Fenderson *v.* Atlantic, etc., R. Co., 56 N. J. L. 708, s. c. 31 Atl. R. 767; Bahr *v.* Lombard, 53 N. J. Law 233, s. c. 21 Atl. R. 190, 23 Atl. R. 167; Titus *v.* Bradford, etc., R. Co., 136 Pa. St. 618, s. c. 20 Am. St. R. 944; Georgia, etc., R. *v.* Nelms, 83 Ga. 70, s. c. 20 Am. St. R. 308; Chicago, etc., R. Co. *v.* DuBois, 56 Ill. App. 181. See, generally, Ross *v.* Pearson, etc., Co., 164 Mass. 257, s. c. 41 N. E. R. 284; Warner *v.* New York, etc., R. Co., 44 N. Y. 465; Cordell *v.* New York, etc., R. Co., 75 N. Y. 330; Toledo, etc., R. Co. *v.* Brannagan, 75 Ind.

should be direct or positive for negligence may be inferred from circumstances properly proved, but the inference must be a natural and reasonable one, and be very much more than a mere conjecture.[1] Where the complaint or declaration specifies the defects the plaintiff's evidence must conform to the allegations of the pleading and he can not recover upon evidence of entirely different defects from those specified in the pleading.[2]

§ 1310. Employer not liable to employe unless the negligence was the proximate cause of the injury.—It is not sufficient to entitle an employe to recover damages for a personal injury to show a negligent breach of the employer's duty, for to entitle the employe to a recovery it must be shown that the breach of duty was the proximate cause of the injury.[3] The general rule is that negligence will not create a right of action unless it was the proximate cause of the injury,[4] and this gen-

490, Nitro Glycerine Case, 15 Wall. 524, 537; Hermann *v.* Port Blakely, etc., Co., 71 Fed. R. 853; Jones *v.* Alabama, etc., R. Co., (Ala.) 18 So. R. 30.

[1] Gores *v.* Graff, 77 Wis. 174, s. c. 46 N. W. R. 48; Sorenson *v.* Menasha, 56 Wis. 338, s. c. 14 N. W. R. 446; Trapnell *v.* City of Red Oak Junction, 76 Iowa 744, s. c. 39 N. W. R. 884; Stager *v.* Ridge Ave. R. Co., 119 Pa. St. 70, s. c. 12 Atl. R. 821; Dunbar *v.* McGill, 64 Mich. 676, s. c. 31 N. W. R. 578; Walker *v.* Chicago, etc., Ry. Co., 71 Iowa 658, s. c. 33 N. W. R. 224; Case *v.* Chicago, etc., Ry. Co., 64 Iowa 762, s. c. 21 N. W. R. 30; Brymer *v.* Southern Ry. Co., 90 Cal. 496, s. c. 27 Pac. R. 371; Wormell *v.* Maine, etc., Ry. Co., 79 Me. 397, s. c. 10 Atl. R. 49; Griffin *v.* Boston, etc., R. Co., 148 Mass. 143, s. c. 19 N. E. R. 166.

[2] Arcade File Works *v.* Juteau, (Ind. App.) 40 N. E. R. 818. See Cleveland, etc., R. Co. *v.* Wynant, 100 Ind. 160; Chicago, etc., R. Co. *v.* Burger, 124 Ind. 275, s. c. 24 N. E. R. 981; Louisville, etc., R. Co. *v.* Renicker, 8 Ind. App. 404, s. c. 35 N. E. R. 1047.

[3] Abbot *v.* McCadden, 81 Wis. 563, s. c. 51 N. W. R. 1079; Whitwam *v.* Wisconsin, etc., Ry. Co., 58 Wis. 408, s. c. 17 N. W. R. 124; Bajus *v.* Syracuse, etc., R. Co., 103 N.Y. 312, s. c. 8 N. E. R. 529; Waldhier *v.* Hannibal, etc., Ry. Co., 87 Mo. 37; Pease *v.* Chicago, etc., Ry. Co., 61 Wis. 163, s. c. 20 N. W. R. 908; Fowler *v.* Chicago, etc., Ry. Co., 61 Wis. 159, s. c. 21 N. W. R. 40; Hoffnagle *v.* New York, etc., R. Co., 55 N. Y. 608; Loring *v.* Kansas City, etc., R. Co., 128 Mo. 349, s. c. 31 S. W. R. 6; Galveston, etc., R. Co. *v.* Herring, (Tex. Civ. App.) 36 S. W. R. 129.

[4] Sutton *v.* Town of Wauwatosa, 29 Wis. 21; Pennsylvania Co. *v.* Horton, 132 Ind. 189, 192; Leavitt *v.* Terre Haute, etc., R. Co., 5 Ind. App. 513; Metropolitan, etc., R. Co. *v.* Jackson, L. R. 3 App. Cas. 193; Hoag *v.* Lake Shore, etc., R. Co., 85 Pa. St. 293; Henry *v.* Southern, etc., R. Co., 50 Cal., 176; Billman *v.* Indianapolis,

eral rule applies to actions by an employe against the employer. It is upon the general principle stated that it is held that a violation of a municipal ordinance requiring a flagman to be stationed at a street crossing will not entitle an employe to recover.[1] The rule is illustrated by a case where a switchman was injured by stumbling over a piece of coke and falling in front of a train, and it was held that as the stumbling over the piece of coke was the proximate cause of the accident evidence that the drawbars of the car which the switchman was running to couple were defective was immaterial.[2] Another case involving the same general principle is one in which it was held that a brakeman could not recover upon the ground that the engineer failed to give the signals at highway crossings required by the statute.[3] Where an engineer is incompetent and his incompetency is known to the company, still, a brakeman who is injured in attempting to couple the cars of a train running at an obviously dangerous rate of speed can not recover damages from the company.[4]

etc., R. Co., 76 Ind. 166, s. c. 40 Am. Rep. 230; Hoadly *v.* Northern, etc., Co., 115 Mass. 304.

[1] Kansas City, etc., R. Co. *v.* Kirksey, 60 Fed. R. 999. Nor will the violation of a municipal ordinance entitle a third person to recover unless it was the proximate cause of his injury. Pennsylvania Co. *v.* Hensil, 70 Ind. 569; State *v.* Manchester, etc., R. Co., 52 N. H. 528.

[2] Cincinnati, etc., R. Co. *v.* Mealer, 50 Fed. R. 725, citing Milwaukee, etc., Ry. Co. *v.* Kellogg, 94 U. S. 469.

[3] Randall *v.* Baltimore, etc., R. Co., 109 U. S. 478, s. c. 3 Sup. Ct. R. 322, affirming the doctrine of O'Donnell *v.* Providence, etc., R. Co., 6 R. I. 211; Harty *v.* Central, etc., R. Co., 42 N. Y. 468, that statutes requiring signals at crossings are not intended for the protection of employes.

[4] Sheets *v.* Chicago, etc., R. Co., 139 Ind. 682, s. c. 39 N. E. R. 154. The decision in the case cited was put upon the ground of contributory negligence, but it is clear that the incompetency of the engineer was not the proximate cause of the injury. There is often difficulty in discriminating between cases where recovery is defeated upon the ground of contributory negligence and where it is defeated upon the ground that the negligence of the defendant was not the proximate injury. In Chicago, etc., R. Co. *v.* Kennedy, (Kan. App.) 43 Pac. R. 802, the question of proximate cause is considered and it was held that although the violation of a municipal ordinance is negligence, yet there could be no recovery unless the violation of the ordinance was the proximate cause of the injury. The court cited among other cases, Atchison, etc., R. Co. *v.* Morgan, 31 Kan. 77, s. c. 1 Pac. R. 298; Quincy R. Co. *v.* Wellhoener, 72 Ill. 60; Stoneman *v.* Atlantic, etc., R. Co., 58 Mo. 503.

§ 1311. **Knowledge of defects on part of employe—Averment and proof.**—It is a well settled general rule, as we have seen, that the employe can not recover for injuries caused by defects of which he has knowledge.[1] The employe is generally required to aver in his complaint or declaration that he did not have knowledge of the defects and that the employer did have knowledge.[2] There is, we know, some conflict of authority upon this question but we think the rule stated is the correct one for of defects of which the employe has notice he takes the risk, and in order to constitute a cause of action it is necessary to show that the defect is one for which the employer is responsible and for defects known to the employe he is not responsible. The fact that the employe has notice of defects does not defeat him simply upon the ground of contributory negligence, but defeats him because he assumes the risks of injury from such defects. The question is not one of contributory negligence but of risks assumed.[3]

§ 1312. **Knowledge of defects on part of employe—Evidence of.**—It is not necessary to prove by direct or positive evidence that an employe has knowledge of the dangers of the place in which he is required to work, or of defects in appliances or machinery. If facts are shown legitimately authorizing the inference of knowledge it will be sufficient. If defects are shown to be open and obvious to observation it is sufficient to

[1] Missouri, etc., R. Co. *v.* Spellman, (Tex.) 34 S. W. R. 268.

[2] Griffiths *v.* London, etc., Co., L. R. 13 Q. B. D. 259; Buzzell *v.* Laconia, etc., Co., 48 Me. 113, s. c. 77 Am. Dec. 212; New Kentucky, etc., R. Co. *v.* Abbani, 12 Ind. App. 497, s. c. 40 N. E. R. 702; Matchett *v.* Cincinnati, etc., R. Co., 132 Ind. 334; Louisville, etc., R. Co. *v.* Corps, 124 Ind. 427, s. c. 24 N. E. R. 1046; Peerless Stone Co. *v.* Wray, (Ind.) 42 N. E. R. 927; Louisville, etc., R. Co. *v.* Quinn, (Ind. App.) 43 N. E. R. 240. Equal knowledge on the part of the employer and employe imposes upon the employed the risks. Indianapolis, etc., R. Co. *v.* Love, 10 Ind. 554; Missouri, etc., R. Co. *v.* Spellman, (Tex.) 34 S. W. R. 298.

[3] Louisville, etc., R. Co. *v.* Sandford, 117 Ind. 265, 267, s. c. 19 N. E. R. 770; Evansville, etc., R. Co. *v.* Duel, 134 Ind. 156, 159, s. c. 33 N. E. R. 355; Beach on Contributory Neg., (1st ed.) § 140. See, generally, Owen *v.* Louisville, etc., R. Co., 87 Ky. 626; Henderson *v.* Kentucky, etc. R. Co., 86 Ky. 389, s. c. 5 S. W. R. 875.

charge the employe with knowledge, and knowledge may be inferred from evidence of familiarity with the working place or the machinery with which he is required to work.[1] Where the defect is in an appliance not open to observation it can not be inferred from the mere fact that the employe used the appliance that he was aware of the defect, nor can it be inferred that there was knowledge of such a defect unless the time during which the employe used it was reasonably sufficient to enable the employe to discover it.[2]

§ 1313. **Contributory negligence of employes.**—It is quite well agreed that contributory negligence on the part of an employe will defeat an action for the recovery of damages for injuries caused by the negligence of the employer.[3] There is much diversity of opinion upon the question as to which party has the burden. Some of the courts hold that the burden is on the plaintiff to prove that he was not guilty of con-

[1] Leary *v.* Boston, etc., R. Co., 139 Mass. 580, s. c. 52 Am. R. 733; New York, etc., R. Co. *v.* Powers, 98 N. Y. 274, s. c. 21 Am. & Eng. R. Cas. 609; Walsh *v.* St. Paul, etc., R. Co., 27 Minn. 367, s. c. 2 Am. & Eng. R. Cas. 144; Berger *v.* St. Paul, etc., R. Co., 39 Minn. 78; Rains *v.* St. Louis, etc., R. Co., 71 Mo. 164, s. c. 5 Am. & Eng. R. Cas. 610; Kelly *v.* Baltimore, etc., R. Co., (Pa. St.) 11 Atl. R. 659; Gaffney *v.* New York, etc., R. Co., 15 R. I. 456, s. c. 31 Am. & Eng. R. Cas. 265; Lovejoy *v.* Boston, etc., R. Co., 125 Mass. 79; Clark *v.* St. Paul, etc., R. Co., 28 Minn. 128; Baylor *v.* Delaware, etc., R. Co., 40 N. J. L. 23; Gibson *v.* Erie, etc., R. Co., 63 N. Y. 449, s. c. 20 Am. R. 552; Norfolk, etc., R. Co. *v.* Jackson, 85 Va. 489, s. c. 8 S. E. R. 370; Morris *v.* Gleason, 1 Ill. App. 510. But see Sioux City, etc., R. Co. *v.* Finlayson, 16 Neb. 578, s. c. 18 Am. & Eng. R. Cas. 68.

[2] Northern Pac., etc., R. Co. *v.* Herbert, 116 U. S. 642; Smith *v.* Peninsular Car Works, 60 Mich. 501.

[3] Beach on Contributory Negligence, (2d ed.) § 299; Bomar *v.* Louisiana, etc., R. Co., 42 La. Ann. 983, 8 So. R. 478; Bunt *v.* Sierra, etc., Co., 138 U. S. 438, s. c. 11 Sup. Ct. R. 464; Quibell *v.* Union, etc., R. Co., 7 Utah 122, s. c. 25 Pac. R. 734; The Jersey City, 46 Fed. R. 134; East Tennessee, etc., R. Co. *v.* Lewis, 89 Tenn. 235, s. c. 14 S. W. R. 603; Moore *v.* Norfolk, etc., R. Co., 87 Va. 489, s. c. 12 S. E. R. 968; Roddy *v.* Missouri, etc., R. Co., 104 Mo. 234, s. c. 15 S. W. R. 1112, 43 Alb. L. J. 479; Helfrich *v.* Ogden, etc., R. Co., 7 Utah 186, s. c. 26 Pac. 295; Magee *v.* Chicago, etc., R. Co., 82 Iowa 249, s. c. 48 N. W. R. 92; Mayfield *v.* Savannah, etc., R. Co., 87 Ga. 374, 13 S. E. R. 459.

tributory negligence,[1] but the majority of the courts hold that it is on the defendant.[2] Railroad employes may be guilty of contributory negligence in cases where they disobey rules or orders, where they voluntarily leave their post and go to one of greater danger, or where they fail to exercise ordinary care to guard against dangers known to them, or which, in the exercise of ordinary prudence and caution, they ought to have known.[3] Some of the cases hold that where an employe uses

[1] Murphy *v.* Deane, 101 Mass. 455; Terre Haute, etc., R. Co. *v.* Graham, 95 Ind. 291; Park *v.* O'Brien, 23 Conn. 339; Lesan *v.* Maine, etc., R. Co., 77 Me. 85; Miss. Central, etc., R. Co. *v.* Mason, 51 Miss. 234; Prather *v.* Richmond, etc., R. Co., 80 Ga. 427, s. c. 9 S. E. R. 530; Owens *v.* Richmond, etc., R. Co., 88 N. C. 502; Mynning *v.* Detroit, etc., R. Co., 67 Mich. 677; Mitchell *v.* Chicago, etc., R. Co., 51 Mich. 236, s. c. 47 Am. R. 566; Galena, etc., R. Co. *v.* Fay, 16 Ill. 558, s. c. 63 Am. Dec. 323; Greenleaf *v.* Illinois, etc., R. Co., 29 Iowa 14, s. c. 4 Am. R. 181; Waite *v.* Northeastern, etc., R. Co., El. Bl. & E. 719.

[2] Hough *v.* Railway Co., 100 U. S. 213; Amato *v.* Northern, etc., R. Co., 46 Fed. R. 561; Texas, etc., R. Co. *v.* Volk, 151 U. S. 73, s. c. 14 Sup. Ct. R. 239; Pennsylvania Co. *v.* Roy, 102 U. S. 451; Freer *v.* Cameron, 4 Rich. (Law) 228; Grand Trunk, etc., R. Co. *v.* Ives, 144 U. S. 408, s. c. 12 Sup. Ct. R. 679; Finn *v.* Vallejo, etc., Co., 7 Calf. 253; Thompson *v.* Central, etc., Co., 54 Ga. 509; St. Louis, etc., R. Co. *v.* Weaver, 35 Kan. 412; Northern, etc., R. Co. *v.* State, 31 Md. 357; Hocum *v.* Weitherick, 22 Minn. 152; Hicks *v.* Pacific R. Co., 65 Mo. 34; White *v.* Concord, etc., R. Co., 30 N. H. 188; Moore *v.* Central, etc., R. Co., 24 N. J. Law 268; Cassidy *v.* Angell, 12 R. I. 447, s. c. 34 Am. R. 690; Danner *v.* South Carolina R. Co., 4 Rich. Law 329, s. c. 55 Am. Dec. 678; San Antonio, etc., R. Co. *v.* Bennett, 76 Tex. 151; Prideaux *v.* Mineral Point, 43 Wis. 513, s. c. 28 Am. R. 558; Sanderson *v.* Frazier, 8 Colo. 79; Paducah, etc., R. Co. *v.* Hoehl, 12 Bush 41; Northern Pac. R. Co. *v.* O'Brien, 1 Wash. 599, s. c. 21 Pac. R. 32; Holden *v.* Liverpool, etc., Co., 3 C. B. 1; Davey *v.* London, etc., R. Co., 11 L. R. Q. B. Div. 213; Bridge *v.* Grand Junction R. Co., 3 M. & W. 244; Martin *v.* Great Northern, etc., R. Co., 16 C. B. 179.

[3] Where there is a safe mode of performing a duty and the employe, instead of performing the duty in that mode adopts an unsafe one, the general rule is that he is guilty of contributory negligence. Pennsylvania Co. *v.* O'Shaughnessy, 122 Ind. 588. See, generally, Spencer *v.* Ohio, etc., R. Co., 130 Ind. 181; Bresnahan *v.* Michigan, etc., R. Co., 49 Mich. 410. The duty of employes is not to assume unnecessary risks, and this duty requires them to take the safe course when work can be done in one of two methods, the one safe and the other unsafe. St. Louis, etc., Co. *v.* Brennan, 20 Ill. App. 555; St. Louis, etc., Co. *v.* Burke, 12 Ill. App. 369.

an appliance for a purpose for which it is not intended, or goes to a place different from that which the contract of service requires him to occupy, he is guilty of contributory negligence, and, for that reason, can not hold the employer liable, but we are of the opinion, as elsewhere indicated, that in such cases the true ground upon which the rule that the employer is not liable rests is that the duty of the employer does not extend over such cases. We think that there may be no negligence on the part of the employe and still a recovery can not be had because he goes to a place, or does an act, not embraced by the contract of service, and, while there, is not within the duty created by the contract of service. If the evidence, whether adduced by the plaintiff or the defendant, shows contributory negligence, it will defeat a recovery,[1] and if it is clearly shown without substantial conflict, although there may be a scintilla of the evidence to the contrary, the court may direct a verdict.[2] It is not always sufficient to defeat a recovery that there be evidence of negligence on the part of the employe for it must also appear that such negligence proximately contributed to the injury.[3]

§ 1314. **Contributory negligence of employes—Illustrative instances.**—The cases applying the doctrine of contributory negligence to railroad employes are very numerous, and we shall not undertake to cite a very great number of them, but shall refer to some of them which seem to most clearly illustrate the application of the general doctrine. It is very generally held that disobedience of the rules and orders of the employer constitutes contributory negligence.[4] There may be

[1] Horn *v.* Baltimore, etc., R. Co., 54 Fed. R. 301, s. c. 4 C. C. A. 346; Smith *v.* Chicago, etc., R.Co., 4 S.Dak. 30, 71, s. c. 55 N. W. R. 717; McMurtry *v.* Louisville, etc., Co.,67 Miss. 601, s. c. 7 So. R. 401.

[2] Johnson *v.* Hudson R. Co., 20 N. Y. 65.

[3] Tuff *v.* Warman, 5 C. B. (N. S.) 573, 586; McGonigle *v.* Kane, 20 Colo. 292, s. c. 38 Pac. R. 367; White *v.* Louisville, etc., R. Co. 72 Miss. 12, 16 So. R. 248; Terre Haute, etc., R. Co. *v.* Mansberger, 65 Fed. R. 196, 12 C. C. A. 574; Phillips *v.* Chicago, etc., R. Co., 64 Wis. 475, s. c. 25 N. W. R. 544.

[4] Robinson *v.* West Virginia, etc., R. Co., 40 W. Va. 583, s. c. 21 S. E. R. 727; Chicago, etc., R. Co. *v.* Maney, 55 Ill. App. 588; Fritz *v.* Missouri,

circumstances which will excuse disregard of orders or rules,[1] but, *prima facie*, disobedience is always negligence, and it is only in clear cases that disobedience should be held to be excused. The assent of other employes will not release from the consequences of a disobedience of established rules.[2] Some of the cases hold that where an employe voluntarily encounters a danger against which he is warned, he is guilty of contributory negligence,[3] but we think that he assumes the risk from such danger as one of the risks of his service, and for that reason can not recover.[4] An employe, where there is no emer-

etc., R. C. (Tex. Civ. App.) 30 S. W. R. 85; Chicago, etc., R. Co. *v.* Flynn, 154 Ill. 448, s. c. 40 N. E. R. 332; Bryant *v.* New York, etc., R. Co., 84 Hun 164, s. c. 30 N. Y. Supp. 737; Louisville, etc., R. Co. *v.* Stutts, 105 Ala. 368, s. c. 17 So. R. 29; Smith *v.* New York, etc., R. Co., 88 Hun 468, s. c. 34 N. Y. Supp. 881; Louisville, etc., R. Co. *v.* Woods, 105 Ala. 561, s. c. 17 So. R. 41; LeBahn *v.* New York, etc., R. Co., 80 Hun 116, s. c. 30 N. Y. Supp. 7; Davis *v.* Nuttalisburg, etc., Co., 34 W. Va. 500, s. c. 12 S. E. R. 539. Where a violation of the time table regulations or of other rules brings on a collision, the employes who disobey the rules can not recover. Sutherland *v.* Troy, etc., R. Co., 125 N. Y. 737, s. c. 26 N. E. R. 609. Coupling cars in disobedience of rules. Schaub *v.* Hannibal, etc., R. Co., 106 Mo. 74, s. c. 16 S. W. R. 924; East Tennessee, etc., R. Co. *v.* Smith, 89 Tenn. 114, s. c. 14 S. W. R. 1077; Sloan *v.* Georgia, etc., R. Co., 86 Ga. 15, s. c. 12 S. E. R. 179, 44 Am. & Eng. R. Cas. 553; Pryor *v.* Louisville, etc., R. Co., 90 Ala. 32, s. c. 8 So. R. 55; Grand *v.* Michigan, etc., R. Co., 83 Mich. 564, s. c. 47 S. W. R. 837, 11 L. R. A. 402.

[1] Hannah *v.* Connecticut, etc., R. Co., 154 Mass. 529, s. c. 28 N. E. R. 682; Memphis, etc., R. Co. *v.* Graham, 94 Ala. 545, s. c. 10 So. R. 283; Illinois Cent. R. Co. *v.* Person, 63 Miss. 319, 3 So. R. 375. See Illinois, etc., R. Co. *v.* Gilbert, 157 Ill. 354, s. c. 41 N. E. R. 724; Light *v.* Chicago, etc., R. Co., (Iowa) 61 N. W. R. 380.

[2] *Ante*, § 1282; Port Royal, etc., R. Co. *v.* Davis, 95 Ga. 292, s. c. 22 S. E. R. 833; Atchison, etc. R. Co. *v.* Reesman, 60 Fed. R. 370, 9 C. C. A. 20; Richmond, etc., R. Co. *v.* Rush, 71 Miss. 987, s. c. 15 So. R. 133; Lehigh, etc., R. Co. *v.* Snyder, 56 N. J. Law 326, 28 Atl. R. 376; Westcott *v.* New York, etc., R. Co., 153 Mass. 460, s. c. 27 N. E. R. 10. But see Illinois, etc., R. Co. *v.* Neer, 31 Ill. App. 126. Effect of inconsistent orders. Hall *v.* Chicago, etc., R. Co., 46 Minn. 439, s. c. 49 N. W. R. 239. Effect of an order of a superior where no emergency. Davis *v.* Western, etc., R. Co., (Ala.) 18 So. R. 173.

[3] Williams *v.* Walton, etc., Co., 9 Houst. 322, 32 Atl. R. 726; Saner *v.* Lake Shore, etc., R. Co., (Mich.) 65 N. W. R. 624.

[4] Knight *v.* Cooper, 36 W. Va. 232, s. c. 14 S. E. R. 999; Paland *v.* Chicago, etc., R. Co., 44 La. Ann. 1003, s. c. 11 So. R. 707; Haley *v.* Jump River Lumber Co., 81 Wis. 412, s. c. 51 N. W. R. 321; Lasky *v.* Canadia, etc., R.

gency, who knowingly or carelessly assumes an unnecessary risk, is guilty of contributory negligence.[1] It is the duty of all employes to exercise ordinary care to avoid injury,[2] to take reasonable precautions against known dangers,[3] and not to expose themselves to extraordinary dangers.[4] It is held by some of the courts that where the employer assures the employe that there is no danger, and the employe acts upon such assurance,

Co., 83 Me. 461, s. c. 22 Atl. R. 367. See Niles *v.* Minneapolis, etc., R. Co., (Mich.) 65 N. W. R. 103.

[1] Wilson *v.* Michigan, etc., R. Co., 94 Mich. 20, s. c. 53 N. W. R. 797; Browne *v.* New York, etc., R. Co., 158 Mass. 247, s. c. 33 N. E. R. 650; Hudson *v.* Charleston, etc., R. Co., 55 Fed. R. 248; Dowell *v.* Vicksburg, etc., Ry. Co., 61 Miss. R. 519; Chambers *v.* Western R. Co., 91 N. Car. 471; Novock *v.* Michigan, etc., R. Co., 63 Mich. 121, s. c. 29 N. W. R. 525; Burgin *v.* Louisville, etc., R. Co., 97 Ala. 274, 12 So. R. 395; Wilson *v.* Michigan, etc., R. Co., 94 Mich. 20, s. c. 53 N. W. R. 797; Lyttle *v.* Chicago, etc., R. Co., 84 Mich. 289, s. c. 47 N. W. R. 571; Alabama, etc., R. Co. *v.* Richie, 99 Ala. 346, 12 So. R. 612; Finnell *v.* Delaware, etc., R. Co., 129 N. Y. 669, s. c. 29 N. E. R. 825.

[2] Pieart *v.* Chicago, etc., R. Co., 82 Iowa 148, s. c. 47 N. W. R. 1017; Louisville, etc., R. Co. *v.* Crawford, 89 Ala. 240, s. c. 8 So. R. 243, 44 Am. & Eng. R. Cas. 568; St. Louis, etc., R. Co. *v.* Mara, (Ark.) 16 S. W. R. 196; Tomko *v.* Central, etc., R. Co., 37 N. Y. S. 144; Southern, etc. *v.* Pool, 160 U. S. 438, 16 Sup. Ct. R. 338; Dooner *v.* Delaware, etc., R. Co., 171 Pa. St. 581, s. c. 33 Atl. R. 415; Chicago, etc., R. Co. *v.* Davis, 53 Fed. R. 61, s. c. 53 Am. & Eng. R. Cas. 461; Hickey *v.* Boston, etc., R. Co., 14 Allen 429; Lehigh, etc., R. Co. *v.* Greiner, 113 Pa. St. 600, s. c. 6 Atl. R. 246.

[3] Haden *v.* Sioux City, etc., R. Co., (Iowa) 48 N. W. R. 733; Houston, etc., R. Co. *v.* Crawford, (Tex. Civ. App.) 32 S. W. R. 155; St. Louis, etc., R. Co. *v.* Bloyd, (Ark.) 31 S. W. R. 457; Stewart *v.* Ohio, etc., R. Co., 40 W. Va. 188, 20 S. E. R. 922; Nelling *v.* Chicago, etc., R. Co., (Iowa) 63 N. W. R. 568; Loring *v.* Kansas City, etc., R. Co., 128 Mo. 349, s. c. 31 S. W. R. 6; Baker *v.* Chicago, etc., R. Co., (Iowa) 63 N. W. R. 667; Illinois, etc., R. Co. *v.* Winslow, 56 Ill. App. 462; Beuhring *v.* Chesapeake, etc., R. Co., 37 W. Va. 502, s. c. 16 S. W. R. 435.

[4] York *v.* Kansas City, etc., R. Co., 117 Mo. 405, s. c. 22 S. W. R. 1081; Georgia, etc., R. Co. *v.* Hallman, (Ga.) 23 S. E. R. 73; Walker *v.* Redington, etc., Co., 86 Me. 191, s. c. 29 Atl. R. 979; Rawlston *v.* East Tennessee, etc., R. Co., 94 Ga. 536, s. c. 20 S. E. R. 123; Cooney *v.* Great Northern, etc., R. Co., 9 Wash. 292, s. c. 37 Pac. R. 438; Andrews *v.* Birmingham, etc., R. Co., 99 Ala. 436, 12 So. R. 432. See Northern Pac. R. Co. *v.* Egeland, 56 Fed. R. 200. Where an employe voluntarily makes use of an engine, unsafe unless proper precautions are used, he is guilty of contributory negligence unless he uses such precautions. Thompson *v.* Montana, etc., R. Co., (Mont.) 43 Pac. R. 496. See Erskine *v.* Chino, etc., Co., 71 Fed. R. 270.

he is not guilty of contributory negligence,[1] but we suppose that this rule would not prevail if the employe had full knowledge of the danger. An employe may, within limits, act upon the assumption that the employer's duty to exercise ordinary care has been performed,[2] but the fact that the employe may act upon such assumption does not relieve him from the duty of exercising ordinary care to avoid injury.[3] The presumption that the duties of the employer to the employe have been performed does not, however, authorize the employe to carelessly or heedlessly venture into danger, nor does it relieve him from the duty of taking knowledge of and guarding against dangers plainly and fully open to observation.[4] The duties of employer and employe as to discovering defects and dangers are not the same, for the duty of the employer is greater than that of the employe, and what would be negligence on the part of the employer is not always or necessarily negligence on the part of the employe. In the majority of cases the question of contributory negligence is one of fact for the jury, but, as is evident from the great number of cases with which the books abound, it is very frequently a question of law for the court. There is much conflict of opinion as to when the question is one of law for the court and when it is one of fact for the jury. We shall not enter this field of conflict, for an adequate consideration of the subject would require far more space than we can yield it.

§ 1315. **Contributory negligence—Violation of statutory duty.**—There are many modern statutes requiring the per-

[1] Warner *v.* Chicago, etc., R. Co., 1 Mo. App. Rep. 490.

[2] Michigan, etc., R. Co. *v.* Dolan, 32 Mich. 510; Bradbury *v.* Goodwin, 108 Ind. 286; Cook *v.* St. Paul, etc., Ry. Co., 34 Minn. 45, s. c. 24 N. W. R. 311; Gibson *v.* Pacific Ry. Co., 46 Mo. 163; Russell *v.* Minneapolis, etc., Ry. 32 Minn. 230, s. c. 20 N. W. R. 147; Wallace *v.* Central, etc., R. Co., 138 N. Y. 302, s. c. 59 Am. & Eng. R. Cas. 264. See Central, etc., R. Co. *v.* Brantley, 93 Ga. 259, s. c. 20 S. E. R. 98; Abbitt *v.* Lake Erie, etc., R. Co., (Ind.) 40 N. E. R. 40.

[3] Long *v.* Coronado, etc., R. Co., 96 Cal. 269, s. c. 31 Pac. R. 170. See Devine *v.* Savannah, etc., R. Co., 89 Ga. 541, s. c. 15 S. E. R. 781.

[4] Rogers *v.* Leyden, 127 Ind. 50, 58; Wormell *v.* Maine, etc., R. Co., 79 Me. 397, s. c. 10 Atl. R. 49; Skipp *v.* Eastern Counties, etc., R. Co., 9 Exch. 223.

formance of specified acts and denouncing a penalty against persons who fail or refuse to perform the designated acts. In some of the books it is suggested that the doctrine of contributory negligence does not apply where the injury is caused by a violation of a statute. The overwhelming weight of authority is, however, that the doctrine does apply, unless the statute explicitly abrogates the rule of the common law.[1] Principle and authority, as we believe, require the conclusion that although the violation of a statute may give a right of action to one who is injured thereby it does not, unless expressly or by necessary implication, so declared, give a right of action to one who is himself guilty of contributory negligence.[2]

[1] The general doctrine stated in the text is not confined to cases between employe and employer as the cases cited in the note to this section show, but applies to almost all classes of cases where the issue is negligence.

[2] Krause *v.* Morgan, (Ohio St.) 40 N. E. R. 886; Spivay *v.* Osage, etc., Mining Co., 88 Mo. 68; Linton, etc., Co. *v.* Persons, 11 Ind. App. 264; Reynolds *v.* Hindman, 32 Iowa 146; Taylor *v.* Carew Manf. Co., 143 Mass. 470, s. c. 10 N. E. R. 308; Durant *v.* Lexington, etc., Mining Co., 97 Mo. 62; Grand *v.* Michigan, etc., R. Co. 83 Mich. 564, s. c. 47 N. W. R. 837; Holum *v.* Chicago, etc., Ry. Co., 80 Wis. 299, s. c. 50 N. W. R. 99; Victor Coal Co. *v.* Muir, 20 Col. 320, s. c. 38 Pac. R. 378; Mullhern *v.* Lehigh Coal Co., 161 Pa. St. 270; Thompson *v.* Edward P. Allis Co., 89 Wis. 523; Curry *v.* Chicago, etc., R. Co., 43 Wis. 665; Cassady *v.* Boston, etc., R. Co., 164 Mass. 168, 40 N. E. R. 129; Queen *v.* Dayton, etc., R. Co., 95 Tenn. 458, s. c. 32 S. W. R. 460; Holum *v.* Chicago, etc., R. Co., 80 Wis. 299, 50 N. W. R. 99; Johnson *v.* Chicago, etc., Ry. Co., 29 Minn. 425. *Contra*, Bartlett, etc., Mining Co. *v.* Roach, 68 Ill. 174; Litchfield, etc., Coal Co. *v.* Taylor, 81 Ill. 590. See, generally, Carle *v.* Bangor, etc., R. Co., 43 Me. 269; Sullivan *v.* Mississippi, etc., R. Co., 11 Iowa 421.

CHAPTER LI.

FELLOW-SERVANTS.

§ 1316. Survey of the fellow-servant rule—General doctrine.
1317. Vice-principal — Superior agent — Views of the authors.
1318. Vice-principal — Superior agent—Illustrative cases.
1319. Vice-principal as to particular subjects.
1320. What constitutes a common employment
1321. General managers—Superintendents.
1322. Train dispatcher.
§ 1323. Master mechanic.
1324. Road masters.
1325. Train masters.
1326. Station masters.
1327. Inspectors.
1328. Telegraph operators.
1329. Foremen.
1330. Trainmen engaged in operating the same train.
1331. Trainmen operating different trains.
1332. Trainmen and switchmen and laborers and sectionmen.
1333. Recent federal cases.

§ 1316. Survey of the fellow-servant rule—General doctrine.—The English courts for many years gave almost unlimited effect to the doctrine of *respondeat superior* and held the common master liable to a servant for the negligence of a fellow-servant. The decision in one case wrought a radical and far-sweeping change.[1] As often happens the courts in swinging from one extreme swung to the other. The English case to which we have referred carried the doctrine beyond the limits of right reason, but it was for a time very generally followed in all its scope both in England and America,[2] and its doctrine

[1] Priestley *v.* Fowler, 3 Mees. & W. 1.

[2] Hutchinson *v.* York, etc., R. Co., 5 Exch. 343; 19 L. J. R. Exch. 296; Murray *v.* South Carolina R. Co., 1 McMullen (S. Car.) 385; Farwell *v.* Boston, etc., R. Co., 4 Metc. 49; McEniry *v.* Waterford, etc., R. Co., 8 Ir. C. L. R. 312; Bartonshill, etc., Co. *v.* Reid, 3 Macq. 266; King *v.* Ohio, etc., R. Co., 14 Fed. R. 277; Carle *v.* Bangor, etc., R. Co., 43 Me. 269; Russell *v.* Hudson River, etc., R. Co., 17 N. Y. 134; Kenney *v.* Central R. Co., 61 Ga. 590; Robinson *v.* Houston, etc., R. Co., 46 Tex. 540; Crispin *v.* Babbitt, 81 N. Y. 516; Adams *v.* Iron Cliffs Co., 78 Mich. 271, s. c. 44 N. W. R. 270; Hard *v.* Vermont, etc., Ry.

yet prevails, not, however, in its full force and extent, for it has been greatly limited and modified by the modern decisions. It is still the rule of the common law that if the employer exercises ordinary care to select competent servants he is not liable to a servant for injuries caused by the negligence of a fellow-servant.[1] The Supreme Court of the United States for a time[2] departed from the fellow-servant rule, but the later cases have practically asserted and enforced it.[3] The principal point of difference between the doctrine of non-liability for the negligence of fellow-servants as originally declared and the rule now generally accepted is that the latter rule recognizes the doctrine of superior agents and subordinate employes which the original rule practically denied.[4] The great weight of

Co., 32 Vt. 473; Yates *v.* McCullough, etc., R. Co., 69 Md. 370, s. c. 16 Atl. R. 280; Memphis, etc., R. Co. *v.* Thomas, 51 Miss. 637; Schultz *v.* Chicago, etc., R. Co., 67 Wis. 616, s. c. 58 Am. R. 881; Columbus, etc., R. Co. *v.* Arnold, 31 Ind. 174.

[1] Keystone Bridge Co. *v.* Newberry, 69 Pa. St. 246, s.c. 42 Am.R.543; Nashville, etc., R. Co. *v.* Wheless, 10 Lea 741, s. c. 43 Am. R. 317; Indianapolis, etc., R. Co. *v.* Johnson, 102 Ind. 352; Gibson *v.* Pacific, etc., R. Co., 46 Mo. 163; Brown *v.* Winona, etc., R. Co., 27 Minn. 162, s. c. 38 Am. R. 285; Joslin *v.* Grand Rapids, etc., R. Co., 50 Mich. 516, s. c. 45 Am. R. 54; McGee *v.* Boston, etc., R. Co., 139 Mass. 445; Blake *v.* Maine, etc., R. Co., 70 Me. 60, s. c. 35 Am. R. 297; Crusselle *v.* Pugh, 67 Ga. 430, s. c. 44 Am. R. 724; Johnson *v.* Boston, etc., R. Co., 135 Mass. 209, s. c. 46 Am. R. 458; Louisville, etc., R. Co. *v.* Cavens, 9 Bush. 559; Murphy *v.* Boston, etc., R. Co., 88 N. Y. 146; Peschel *v.* Chicago, etc., R. Co., 62 Wis. 338, s. c. 17 Am. & Eng. R. Cas. 545; Hanrathy *v.* Northern, etc., R. Co., 46 Md. 280; Riley *v.* West Va., etc., R. Co., 27 W. Va. 145; Davis *v.* Central, etc., R. Co., 55 Vt. 84, s. c. 11 Am. & Eng. R. Cas. 173; Moon *v.* Richmond, etc., R. Co., 78 Va. 745, s. c. 17 Am. & Eng. R. Cas. 531; Lawler *v.* Androscoggin, etc., R. Co., 62 Me. 463; Hannibal, etc., R. Co. *v.* Fox, 31 Kan. 587, s. c. 15 Am. & Eng. R. Cas. 325; Willis *v.* Oregon, etc., R. Co., 11 Ore. 257; Brown *v.* Sennett, 68 Cal. 225; Berea, etc., Co. *v.* Kraft, 31 Ohio St. 287, s. c. 27 Am. R. 510; Hobson *v.* New Mexico, etc., R. Co., (Ariz.) 11 Pac. R. 545, s. c. 28 Am. & Eng. R. Cas. 360; Burlington, etc., R. Co. *v.* Crockett, 19 Neb. 138; Ewan *v.* Lippincott, 47 N. J. Law 192; Palmer *v.* Utah, etc., R. Co., 2 Idaho 290, s. c. 13 Pac. R. 425.

[2] Chicago, etc., R. Co. *v.* Ross, 112 U. S. 377, 5 Sup. Ct. R. 184.

[3] Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, s. c. 13 Sup. Ct. R. 914.

[4] We do not mean simply a difference in rank, by the term "superior agent," but we mean to denote by the term "superior agent" one who is entrusted with the performance of the duties of the master. There are well reasoned cases which hold that a bare difference in rank breaks the force of the fellow-servant rule.

modern authority is that an employe entrusted with duties resting upon the master may be a vice-principal and as such impose a liability upon the common master to an employe injured by his negligence. If the employes or servants are co-employes or fellow-servants, and not subordinates and superiors, then the fellow-servant rule is still the rule in the absence of legislative enactment.[1] There is, however, a wide diversity of opinion as to who are fellow-servants, but there is little, if any, substantial conflict as to the rule where the relation is that of fellow-servants. The dispute falls upon the question who are and who are not to be regarded as fellow-servants rather than upon the rule that governs where the relation of fellow-servants exists. It is impossible to reconcile the conflict upon the question as to who are and who are not to be regarded as fellow-servants, or to say what is the true test for determining who is or is not a vice-principal. It is, however, now pretty generally agreed that the rank of the employe does not

Cleveland, etc., R. Co. *v.* Keary, 3 Ohio St. 201; Kentucky Central, etc., R. Co. *v.* Ackley, 87 Ky. 278, s. c. 8 S. W. R. 691; Chicago, etc., R. Co. *v.* May, 108 Ill. 288; Missouri, etc., R. Co. *v.* Peregoy, 36 Kan. 424; Chicago, etc., R. Co. *v.* Lundstrom, 16 Neb. 254; Patton *v.* Western, etc., R. Co., 96 N. Car. 455, s. c. 31 Am. & Eng. R. Cas. 298; Louisville, etc., R. Co. *v.* Bowler, 9 Heisk. 866. But we think that the weight of authority at present is that the bare fact that one employe is superior in rank to another does not break the force of the fellow-servant rule, and that it is only where the employe is entrusted with some duty resting upon the master that the weight of authority justifies the conclusion that he is not a co-employe but a superior agent.

[1] Keenan *v.* New York, etc., R. Co., 145 N. Y. 190, s. c. 45 Am. St. R. 604; New Pittsburg, etc., Co. *v.* Peterson, 136 Ind. 398, s. c. 43 Am. St. R. 327; Heine *v.* Chicago, etc., R. Co., 58 Wis. 525; Ell *v.* Northern Pac. R. Co., 1 N. Dak. 336, s. c. 26 Am. St. R. 621, 12 L. R. A. 91; Colorado, etc., R. Co. *v.* Naylon, 17 Colo. 501, s. c. 31 Am. St. R. 335; Hankins *v.* New York, etc., R. Co., 142 N. Y. 416, s. c. 40 Am. St. R. 616; Schroeder *v.* Flint. etc., R. Co., (Mich.) 29 L. R. A. 321; Dixon *v.* Chicago, etc., R. Co., 109 Mo. 413, s. c. 18 L. R. A. 792; Baltimore, etc., R. Co. *v.* Andrews, 50 Fed. R. 728; Anderson *v.* Bennett, 16 Ore. 515; Darrigan *v.* New York, etc., R. Co., 52 Conn. 285, s. c. 52 Am. R. 590; Chicago, etc., R. Co. *v.* May, 108 Ill. 288; Flike *v.* Boston, etc., R. Co., 53 N. Y. 549, s. c. 13 Am. R. 545; Borgman *v.* Omaha, etc., R. Co., 41 Fed. R. 667; Alabama, etc., R. Co. *v.* Waller, 48 Ala. 459; Alleghany, etc., R. Co. *v.* Rohan, 118 Pa. St. 223, s. c. 11 Atl. R. 789.

determine the question, for, if an employe is charged with the performance of a duty that the law imposes on the master, as to that particular duty the employe is a vice-principal.[1] But in applying this doctrine there is a conflict of authority that leads to hopeless confusion. The confusion deepens as the adjudged cases are studied, for there are a variety of opinions as to what are or are not the master's duties in such a sense as to make the person to whom their performance is entrusted a superior agent; so there is upon the question of the necessity of consociation in service to create the relation of fellow-servants, and so there is in relation to what is called the departmental theory. We can not hope to do much towards clearing away the obscurity that clouds the subject, nor can we do more in view of the multitude of cases than refer to some of them which seem to us to best illustrate the important phases of the subject and bring into clear light its principal features.

§ 1317. Vice-principal—Superior agent—Views of the authors.—The term "vice-principal" is generally used to denote an employe to whom the employer has entrusted the performance of a duty which the law requires the employer himself to

[1] Ford *v.* Fitchburg, etc., R. Co., 110 Mass. 240, s. c. 14 Am. R. 598; Atchison, etc., R. Co. *v.* Moore, 29 Kan. 632; Indiana Car Co. *v.* Parker, 100 Ind. 181; Mullan *v.* Philadelphia, etc., R. Co., 78 Pa. St. 25, s. c. 21 Am. R. 2; McCosker *v.* Long Island R. Co., 84 N. Y. 77; Brothers *v.* Cartter, 52 Mo. 373, s. c. 14 Am. R. 424; Hough *v.* Railway Co., 100 U. S. 213, 218; Hannibal, etc., R. Co. *v.* Fox, 31 Kan. 587, s. c. 15 Am. & Eng. R. Cas. 325; Mason *v.* Richmond, etc., Ry. Co., 111 N. Car. 482, s. c. 16 S. E. R. 698; Norfolk, etc., R. Co. *v.* Donnelly, 88 Va. 853, s. c. 14 S. E. R. 692; Wells *v.* Coe, 9 Colo. 159, s. c. 11 Pac. R. 50; Schultz *v.* Chicago, etc., Ry. Co., 48 Wis. 375, s. c. 4 N. W. R. 399; Anderson *v.* Bennett, 16 Ore. 515, s. c. 19 Pac. R. 765; Gunter *v.* Graniteville, etc., R. Co., 18 S. Car. 262, s. c. 44 Am. R. 573; Calvo *v.* Railroad Co., 23 S. Car. 526, s. c. 28 Am. & Eng. R. Cas. 327; Fones *v.* Phillips, 39 Ark. 17; Louisville, etc., R. Co. *v.* Cavens, 9 Bush. 559; McBride *v.* Union Pac. R. Co., 3 Wyo. 247, s. c. 21 Pac. R. 687; Towns *v.* Vicksburg, etc., Ry. Co, 37 La. Ann. 630, s. c. 55 Am. R. 508; Brodeur *v.* Valley Falls, etc , R. Co., 16 R. I. 448, s. c. 17 Atl. R. 54; Foster *v.* Pusey, 8 Houst. (Del.) 168, 14 Atl. R. 545; Wilson *v.* Merry, L. R. 1 H. L. Sc. 326; Nashville, etc., R. Co. *v.* Handman, 13 Lea 423; Smoot *v.* Mobile, etc., Ry. Co., 67 Ala. 13; Sayward *v.* Carlson, 1 Wash. St. 29, s. c. 23 Pac. R. 830.

perform. We think that a superior agent or vice-principal is an employe who is entrusted generally with the performance of the master's duties, or is entrusted with the performance of some of the master's duties, although he may not be entrusted with all the duties of the employer.[1] We believe that where the duty which the law imposes upon the employer is entrusted to an employe the employe is a vice-principal as to that duty, although the matter to which it relates may not be in the strict sense a general one. But we venture to express our opinion with much hesitation, for the difference among authors and judges is so wide that one is not safe in assuming to express his judgment. We believe that the rule we have ventured to

[1] Harley *v.* Louisville, etc., R. Co., 57 Fed. R. 144; Baltimore and Ohio R. Co. *v.* Baugh, 149 U. S. 368, s. c. 13 Sup. Ct. R. 914; Findlay *v.* Russell, etc., (Mich.) 66 N. W. R. 50; Wooden *v.* Western, etc., R. Co., 147 N. Y. 508, s. c. 42 N. E. R. 199; Ross *v.* Walker, 139 Pa. St. 42, s. c. 21 Atl. R. 157; Ell *v.* Northern, etc., R. Co., 1 N. Dak. 336, s. c. 48 N. W. R. 222, 12 L. R. A. 97, 43 Alb. L. J. 414; Kelley *v.* Cable Co., 7 Mont. 70, s. c. 14 Pac. R. 633; New Pittsburgh, etc., R. Co. *v.* Peterson, 136 Ind. 398, 35 N. E. R. 7; Hofnagle *v.* New York, etc., R. Co., 55 N. Y. 688; Sullivan *v.* Railway Co., 62 Conn. 208, s. c. 25 Atl. R. 711; McCosker *v.* Long Island, etc., R. Co., 84 N. Y. 77; Davis *v.* New York, etc., R. Co., 159 Mass. 532, s. c. 34 N. E. R. 1070; Northern, etc., R. Co. *v.* Peterson, 51 Fed. R. 182; Clowes *v.* The Frank, etc., 45 Fed. R. 494; Coyne *v.* Railway Co., 133 U. S. 370, s. c. 10 Sup. Ct. R. 382; Halversen *v.* Nisen, 3 Sawy. (U. S.) 562; Anderson *v.* Winston, 31 Fed. R. 528; Quinn *v.* Lighterage Co., 23 Fed. R. 363; Thom *v.* Pittard, 62 Fed. R. 232; Deavers *v.* Spencer, 70 Fed. R. 480; Central, etc., R. Co. *v.* Keegan, 160 U. S. 259, s. c. 16 Sup. Ct. R. 269; Bedford, etc., R. Co. *v.* Brown, 142 Ind. 659, s. c. 42 N. E. R. 359; Allen *v.* Goodwin, 92 Tenn. 385, s. c. 21 S. W. R. 760; Coal Creek, etc., M. Co. *v.* Davis, 90 Tenn. 711, s. c. 18 S. W. R. 387; Jones *v.* Old Dominion, etc., Mills, 82 Va. 140, s. c. 3 Am. St. R. 92; Lindvall *v.* Woods, 41 Minn. 212, s. c. 4 L. R. A. 793. See Calvo *v.* Charlotte, etc., R. Co., 23 S. Car. 526, s. c. 55 Am. R. 28; Tierney *v.* Minneapolis, etc., R. Co., 33 Minn. 311, s. c. 53 Am. R. 35; Davis *v.* Central, etc., R. Co., 55 Vt. 84, s. c. 45 Am. R. 590; Moon's, Adm'r *v.* Richmond, etc., R. Co., 78 Va. 745, s. c. 49 Am. R. 401; Gilmore *v.* Northern, etc., R. Co., 18 Fed. R. 866, s. c. 15 Am. & Eng. R. Cas. 304; Packet Co. *v.* McCue, 17 Wall. 508; Railway Co. *v.* Fort, 17 Wall. 553; Lalor *v.* Chicago, etc., R. Co., 52 Ill. 401; Brickner *v.* New York, etc., R. Co., 2 Lans. 506, s. c. 49 N. Y. 672; Mullen *v.* Steamship Co., 78 Pa. St. 25; Atchison, etc., R. Co. *v.* Moore, 31 Kan. 197, s. c. 15 Am. & Eng. R. Cas. 312; Anderson *v.* Bennett, 16 Ore. 515, s. c. 19 Pac. R. 765, s. c. 8 Am. St. R. 311.

state is the true one, although the employe may be, in conjunction with other employes, engaged in "a common employment under a common employer," for all persons engaged in a general line of business under a common employer, from general manager or general superintendent to a laborer, are in a common employment under a common master, but it does not follow from that fact that the superintendent or manager may not be a vice-principal. The test of common employment recognized in many of the cases[1] is not a just one, nor is the test founded upon the bare fact that one employe is in some respects the superior of another.

§ 1318. **Vice-principal—Superior agent—Illustrative cases.** —An employe entrusted with the duty of instructing a young and inexperienced servant has been held to be a vice-principal upon the ground that the duty to instruct is that of the master.[2] The duty of opening and closing a switch is not a duty of the employer, but is a duty relating to the operation of the road, and the person to whom it is entrusted is not a superior agent or vice-principal.[3] An employe entrusted with the duty of

[1] Howells *v.* Steel Co., L. R. 10 Q. B. 62; Wilson *v.* Merry, L. R. 1 H. L. Cas., s. c. App. 326; Conway *v.* Belfast R. Co., Ir. Rep. 9 C. L. 498; Waller *v.* South Eastern, etc., R. Co., 2 H. & C. 102; Mobile, etc., R. Co. *v.* Smith, 59 Ala. 245; Buckley *v.* Gould, 14 Fed. R. 833; Harrison *v.* Central, etc., R. Co., 31 N. J. Law 293; Pollock on Torts, 86, 88. We think, however, that the test of common employment is the true one when qualified by the statement that where the employe is entrusted with a duty which the master is himself required to perform the employe is a superior agent.

[2] Wallace *v.* Standard Oil Co., 66 Fed. R. 260; Lebbering *v.* Struthers, 157 Pa. St. 312, s. c. 27 Atl. R. 720. See City of Minneapolis *v.* Lundin, 58 Fed. R. 525.

[3] St. Louis, etc., R. Co. *v.* Needham, 63 Fed. R. 107, citing Naylor *v.* Railroad Co., 33 Fed. R. 801; Roberts *v.* Railway Co., 33 Minn. 218, s. c. 22 N. W. R. 389; Harvey *v.* Railroad Co., 88 N. Y. 481, 484; Slattery *v.* Railroad Co., 23 Ind. 81; Chicago R. Co. *v.* Henry, 7 Bradw. (Ill. App.) 322; Walker *v.* Railroad Co., 128 Mass. 8; Miller *v.* Railroad Co., 20 Ore. 285, s. c. 26 Pac. R. 70; Gilman *v.* Railroad Co., 10 Allen 233; Railway Co. *v.* Troesch, 68 Ill. 545; Quebec Steamship Co. *v.* Merchant, 133 U. S. 375, 10 Sup. Ct. 397; Railroad Co. *v.* Andrews, 50 Fed. R. 728; Railroad Co. *v.* Baugh, 149 U. S. 368, s. c. 13 Sup. Ct. R. 914; Railroad Co. *v.* Hambly, 154 U. S. 349, s. c. 14 Sup. Ct. R. 983. Distinguishing the cases of Railroad Co. *v.* Ross, 112 U. S. 377, s. c. 5 Sup. Ct. R. 184; Railway Co. *v.* Callahan, 56 Fed. R. 988; Garraby, etc., R. Co., 25 Fed. R.

providing and keeping safe the place where employes are required to work, by their contract of employment, is a superior agent and not a fellow-servant, inasmuch as the duty of providing a safe working place is that of the master.[1] Where an employe works with another employe he is as to such work a fellow-servant, although as to the duty of making the working place safe he may be a superior agent.[2] An employe charged with the duty of keeping machinery and appliances in repair usually acts in discharging such duty in the master's place and is not a mere fellow-servant.[3] It has been held that a train-master in directing a car to be removed from a train is a fellow-servant of the brakemen of that train.[4]

§ 1319. **Vice-principal as to particular subjects.**—There are well reasoned cases which hold that an employe may be a fel-

258; Ragsdale *v.* Railroad Co., 42 Fed. R. 383, and Mase *v.* Railroad Co., 57 Fed. R. 283; Clarke *v.* Pennsylvania, etc., R. Co., 132 Ind. 199, s. c. 31 N. E. R. 808, 17 L. R. A. 811; Ling *v.* St. Paul, etc., R. Co., 50 Minn. 160, s. c. 52 N. W. R. 378; Miller *v.* Southern, etc., R. Co., 20 Ore. 285, s. c. 26 Pac. R. 70, 43 Alb. L. J. 354.

[1] Roux *v.* Blodgett, etc., Co., 94 Mich. 607, s. c. 54 N. W. R. 492; Zintek *v.* Stimson, etc., Co., 6 Wash. 178, s. c. 32 Pac. R. 997, 33 Pac. R. 1055. But see Gilmore *v.* Oxford, etc., Co., 55 N. J. Law 39, s. c. 25 Atl. R. 707. See, generally, Palmer *v.* Michigan, etc., R. Co., 93 Mich. 363, s. c. 53 N. W. R. 397, 17 L. R. A. 636; Sadowski *v.* Michigan, etc., R. Co., 84 Mich. 100, s. c. 47 N. W. R. 598; Galveston, etc., R. Co. *v.* Smith, 76 Tex. 611, s. c. 13 S. W. R. 562.

[2] Stockmeyer *v.* Reed, 55 Fed. R. 259, s. c. 47 Alb. L. J. 488; Lindvall *v.* Woods, 44 Fed. R. 855. See Stutz *v.* Armour, 84 Wis. 623, s. c. 54 N. W. R. 1000; Kliegel *v.* Wiesel, 84 Wis. 148, s. c. 53 N. W. R. 1119; Northern, etc., R. Co. *v.* Petersen, 51 Fed. R. 182, s. c. 32 Am. Law Reg. 340; McGinley *v.* Levering, 152 Pa. St. 366, s. c. 25 Atl. R. 824. See Nall *v.* Louisville, etc., R. Co., 129 Ind. 260, s. c. 28 N. E. R. 611, 48 Am. & Eng. R. Cas. 309; Malcom *v.* Fuller, 152 Mass. 160, s. c. 25 N. E. R. 83; Telander *v.* Sunlin, 44 Fed. R. 564; Cullen *v.* Norton, 126 N. Y. 1; Babcock *v.* Old Colony R. Co., 150 Mass. 467, s. c. 23 N. E. R. 325; Louisville, etc., R. Co. *v.* Graham, 124 Ind. 89, s. c. 24 N. E. R. 668; Hussey *v.* Coger, 112 N. Y. 614, s. c. 20 N. E. R. 556, 8 Am. St. R. 787, 3 L. R. A. 559.

[3] Fox *v.* Spring Lake, etc., Co., 89 Mich. 387, s. c. 50 N. W. R. 872.

[4] Martin *v.* Chicago, etc., R. Co., 65 Fed. R. 384. But it has been held, erroneously, as we think, that a section man in placing cars upon a side-track is not a fellow-servant of the trainmen. See Northern, etc., R. Co. *v.* Hogan, 63 Fed. R. 102; Parker *v.* New York, etc., R. Co., 18 R. I. 773, s. c. 30 Atl. R. 849; Clay *v.* Chicago, etc., R. Co., 56 Ill. App. 235.

low-servant as to some duties and a vice-principal as to others.[1] In one of the cases it was held that the foreman of a gang of section hands, with authority to employ and discharge men, was a vice-principal as to that duty, but a fellow-servant with the section men in doing work on the track.[2] The question as to what duties the employe is a fellow-servant and as to what duties he is a superior agent is to be determined by ascertaining to what extent he acts in the master's place, for to that extent and no further he is, according to what seems to us the better opinion, to be regarded as a superior agent.

§ 1320. **What constitutes a common employment.**—The modern decisions do not recognize the rule of the earlier English and American cases upon the question of what constitutes a common employment, but, while there can be no doubt that there is a change in the current of decisions there is very great doubt as to what the law is. The federal decisions are in conflict and the state courts have taken widely different views of the question. The cases agree that in order to constitute a common employment there must be a common master and the servants must be engaged in the same general line of service,[3] but as to what is the same general line of service there is very great conflict. Some of the courts affirm the department theory, others the consociation doctrine, while others deny both the department and consociation theories. We shall not attempt to analyze the cases nor to comment upon them, but in treating of the different classes of railroad employes we shall refer to cases which illustrate the different lines of decision.[4] It has been held that the porter in the service of a palace car company is not the fellow-servant of the trainmen of the train

[1] Brick *v.* Rochester, etc., R. Co., 98 N. Y. 211, s. c. 21 Am. & Eng. R. Cas. 605; Borgman *v.* Omaha, etc., R. Co., 41 Fed. R. 667; Criswell *v.* Railway Co., 30 W. Va. 798, s. c. 6 S. E. R. 31; Quinn *v.* New Jersey, etc., Co., 23 Fed. R. 363; Hussey *v.* Coger, 112 N. Y. 614, s. c. 20 N. E. R. 556; Crispin *v.* Babbitt, 81 N. Y. 516, s. c. 37 Am. R. 521.

[2] Justice *v.* Pennsylvania Co., 130 Ind. 321, s. c. 30 N. E. R. 303. See Hardy *v.* Minneapolis, etc., R. Co., 36 Fed. R. 657.

[3] Hardy *v.* Delaware, etc., R. Co., (N. J.) 31 Atl. R. 281.

[4] Underhill on Torts, 52.

to which the palace car is attached,[1] but we think the case referred to in many respects goes entirely too far. It has also been held that a porter of a sleeping-car is not the fellow-servant of the employes of a railroad company engaged in operating a different train from the one to which the sleeping-car was attached.[2] A porter of a railroad train and the engineer have been held not to be fellow-servants,[3] but it seems to us that this doctrine is unsound, for in such a case there is a common service in all that the term implies, and the case is not that of servant of different masters, nor is the duty of either the engineer or of the porter that of the master.

§ 1321. **General managers—Superintendents.**—Where general charge and control of the operation of a railroad is given to a general manager or general superintendent such an agent or officer is a vice-principal.[4] The doctrine that the company is liable only in cases where the board of directors is guilty of

[1] Jones *v.* St. Louis, etc., R. Co., 125 Mo. 666, 26 L. R. A. 718, citing Mound City, etc., Co. *v.* Conlon, 92 Mo. 221; Rourke *v.* White Moss, etc., Co., L. R. 1 C. P. Div. 556; Morgan *v.* Smith, 159 Mass. 570; Brown *v.* Smith, 86 Ga. 274; Wyllie *v.* Palmer, 137 N. Y. 248, s. c. 19 L. R. A. 285; Pennsylvania Co. *v.* Roy, 102 U. S. 451; Railway Company *v.* Walrath, 38 Ohio St. 461; Thorpe *v.* New York, etc., R. Co., 76 N. Y. 402, s. c. 32 Am. R. 325; Dwinelle *v.* New York, etc., R. Co., 120 N. Y. 117, s. c. 8 L. R. A. 224; Louisville, etc., R. Co. *v.* Katzenberger, 16 Lea 380, s. c. 57 Am. R. 232. The court cited the cases of Mellor *v.* Missouri, etc., R. Co., 105 Mo. 455, s. c. 10 L. R. A. 36; Graham *v.* Pacific Railroad Co., 66 Mo. 536; Tibby *v.* Missouri, etc., R. Co., 82 Mo. 292; Carroll *v.* Missouri, etc., R. Co., 88 Mo. 239, s. c. 57 Am. R. 382, and held that under the doctrine of those cases the porter was a passenger.

[2] Hughson *v.* Richmond, etc., R. Co., 2 App. D. C. 98. See Union, etc. R. Co. *v.* Kelly, 4 Colo. App. 325.

[3] Cincinnati, etc., R. Co. *v.* Palmer, (Ky.) 33 S. W. R. 199. It seems to us that the case cited carries even the erroneous "doctrine of subordination" much too far.

[4] Pennsylvania, etc., R. Co. *v.* Mason, 109 Pa. St. 296, s. c. 58 Am. R. 722; Frazier *v.* Pennsylvania, etc., R. Co., 38 Pa. St. 104, s. c. 80 Am. Dec. 467; Washburn *v.* Nashville, etc., R. Co., 3 Head (Tenn.) 638, s. c. 75 Am. Dec. 784; Savannah, etc., R. Co. *v.* Goss, 80 Ga. 524, s. c. 5 S. E. R. 777; Patterson *v.* Pittsburg, etc., R. Co., 76 Pa. St. 389; Lasky *v.* Canadian, etc., R. Co., 83 Me. 461, s. c. 22 Atl. R. 367; Krogg *v.* Atlanta, etc., R. Co., 77 Ga. 202; Wilson *v.* Willimantic Linen Co., 50 Conn. 433, s. c. 47 Am. R. 653; Stephens *v.* Hannibal, etc., R. Co., 86 Mo. 221; Chicago, etc., Brick Co. *v.* Sobkowiak, 148 Ill. 573, s. c. 36 N. E. R. 572; Shumway *v.* Walworth, etc., Co., 98 Mich. 411, s. c. 57 N. W. R.

negligence is not supported by the modern authorities. A subordinate manager or superintendent may or may not be a vice-principal, for, whether he is or not, depends upon whether duties resting upon the employer have been entrusted to him.[1]

§ 1322. **Train dispatcher.**—As is true of very many phases of the law of master and servant there is conflict upon the question whether a train dispatcher is the fellow-servant of employes engaged in operating the trains of the company, but by no means so great as upon other phases of the law of master and servant. The decided weight of authority is that a train dispatcher is not a fellow-servant,[2] but there is some au-

251; Hughlett *v.* Ozark, etc., Co., 53 Mo. App. 87; Gerrish *v.* New Haven Ice Co., 63 Conn. 9, s. c. 27 Atl. R. 235; Indiana Car Co. *v.* Parker, 100 Ind. 181; Phillips *v.* Chicago, etc., R. Co., 64 Wis. 475, s. c. 25 N. W. R. 544, 23 Am. & Eng. R. Cas. 453; Hoover Stone Co. *v.* McCain, 133 Ind. 231, s. c. 31 N. E. R. 956; Cumberland, etc., R. Co. *v.* State, 44 Md. 283; Gunter *v.* Graniteville Manufacturing Co., 18 S. Car. 262, s. c. 44 Am. R. 573. See, generally, Kain *v.* Smith, 89 N. Y. 375; What Cheer Coal Co. *v.* Johnson, 56 Fed. R. 810; Cheeney *v.* Ocean Steamship Co., 95 Ga. 381, s. c. 19 S. E. R. 33; Quinn *v.* New Jersey, etc., Co., 23 Fed. 363. The decision in Mobile, etc., R. Co. *v.* Smith, 59 Ala. 245, seems to deny the doctrine stated in the text, but so far as it can be regarded as doing so it is in conflict with the decision in Krogg *v.* Atlanta, etc., R. Co., *supra*. The old English rule is strikingly illustrated by the case of Conway *v.* Belfast, etc., R. Co., 11 Ir. R. C. L. 345.

[1] Beilfus *v.* New York, etc., R. Co., 29 Hun 556; Corcoran *v.* Holbrook, 59 N. Y. 517, s. c. 17 Am. R. 369; Webber *v.* Piper, 109 N. Y. 496; Malone *v.* Hathaway, 64 N. Y. 38; Texas, etc., R. Co. *v.* Tatman, (Tex. Civ. App.) 31 S. W. R. 333; Ellington *v.* Beaver, etc., Co., 93 Ga. 53, s. c. 19 S. E. R. 21; Rogers, etc., Co. *v.* Hand, 21 Vroom (N. J.) 464. See, generally, Hathaway *v.* Illinois Cent. R. Co., (Iowa) 60 N. W. R. 651; McAndrews *v.* Burns, 39 N. J. Law 117.

[2] Little Rock, etc., R. Co. *v.* Barry, 58 Ark. 198, s. c. 25 L. R. A. 386; Hankins *v.* New York, etc., R. Co., 142 N. Y. 416, s. c. 25 L. R. A. 396; McKune *v.* Southern, etc., R. Co., 66 Cal. 302; Haynes *v.* East Tennessee, etc., R. Co., 3 Coldw. 222; Darrigan *v.* New York, etc., R. Co., 52 Conn. 285, s. c. 52 Am. R. 590; Chicago, etc., R. Co. *v.* Young, 26 Ill. App. 115; Chicago, etc., R. Co. *v.* McLallen, 84 Ill. 109; Hannibal, etc., R. Co. *v.* Kanaley, 39 Kan. 1; McLeod *v.* Ginther, 80 Ky. 399; Lasky *v.* Canadian, etc., R. Co., 83 Me. 461; Hunn *v.* Michigan, etc., R. Co., 78 Mich. 513, s. c. 7 L. R. A. 500; Smith *v.* Wabash, etc., R. Co., 92 Mo. 359; McChesney *v.* Panama R. Co., 49 N. Y. S. R. 148; Lewis *v.* Seifert, 116 Pa. St. 628; Washburn *v.* Nashville, etc., R. Co., 3 Head. 638, s.

thority upon the opposite side of the question.[1] It seems to us that where the matter of moving trains and giving orders is entrusted to a train dispatcher generally he should be regarded as a superior agent and not as a mere fellow-servant, but that as to a signal man, telegraph operator or the like, whose duties concern mere details in the operation of a railroad, the rule is different. The general duty of providing for the movement of trains may, as we believe, be justly regarded as the duty of the employer, while matters of detail, such as giving signals, telegraphing orders and the like can not be so considered. It is not to be expected, as is quite well agreed, that the master will act in matters of detail connected with the operation of the road, but as to the general movement of trains it is otherwise.

§ 1323. **Master mechanic.**—Where a railroad company entrusts to a master mechanic the duty of providing and keeping in safe condition for use the machinery and appliances with which employes are required to work the company is liable to an employe who, without contributory fault, and while acting within the scope of his duties, is injured by the negligence of the master mechanic. There is conflict upon this question and the older authorities are opposed to the doctrine we have stated,[2] but it is fully sustained by the modern cases.[3] The

c. 75 Am. Dec. 784; Galveston, etc., R. Co. *v.* Arispe, 5 Tex. Civ. App. 611; Cincinnati, etc., R. Co. *v.* Clarke, 57 Fed. R. 125; Sheehan *v.* New York, etc., R. Co., 91 N. Y. 332; Dana *v.* New York, etc., R. Co., 92 N. Y. 639; Phillips *v.* Chicago, etc., R. Co., 64 Wis. 475, s. c. 23 Am. & Eng. R. Cas. 453; Baltimore, etc., R. Co. *v.* Camp, 65 Fed. R. 952.

[1] Norfolk, etc., R. Co. *v.* Hoover, 79 Md. 253, s. c. 25 L. R. A. 710; Robertson *v.* Terre Haute, etc., R. Co., 78 Ind. 77, s. c. 41 Am. R. 552; Chicago, etc., R. Co. *v.* Doyle, 60 Miss. 977; Millsaps *v.* Louisville, etc., R. Co., 69 Miss. 423. See Blessing *v.* St. Louis, etc., R. Co., 77 Mo. 410; Rose *v.* Boston, etc., R. Co., 58 N. Y. 217. Notice to the train dispatcher of the incompetency of a station agent and telegraph operator has been held not to be notice to the company. Reiser *v.* Pennsylvania Co., 152 Pa. St. 38. As to the officers to whom notice of the incompetency of servants may be effectively given, see Missouri, etc., R. Co. *v.* Patton, (Tex. Civ. App.) 25 S. W. R. 339; McDermott *v.* Hannibal, etc., R. Co., 87 Mo. 285; Sutton *v.* New York, etc., R. Co., 50 N. Y. S. R. 514; Davis *v.* Detroit, etc., R. Co., 20 Mich. 105.

[2] Columbus, etc., R. Co. *v.* Arnold, 31 Ind. 174; Hard *v.* Vermont, etc., R. Co., 32 Vt. 473. But see, *contra*, Davis *v.* Central, etc., R. Co., 55 Vt. 84, s. c. 11 Am. & Eng. R. Cas 173.

[3] Krueger *v.* Louisville, etc., R. Co.,

rule does not rest upon the doctrine of subordination but upon the principle that it is the master's duty to provide safe machinery and appliances, and in performing that duty the master mechanic occupies the master's place. The question whether a master mechanic is a superior agent or a fellow-servant is not determined from the name or title but from the duties entrusted to him. As in other cases where the question is as to the nature and scope of an employe's authority, the party who affirms that he is a superior agent must prove, as a fact, that the master mechanic was entrusted with the performance of a duty imposed by law upon the employer, for it is only as to such a duty that he can be regarded as a vice-principal.

§ 1324. **Roadmasters.**—Where a roadmaster is placed in charge of the roadbed or track he is in relation to that duty a vice-principal.[1] It has been held that where a train is in charge of a roadmaster the trainmen and laborers and section-men are all fellow-servants.[2] It seems to us that such employes as those just named would be fellow-servants, although the train was not under the charge of the roadmaster.[3] In an-

111 Ind. 51, s. c. 31 Am. & Eng. R. Cas. 329; Gottlieb *v.* New York, etc., R. Co., 100 N. Y. 462, s. c. 24 Am. & Eng. R. Cas. 421; Cooper *v.* Pittsburgh, etc., R. Co., 24 W. Va., 37; Hough *v.* Texas, etc., R. Co., 100 U. S. 213; Ford *v.* Fitchburg, R. Co., 110 Mass. 240, s. c. 14 Am. R. 598; Douglas *v.* Texas, etc., R. Co., 63 Tex. 564. See Ballard *v.* Hitchcock, etc., Co., 71 Hun 582, 24 N. Y. Supp. 1101; Hughlett *v.* Ozark, etc., Co., 53 Mo. App. 87. But see Kidwell *v.* Houston, etc., R. Co., 3 Woods (U. S.) 313, where it is held that notice to a master mechanic of the incompetency of employes is not notice to the company unless it is shown that the master mechanic had authority to hire and discharge such employes. We suppose, however, that if the employes are in the line of service over which the master mechanic has control that notice to him would be notice to the company, but if the employes were in some other line of service a different rule would apply. See, also, What Cheer, etc., Co. *v.* Johnson, 56 Fed. R. 810. *Contra*, Ohio, etc., R. Co. *v.* Collarn, 73 Ind. 261, s. c. 5 Am. & Eng. R. Cas. 554.

[1] Harrison *v.* Detroit, etc., R. Co., 79 Mich. 409, s. c. 44 N. W. R. 1034, 7 L. R. A. 623, 41 Am. & Eng. R. Cas. 398. See Kansas City, etc., R. Co. *v.* Kier, 41 Kan. 661, s. c. 21 Pac. R. 770.

[2] Northern Pac. R. Co. *v.* Smith, 59 Fed. R. 993.

[3] Carney *v.* Caraquet Railway Co., 29 N. B. 425; Evansville, etc., R. Co. *v.* Henderson, 134 Ind. 636, s. c. 33 N. E. R. 1021; Hoover *v.* Beech Creek, etc., R. Co., 154 Pa. St. 362.

other case it was held that a roadmaster was a fellow-servant with the trainmen of the train on which he was riding in such a sense as to preclude him from recovering for injuries caused by the negligence of the trainmen.[1]

§ 1325. **Trainmasters.**—Where the employer entrusts to a trainmaster the general duty of making up and moving trains the trainmaster is, according to what seems to us the better opinion, so far as that duty is concerned, a vice-principal.[2] The test as to the position of such employes as trainmasters is the same as that in other cases where employes are serving a common master in a common employment. That is supplied by the answer to the question, were they entrusted with any of the duties imposed by law upon the employer.

§ 1326. **Station-masters.**—Where a station agent is entrusted with duties imposed by law upon the master, then, so far as those specific duties are concerned, there is reason for regarding him as a vice-principal, but unless he is entrusted with such duties he is, as we believe, a fellow-servant of section-men, trainmen and all employes engaged in the common service of loading, switching, running trains and the like. Whether the station agent or station-master is entrusted with the duties resting on the employer is ordinarily a question of fact, and it must, as we think, be shown that he was entrusted with the performance of such duties by a party who seeks to establish the relation of vice-principal. The courts generally hold that a station agent or station-master is not ordinarily a vice-principal.[3] Trainmen are held to be fellow-servants with

[1] Gulf, etc., R. Co. *v.* Ryan, 69 Tex. 665, s. c. 7 S. W. R. 83.

[2] Goodman *v.* Delaware, etc., R. Co., 167 Pa. St. 332, s. c. 31 Atl. R. 670.

[3] Brown *v.* Minneapolis, etc., R. Co., 31 Minn. 553, s. c. 15 Am. & Eng. R. Cas. 333: Evans *v.* Atlantic, etc., R. Co., 62 Mo. 49; Byrnes *v.* New York, etc., R. Co., 113 N. Y. 251, s. c. 21 N. E R. 50; Galveston, etc., R. Co. *v.* Farmer, 73 Tex. 85, s. c. 11 S. W. R. 156; Mexican, etc., R. Co. *v.* Shean, (Tex.) 18 S. W. R. 151; Gaffney *v.* New York, etc., R. Co., 15 R. I. 456, 31 Am. & Eng. R. Cas. 265; Toner *v.* Chicago, etc., R. Co., 69 Wis. 188; Hodgkins *v.* Eastern R. Co., 119 Mass. 419; Dealey *v.* Philadelphia, etc., R. Co., (Pa. St.) 4 Alt. R. 170. See Palmer *v.* Utah, etc., R. Co., 2 Idaho 350, s. c. 13 Pac. R. 425; Brown *v.* Winona, etc., R. Co., 27 Minn. 162, s. c. 38 Am. R. 285.

employes whose duty it is to take the number of the cars or the like,[1] and we can see no reason why the same rule should not apply to station agents.

§ 1327. Inspectors.—There is a conflict upon the question whether inspectors are to be regarded as fellow-servants. The weight of authority is that they are not fellow-servants but superior agents.[2] There are, however, many cases holding that inspectors are fellow-servants.[3] We think that inspectors are

[1] New York, etc., R. Co. *v.* Hyde, 56 Fed. R. 188; Beuhring *v.* Chesapeake, etc., R. Co., 37 W. Va. 502, s. c. 16 S. E. R. 435.

[2] Terre Haute, etc., R. Co. *v.* Mansberger, 65 Fed. R. 196; Atchison, etc., R. Co. *v.* Mulligan, 67 Fed. R. 569; Louisville, etc., R. Co. *v.* Ward, 61 Fed. R. 927; Louisville, etc., R. Co. *v.* Kelly, 63 Fed. R. 407; Little Rock, etc., R. Co. *v.* Mosely, 56 Fed. R. 1009; Carpenter *v.* Mexican, etc., R. Co., 39 Fed. R. 315; Colorado, etc., R. Co. *v.* Naylon, 17 Colo. 501, s. c. 30 Pac. R. 249; Missouri, etc., R. Co. *v.* Dwyer, 36 Kan. 58; Condon *v.* Missouri, etc., R. Co., 78 Mo. 567, s. c. 17 Am. & Eng. R. Cas. 583; Chicago, etc., Co. *v.* Hoyt, 122 Ill. 369, 31 Am. & Eng. R. Cas. 309; Macy *v.* St. Paul, etc., R. Co., 35 Minn. 200; Cincinnati, etc., R. Co. *v.* McMullen, 117 Ind. 439, s. c. 20 N. E. R. 287; Louisville, etc., R. Co. *v.* Miller, 141 Ind. 533, s. c. 40 N. E. R. 116; Browning *v.* Wabash, etc., R. Co., 124 Mo. 55, s. c. 27 S. W. R. 644; Chicago, etc., R. Co. *v.* Kneirim, 48 Ill. App. 243; Railway Company *v.* Erick, 51 Ohio St. 46, s. c. 37 N. E. R. 128; Coontz *v.* Missouri, etc., R. Co., 121 Mo. 652, s. c. 26 S. W. R. 661; St. Louis, etc., R. Co. *v.* Putnam, 1 Tex. Civ. App. 142, s. c. 20 S. W. R. 1002; Daniels *v.* Union, etc., R. Co., 6 Utah 357, s. c. 23 Pac. R. 762; Carpenter *v.* Mexican, etc., R. Co., 39 Fed. R. 315; Indiana, etc., R. Co. *v.* Snyder, 140 Ind. 647; King *v.* Ohio, etc., R. Co., 14 Fed. R. 277, s. c. 8 Am. & Eng. R. Cas. 119; Fay *v.* Minneapolis, etc., R. Co., 30 Minn. 231, s. c. 11 Am. & Eng. R. Cas. 193; Brann *v.* Chicago, etc., R. Co., 53 Iowa 595, s. c. 36 Am. R. 243; Ballard *v.* Hitchcock, etc., Co., 71 Hun 582, s. c. 24 N. Y. Supp. 1101.

[3] Nashville, etc., Co. *v.* Foster, 10 Lea 351, s. c. 11 Am. & Eng. R. Cas. 180; Mackin *v.* Boston, etc., R. Co., 135 Mass. 201, s. c. 15 Am. & Eng. R. Cas. 196; Byrnes *v.* New York, etc., R. Co., 113 N. Y. 251, s. c. 21 N. E. R. 50; Philadelphia, etc., R. Co. *v.* Hughes, 119 Pa. St. 301; Wonder *v.* Baltimore, etc., R. Co., 32 Md. 411, s. c. 3 Am. R. 143; Smoot *v.* Mobile, etc., R. Co., 67 Ala. 13; Smith *v.* Potter, 46 Mich. 258, s. c. 2 Am. & Eng. R. Cas. 140; Fordyce *v.* Briney, 58 Ark. 206, s. c. 24 S. W. R. 250; St. Louis, etc., R. Co. *v.* Rice, 51 Ark. 457, s. c. 11 S. W. R. 699, 4 L. R. A. 173. The supreme court of Arkansas argues with much ability that there is a difference between a general inspector and car inspectors, but we think the argument, although plausible, is unsound. The duty of inspection being that of the master its delegation to an employe makes him a superior agent, for what the master must himself do can not be the act of

superior agents, for the reason that the duty of inspection is that of the master. Where the duty of inspection rests on the servant himself or on fellow-servants, then the rule that the master must inspect does not apply and an inspector should be regarded as a fellow-servant.[1]

§ 1328. **Telegraph operators.**—It is a matter of which judicial notice is taken that in operating a railroad the services of telegraph operators and signal men are required, and, as it seems to us, judicial notice must also extend to the fact that the class of employes named are ordinarily employed in matters of detail. The courts are by no means agreed upon the question whether telegraph operators are vice-principals or fellow-servants. Many cases affirm that they are vice-principals,[2] while many others assert that they are not.[3] It is, we know, somewhat bold to venture an opinion upon a question upon which the authorities fight so stubbornly, but, nevertheless, we briefly state our views upon the question. It seems to

a mere fellow-servant, nor can it make any difference that the duty relates only to particular appliances or particular place inasmuch as over all places and appliances requiring inspection the master's duty extends. There may, perhaps, be appliances which the master is not under a duty to inspect. McCampbell *v.* Cunard, etc., Co., 144 N. Y. 552, s. c. 39 N. E. R. 637.

[1] Ingebregsten *v.* Nord, etc., Co., (N. J.) 31 Atl. R. 619.

[2] Flannegan *v.* Chesapeake, etc., R. Co., 40 W. Va. 436, s. c. 21 S. E. R. 1028; Madden *v.* Chesapeake, etc., R. Co., 28 W. Va. 610, s. c. 57 Am. R. 695; Haney *v.* Pittsburgh, etc., R. Co., 38 W. Va. 570, s. c. 18 S. E. R. 748; Illinois, etc. R. Co. *v.* Hunter, 70 Miss. 471; Hall *v.* Galveston, etc., R. Co., 39 Fed. R. 18; East Tennessee, etc., R. Co. *v.* De Armond, 86 Tenn. 73, s. c. 5 S. W. R. 600; Northern Pacific, etc., R., Co. *v.* Charless, 51 Fed. R. 562. The case last cited is built principally upon the decision in the Ross case, and, as the Ross case has been practically overthrown, the cases following it can not carry weight as authority. We think that the court in the Charless case, *supra*, was in error in confusing telegraph operators with train dispatchers, and erroneously applied the doctrine of Lewis *v.* Seifert, 116 Pa. St. 628, 11 Atl. R. 514.

[3] Price *v.* Detroit, etc., R. Co., 145 U. S. 651, 12 Sup. Ct. R. 986; Baltimore, etc., R. Co. *v.* Camp, 65 Fed. R. 952; Cincinnati, etc., R. Co. *v.* Clarke, 57 Fed. R. 125; Reiser *v.* Pennsylvania Co., 152 Pa. St. 38, s. c. 25 Atl. R. 125; McKaig *v.* Northern, etc., R. Co., 42 Fed. R. 288; Dana *v.* New York, etc., R. Co., 23 Hun 473; Slater *v.* Jewett, 85 N. Y. 61, s. c. 5 Am. & Eng. R. Cas. 515; Monaghan *v.* New York, etc., R. Co., 45 Hun 113.

us that telegraph operators are employes engaged in performing duties connected with the detail work of operating a railroad, and are not entrusted with the duties devolved by law upon the master, and that they are engaged under a common master in a common employment, that of moving trains upon the road. As well say that persons in charge of telephones over which directions are given in a large manufacturing establishment are vice-principals as that telegraph operators are vice-principals. They can not be regarded as vice-principals without violating the settled rule that the master's duty does not extend to the details of the work of the common employment nor without violating the rule that he only is a vice-principal to whom a duty resting on the master is entrusted. There is no more reason for holding that the master's duty is to see that every telegraphic direction is correctly transmitted than there is for holding that the master must see that every verbal direction given by a switchman, conductor or brakeman regarding the opening or closing of a switch is correctly worded. Our conclusion is that where the master exercises ordinary care in selecting competent telegraph operators he is not liable to an employe injured by reason of their negligence. All the analogous cases support this conclusion, for with very rare exceptions it is held that matters of detail concerning the operation of a railroad pertain to the duties of employes and are not duties of the employer. A train dispatcher who has general charge of the movements of the trains occupies a different position from telegraph operators who assist in the details connected with the movements of trains. In some of the cases a distinction is made between signalmen or flagmen and telegraph operators, but we deferentially submit that there is no solid basis for the distinction.[1] It can not be justly held that telegraph operators whose duty it is to transmit orders or give signals are superior agents, for they do not command inasmuch as they simply transmit telegraphic orders and in

[1] Flannegan *v.* Chesapeake, etc., R. Co., 38 W. Va. 570, s. c. 21 S. E. R. 1028; Haney *v.* Pittsburgh, etc., R. Co., 38 W. Va. 570, s. c. 18 S. E. R. 748.

doing this no more discharge the master's duty than do ordinary signalmen or flagmen.

§ 1329. **Foreman.**—There is hopeless conflict upon the question whether a foreman with authority to hire and discharge employes is or is not a fellow-servant of those engaged in the same common employment.[1] We do not believe that the ques-

[1] Affirming that he is not a fellow-servant: Chicago, etc., R. Co. *v.* Lundstrum, 16 Neb. 254, s. c. 21 Am. & Eng. R. Cas. 528; Sioux City, etc., R. Co. *v.* Smith, 22 Neb. 775, s. c. 36 N. W. R. 285; Blomquist *v.* Chicago, etc., R. Co., 60 Minn. 426, s. c. 62 N. W. R. 818; Claybaugh *v.* Kansas City, etc., R. Co., 56 Mo. App. 630; Logan *v.* North Carolina, etc., R. Co., 116 N. C. 940, s. c. 21 S. E. R. 959; Higgins *v.* Missouri, etc., Ry., 43 Mo. App. 547; Dayharsh *v.* Hannibal, etc., Ry. Co., 103 Mo. 570, s. c. 15 S. W. R. 442; Cleveland, etc., R. Co. *v.* Brown, 56 Fed. R. 804; Woods *v.* Lindvall, 48 Fed. R. 62; Borgman *v.* Omaha, etc., Ry. Co., 41 Fed. R. 667; Texas, etc., R. Co. *v.* Reed, (Tex.) 31 S. W. R. 1058; Mattise *v.* Consumers', etc., Co., 46 La. Ann. 1535, s. c. 16 So. R. 400; Russ *v.* Wabash, etc., R. Co., 112 Mo. 45, s. c. 18 L. R. A. 823; Orman *v.* Mannix, 17 Col. 564, 17 L.R.A. 602; Sweeney *v.* Gulf, etc., R. Co., 84 Tex. 433, s.c. 31 Am. St.R. 71; Sullivan *v.* Hannibal, etc., R. Co., 107 Mo., 66 s. c. 28 Am. St. R. 388; Anderson *v.* Ogden, etc., R. Co., 7 Utah 396, s. c. 30 Pac. R. 305. The federal decisions are in a great measure controlled by the decision in Chicago, etc., Ry. Co. *v.* Ross, 112 U. S. 377, 5 Sup. Ct. R. 184, and as that case has been virtually overruled the cases founded upon it can not be regarded as authority. Adjudging that the relation of fellow-servants exists: Keenan *v.* New York, etc., R. Co., 145 N. Y. 190, s. c. 39 N. E. R. 711, 45 Am. St. R. 654; Norfolk, etc., R. Co. *v.* Hoover, 79 Md. 253, s. c. 29 Atl. R. 994; Dowd *v.* Boston, etc., R. Co., 162 Mass. 185, s. c. 38 N. E. R. 440; Ell *v.* Northern, etc., R. Co., 1 N. Dak. 336, s. c. 12 L. R. A. 97; Sherman *v.* Rochester, etc., R. Co., 17 N. Y. 153; Loughlin *v.* State, 105 N. Y. 159; New Pittsburgh, etc., Co. *v.* Peterson, 136 Ind. 398, s. c. 43 Am. St. R. 327; Spancake *v.* Philadelphia, etc., R. Co., 148 Pa. St. 184, s. c. 33 Am. St. R. 821; Dube *v.* Lewiston, 83 Me. 211; Houser *v.* Chicago, etc., Co., 60 Iowa 230, s. c. 46 Am. R. 65; Lawler *v.* Androscoggin, etc., R. Co., 62 Me. 463, s. c. 16 Am. R. 492; Cumberland, etc., R. Co. *v.* Scally, 27 Md. 589; Malone *v.* Hathaway, 64 N. Y. 5, s. c. 21 Am. R. 573; Minneapolis *v.* Lunden, 58 Fed. R. 525; Clarke *v.* Pennsylvania Co., 132 Ind. 199, s. c. 17 L. R. A. 811, 31 N. E. R. 808; Shepard *v.* Boston, etc., R. Co., 158 Mass. 174, s. c. 33 N. E. R. 508; Sullivan *v.* New York, etc., R. Co., 62 Conn. 209, s. c. 25 Atl. R. 711; Coal Creek, etc., Min. Co. *v.* Davis, 90 Tenn. 711, s. c. 18 S. W. R. 387; Kinney *v.* Corbin, 132 Pa. St. 141, s. c. 19 Atl. R. 141; Legrone *v.* Mobile, etc., R. Co., 67 Miss. 592, s. c. 7 So. R. 432; Johnson *v.* Ashland Water Co., 77 Wis. 51, s. c. 45 N. W. R. 807. See, generally, Dewey *v.* Parke, 76 Mich. 631, s. c. 43 N. W. R. 644; McBride *v.* Union Pac. R. Co., 3 Wyo. 47, s. c. 21 Pac. R. 687; Hussey *v.* Coger, 112 N. Y. 614, s. c. 3 L. R. A. 559, 8 Am. St. R. 787; Felt-

tion is to be determined upon the theory that the authority to hire and discharge is the test. Possibly the act of a foreman in hiring an incompetent servant, knowing him to be incompetent, may be the act of the employer, but as to the use of appliances, direction of the details of the work and the like pertaining entirely to the common duties of the service we think the foreman, although he may have authority to employ and discharge servants, is not a superior agent. But it is not the name given an employe, nor, indeed, the rank bestowed upon him, that controls, for the controlling question is whether he is entrusted with the performance of duties which rest upon the master. An employe may be called a foreman and yet not be a superior agent, or he may be so designated and yet be a superior agent. If he has charge of the working place and appliances and is entrusted with the duty of providing safe appliances and a safe working place, then, so far as concerns that duty, he occupies the master's place and is a superior agent.[1] Some of the cases hold that a foreman is a superior agent although he has no authority to employ and discharge servants,[2] but the very great weight of authority is against that doctrine.[3]

ham *v.* England, L. R. 2 Q. B. 33; Searle *v.* Lindsay, 11 C. B. N. S. 429; Allen *v.* New Gas Co., L. R. 1 Exch. Div. 251; Howells *v.* London, etc., Co., L. R. 10 Q. B. 62; McLean *v.* Blue Point, etc., Co., 51 Cal. 255.

[1] McElligott *v.* Randolph, 61 Conn. 157, s. c. 22 Atl. R. 1094; Houston *v.* Brush, 66 Vt. 431, s. c. 29 Atl. R. 380; Nixon *v.* Selby, etc., Co., 102 Cal. 458, s. c. 36 Pac. R. 803. See Davis *v.* New York, etc., R. Co., 159 Mass. 532, s. c. 34 N. E. R. 1070; Fisher *v.* Oregon, 22 Ore. 533, s. c. 30 Pac. R. 425, 16 L. R. A. 519; Wellman *v.* Oregon, etc., R. Co., 21 Ore. 530, s. c. 28 Pac. R. 625.

[2] Foster *v.* Missouri, etc., Ry. Co., 115 Mo. 165, s. c. 21 S. W. R. 916; Hall *v.* St. Joseph, etc., R. Co., 48 Mo. App. 356.

[3] Marshall *v.* Schricker, 63 Mo. 308; Brabbitts *v.* Chicago, etc., R. Co., 38 Wis. 289; Mealman *v.* Union, etc., R. Co., 37 Fed. R. 189; New York, etc., R. Co. *v.* Bell, 112 Pa. St. 400, s. c. 28 Am. & Eng. R. Cas. 338; Berea, etc., Co. *v.* Kraft, 31 Ohio St. 287, s. c. 27 Am. R. 510; Louisville, etc., R. Co. *v.* Lahr, 86 Tenn. 335, 6 S. W. R. 663; Peterson *v.* Whitebreast, etc., Co., 50 Iowa 673, s. c. 32 Am. R. 143; Mancuso *v.* Cataract, etc., Co., 87 Hun 519, s. c. 34 N. Y. Supp. 273; Louisville, etc., R. Co. *v.* Isom, 10 Ind. App. 691, s. c. 38 N. E. R. 423; Schroeder *v.* Flint, etc., R. Co., (Mich.) 61 N. W. R. 663; Di Marcho *v.* Builders', etc., Co., 18 R. I. 514, s. c. 28 Atl. R. 661; Chicago, etc., R. Co. *v.* Simmons, 11 Ill. App. 147; San Antonio, etc., R. Co. *v.*

§ 1330. **Trainmen engaged in operating the same train.**—There is comparatively very little conflict upon the question as to whether trainmen engaged in operating the same train are fellow-servants, the very decided weight of authority holding them to be fellow-servants.[1] This seems to us the only rule that can be defended on principle, for such employes are in the strictest sense engaged in the service of a common master, their service is of the same general character and the object of the service is a common one. The doctrine declared in a case[2] decided by the Supreme Court of the United States has created some conflict, and, as we venture to say, brought error into some of the decisions,[3] but the case to which we refer can not be regarded as expressing the rule which now prevails in the federal courts. We can not perceive how the doctrine

Reynolds, (Tex. Civ. App.) 30 S. W. R. 846; Salem, etc., Co. *v.* Chastain, 9 Ind. App. 453, s. c. 36 N. E. R. 910; Oerllich *v.* Hayes, 28 N. Y. Supp. 579. The authorities referred to in a preceding note asserting that a foreman, although he has power to hire and discharge employes, is not a fellow-servant are, of course, fully in line with those here cited upon the general question.

[1] Frazier *v.* Pennsylvania, etc., R. Co., 38 Pa. St. 104, s. c. 80 Am. Dec. 467; Wallis *v.* Morgan's, etc., R. Co., 38 La. Ann. 156; Houston, etc., R. Co. *v.* Myers, 55 Tex. 110, s. c. 8 Am. & Eng. R. Cas. 114; Sherman *v.* Rochester, etc., R. Co., 17 N. Y. 153; Kansas, etc., R. Co. *v.* Peavy, 29 Kan. 169, s. c. 11 Am. & Eng. R. Cas. 260; Abell *v.* Western, etc., R. Co., 63 Md. 433, s. c. 21 Am. & Eng. R. Cas. 503; Pittsburgh, etc., R. Co. *v.* Lewis, 33 Ohio St. 196; East Tennessee, etc., R. Co. *v.* Rush, 15 Lea 145, s. c. 25 Am. & Eng. R. Cas. 502; Jordon *v.* Wells, 3 Woods (U. S.) 527; Henry *v.* Lake Shore, etc., R. Co., 49 Mich. 495; Paulmier *v.* Erie, etc., R. Co., 34 N. J. Law 151; Alabama, etc., R. Co. *v.* Waller, 48 Ala. 459; Northern Pac. R. Co. *v.* Hogan, 63 Fed. R. 102; Becker *v.* Baltimore, etc., R. Co., 57 Fed. R. 188; Newport News, etc., R. Co. *v.* Howe, 52 Fed. R. 362; New Jersey, etc., R. Co. *v.* Young, 49 Fed. R. 723; Baltimore, etc., R. Co. *v.* Andrews, 50 Fed. R, 728.

[2] Railroad Co. *v.* Ross, 112 U. S. 377, s. c. 5 Sup. Ct. R. 184. The case above mentioned is often cited under the title of Chicago, etc., R. Co. *v.* Ross.

[3] Henchman *v.* Mackey, 35 Fed. R. 353; Mealman *v.* Union, etc., R. Co., 37 Fed. R. 189; Howard *v.* Denver, etc., R. Co., 26 Fed. R. 837, s. c. 24 Am. & Eng. R. Cas. 448; Garrahy *v.* Kansas City, etc., R. Co., 25 Fed. R. 258; Van Wickle *v.* Manhattan, etc., R. Co., 32 Fed. R. 278; Van Avery *v.* Union, etc., R. Co., 35 Fed. R. 40; Naylor *v.* New York, etc., Co., 33 Fed. R. 801. But with the virtual overthrow of the doctrine of the Ross case many of the decisions (the federal decisions of course) are left foundationless as authority.

which declares that employes of the same train are not fellow-servants can be upheld without violating the principle that the details of operating a railroad do not pertain to or form part of the master's duty. Under the rule which we have stated, conductors, engineers, firemen, brakemen and baggage-masters of the same train are fellow-servants.[1] There are cases which apply what is sometimes called the "doctrine of subordination" to trainmen performing service on the same train.[2] Conductors are usually considered in the line of decisions just referred to as superiors, and not as fellow-servants, for which heresy the Ross case, so often referred to, is to a great extent responsible. But even those courts which recognize and enforce the "doctrine of subordination" hold that employes on the same train of the same grade, as, for instance, brakemen, are fellow-servants.[3]

§ 1331. **Trainmen operating different trains.**—It seems to us that the rule must be the same whether the trainmen are

[1] Smith *v.* Potter, 46 Mich. 258, s. c. 2 Am. & Eng. R. Cas. 140; Rodman *v.* Michigan, etc., R. Co., 55 Mich. 57, s. c. 17 Am. & Eng. R. Cas. 521; Dow *v.* Kansas City, etc., R. Co., 8 Kan. 642; Atchison, etc., R. Co. *v.* Moore, 29 Kan. 632, s. c. 11 Am. & Eng. R. Cas. 243; Hayes *v.* Western, etc., R. Co., 3 Cush. 270; Kerlin *v.* Chicago, etc., R. Co., 50 Fed. R. 185; Howard *v.* Railway Co., 26 Fed. R. 837; Southern, etc., R. Co. *v.* McGrill, (Ariz.) 44 Pac. R. 302; Ragsdale *v.* Memphis, etc., R. Co., 3 Baxter (Tenn.) 426; Slater *v.* Jewett, 85 N. Y. 161, s. c. 39 Am. R. 627; Johnston *v.* Pittsburgh, etc., R. Co., 114 Pa. St. 443; Baltimore, etc., Co. *v.* Atlanta, etc., Co., 69 Fed. R. 358; Robinson *v.* Houston, etc., R. Co., 46 Tex. 540; Chicago, etc., R. Co. *v.* Doyle, 60 Miss. 977, s. c. 8 Am. & Eng. R. Cas. 171; St. Louis, etc., R. Co. *v.* Needham, 63 Fed. R. 107.

[2] Cincinnati, etc., R. Co. *v.* Palmer, (Ky.) 33 S. W. R. 199; Louisville, etc., R. Co. *v.* Moore, 83 Ky. 675; Volz *v.* Railway Co., 95 Ky. 188, s. c. 24 S. W. R. 119; Louisville, etc., R. Co. *v.* Collins, 2 Duvall, (Ky.) 118; Chicago, etc., R. Co. Moranda, 108 Ill. 576; Louisville, etc., R. Co. *v.* Moore, 83 Ky. 675, s. c. 24 Am. & Eng. R. Cas. 443; Louisville, etc., R. Co. *v.* Brooks, 83 Ky. 129; Little Miami, etc., R. Co., *v.* Stephens, 20 Ohio 415; Madden *v.* Chesapeake, etc., R. Co., 28 W. Va. 610; Moon *v.* Richmond, etc., R. Co., 78 Va. 745, s. c. 17 Am. & Eng. R. Cas. 531; Richmond, etc., R. Co. *v.* Williams, 86 Va. 165, s. c. 9 S. E. R. 990; Northern Pac. R. Co. *v.* O'Brien, 1 Wash. 599, s. c. 21 Pac. R. 32; Boatwright *v.* Northeastern, etc., R. Co., 25 S. Car. 128. See Central, etc., R. Co. *v.* De Bray, 71 Ga. 406; Richmond, etc., R. Co. *v.* Williams, 86 Va. 165, s. c. 9 S. E. R. 990.

[3] Chicago, etc., R. Co. *v.* Howard, 45 Neb. 570, s. c. 63 N. W. R. 872.

engaged on the same train or on different trains. There is, as we think, no valid reason for discriminating between cases where the employes are engaged in operating the same train and cases where they are engaged in operating different trains. In both cases they are employed in the same line of service and by a common master. The weight of authority preponderates very strongly in favor of the doctrine that trainmen, although employed on different trains, are fellow-servants,[1] but there is some conflict of authority upon the question.[2]

§ 1332. **Trainmen and switchmen and laborers and sectionmen.**—The rule supported by the weight of authority is that sectionmen and trainmen are fellow-servants in all matters relating to the details of operating a railroad.[3] But this rule

[1] Wheatley *v.* Delaware, etc., R. Co., (Del.) 30 Atl. R. 660; Herrington *v.* Lake Shore, etc., R. Co., 83 Hun 365, s. c. 31 N. Y. Supp. 910; Wright *v.* New York, etc., R. Co., 25 N. Y. 562; Pittsburgh, etc., R. Co. *v.* Devinney, 17 Ohio St. 197; Van Avery *v.* Union Pac. R. Co., 35 Fed. R. 40; Au *v.* New York, etc., R. Co., 29 Fed. R. 72; McMaster *v.* Illinois Cent. R. Co., 65 Miss. 264, s. c. 4 So. R. 59, 7 Am. St. R. 653; Relyea *v.* Kansas City, etc., R. Co., 112 Mo. 86, s. c. 20 S. W. R. 480, 18 L. R. A. 817; Baltimore, etc., R. Co. *v.* Andrews, 50 Fed. R. 728; Norfolk, etc., R. Co. *v.* Donnelly, 88 Va. 853; Wright *v.* New York, etc., R. Co., 25 N. Y. 562. See Vick *v.* New York, etc., R. Co., 95 N. Y. 267, s. c. 47 Am. R. 36.

[2] Northern Pac. R. Co. *v.* Poirier, 67 Fed. 881; Kentucky, etc., R. Co. *v.* Ackley, 87 Ky. 278, s. c. 8 S. W. R. 691. See, Madden *v.* Chesapeake, etc., R. Co., 28 W. Va. 610, s. c. 57 Am. R. 695; Howard *v.* Denver, etc., R. Co., 26 Fed. R. 837; Chicago, etc., R. Co. *v.* Lundstrom, 16 Neb. 254; Coleman *v.* Wilmington, etc., R. Co., 25 So. Car. 446. The conclusion reached in Northern Pac. R. Co. *v.* Poirier, *supra*, is correct upon the ground that the agent in general charge of the movement of trains was negligent, but we think it is incorrectly held that the trainmen of the different trains were not fellow-servants.

[3] Cumberland, etc., R. Co. Scally, 27 Md. 589; Gillshannon *v.* Stony Brook, etc., R. Co., 10 Cush. 228; McGowan *v.* St. Louis, etc., R. Co., 61 Mo. 528; Loranger *v.* Lake Shore, etc., R. Co., (Mich.) 62 N. W. R. 137; Atchison, etc., R. Co. *v.* Martin, (N. Mex.) 34 Pac. R. 536; Northern Pac. R. Co. *v.* Hambly, 154 U. S. 349, s. c. 14 Sup. Ct. R. 983; Ohio, etc., R. Co. *v.* Tindall, 13 Ind. 366, s. c. 74 Am. Dec. 259; Missouri, etc., R. Co. *v.* Haley, 25 Kan. 35, s. c. 5 Am. & Eng. R. Cas. 594; Southern, etc., R. R. Co. *v.* McGill, (Ariz.) 44 Pac. R. 302; Miller *v.* Railway Co., 24 Ill. App. 326; Heine *v.* Chicago, etc., R. Co., 58 Wis. 525; Elliot *v.* Chicago, etc., R. Co., 5 Dak. 523, s. c. 41

does not apply where the master's duty is devolved upon such employes. Some of the courts, however, hold that laborers and workmen engaged on the track are not the fellow-servants of trainmen,[1] while other cases hold that while going to their work they are fellow-servants of the employes engaged in operating trains.[2] Switchmen and trainmen are generally held to be fellow-servants.[3] It is, indeed, safe to affirm that upon

N. W. R. 758; Wilson *v.* Madison, etc., R. Co., 18 Ind. 226; Lawless *v.* Connecticut, etc., R. Co., 136 Mass. 1, s. c. 18 Am. & Eng. R. Cas. 96; Card *v.* Eddy, 129 Mo. 510, s. c. 28 S. W. R. 979; Norfolk, etc., R. Co. *v.* Nuckols, 91 Va. 193, s. c. 21 S. E. R. 342; St. Louis, etc., R. Co. *v.* Shackelford, 42 Ark. 417; Gormley *v.* Ohio, etc., R. Co., 72 Ind. 31, s. c. 5 Am. & Eng. R. Cas. 581; O'Connell *v.* Baltimore, etc., R. Co., 20 Md. 212, s. c. 83 Am. Dec. 549. See Neal *v.* Northern Pac. R. Co., 57 Minn. 365, s. c. 59 N. W. R. 312; Watts *v.* Hart, 7 Wash. 178, s. c. 34 Pac. R. 423, 771.

[1] Union, etc., R. Co. *v.* Erickson, 41 Neb. 1, s. c. 59 N. W. R. 347; Swadley *v.* Missouri, etc., R. Co., 118 Mo. 268, s. c. 24 S. W. R. 140; McGill *v.* Southern, etc., R. Co., (Ariz.) 33 Pac. R. 821; Dobbin *v.* Richmond, etc., R. Co., 81 N. Car. 446, s. c. 31 Am. R. 512; Chicago, etc., R. Co. *v.* Lundstrom, 16 Neb. 254, s. c. 49 Am. R. 718; Burlington, etc., R. Co. *v.* Crockett, 19 Neb. 138, s. c. 24 Am. & Eng. R. Cas. 390; McKenna *v.* Missouri, etc., R. Co., 54 Mo. App. 161; Howard *v.* Delaware, etc., Canal Co., 40 Fed. R. 195, s. c. 6 L. R. A. 75, 41 Am. & Eng. R. Cas. 473; Chicago, etc., R. Co. *v.* Kelly, 127 Ill. 637, s. c. 21 N. E. R. 203. See Haney *v.* Pittsburgh, etc., R. Co., 38 W. Va. 570, s. c. 18 S. E. R. 748.

[2] Abend *v.* Terre Haute, etc., R. Co., 111 Ill. 202. See Peoria, etc., R. Co. *v.* Rice, 144 Ill. 227, s. c. 33 N. E. R. 951; Chicago, etc., R. Co. *v.* Kelly, 127 Ill. 637, s. c. 21 N. E. R. 203; Chicago, etc., R. Co. *v.* Gross, 35 Ill. App. 178, s. c. 133 Ill. 37, 24 N. E. R. 563; North Chicago Rolling Mill Co. *v.* Johnson, 114 Ill. 57, s. c. 29 N. E. R. 186; Ellington *v.* Beaver, etc., Co., 93 Ga. 53, 19 S. E. R. 21; Austin, etc., R. Co. *v.* Beatty, 6 Tex. Civ. App. 650, s. c. 24 S. W. R. 934; Louisville, etc., R. Co. *v.* Hawthorn, 147 Ill. 226, s. c. 35 N. E. R. 534; White *v.* Kennon, 83 Ga. 343, s. c. 9 S. E. R. 1082.

[3] Rutledge *v.* Missouri, etc., R. Co., 123 Mo. 121, s. c. 27 S. W. R. 327; Smith *v.* Memphis, etc., R. Co., 18 Fed. R. 304; Naylor *v.* New York, etc., R. Co., 33 Fed. R. 801; Fowler *v.* Chicago, etc., R. Co., 61 Wis. 159, s. c. 17 Am. & Eng. R. Cas. 536; Satterly *v.* Morgan, 35 La. Ann. 1166; Roberts *v.* Chicago, etc., R. Co., 33 Minn. 218; Dealey *v.* Philadelphia, etc., R. Co., (Pa. St.) 21 W. N. C. 45, s. c. 4 Atl. R. 170; Miller *v.* Southern, etc., R. Co., 20 Ore. 285, s. c. 26 Pac. R. 70, 43 Alb. L. J. 354; Guthrie *v.* Southern, etc., R. Co., (Ore.) 26 Pac. R. 76; Chicago, etc., R. Co. *v.* Touhy, 26 Ill. App. 99; Slattery *v.* Toledo, etc., R. Co., 23 Ind. 81; Roberts *v.* Chicago, etc., R. Co., 33 Minn. 218. See, generally, Fagundes *v.* Central, etc., R. Co., 79 Cal. 97, s. c. 21 Pac. R. 437, 3 L. R. A. 824.

principle, as well as according to the weight of authority, employes whose duties bring them together in relation to the running and movement of trains, whether they are track-walkers, track-repairers, bridgemen or laborers, are fellow-servants.[1] Even those courts which act upon the department theory, except a few courts which take a very extreme view of the question, recognize the general rule stated, but some of the courts decline to lay down any general rules, asserting that each case must be determined on its particular facts.

§ 1333. **Recent federal cases.**—Since the preparation of a great part of the text of this chapter the Supreme Court of the United States has made two decisions which completely overthrow some of the federal cases criticised by us. The decisions of the Supreme Court to which we refer[2] practically deny much of

[1] East Tennessee, etc., R. Co. *v.* Rush, 15 Lea 145; Schultz *v.* Chicago, etc., R. Co., 67 Wis. 616, s. c. 58 Am. R. 881; Easton *v.* Houston, etc., R. Co., 32 Fed. R. 893; Parrish *v.* Pensacola, etc., R. Co., 28 Fla. 251, s. c. 9 So. R. 696; Spencer *v.* Ohio, etc., R. Co., 130 Ind. 181, s. c. 29 N. E. R. 915; International, etc., R. Co. *v.* Ryan, 82 Tex. 565, s. c. 18 S. W. R. 219; Parker *v.* Hannibal, etc., R. Co., 109 Mo. 362, s. c. 19 S. W. R. 1119, 35 Cent. L. J. 187, 46 Alb. L. J. 286; Wellman *v.* Oregon, etc., R. Co., 21 Ore. 530, s. c. 28 Pac. R. 625; Corona *v.* Galveston, etc., R. Co., (Tex.) 17 S. W. R. 384; Rose *v.* Gulf, etc., R. Co., (Tex.) 17 S. W. R. 789; Mele *v.* Delaware, etc., R. Co., 14 N. Y. Supp. 630; Knahtla *v.* Oregon, etc., R. Co., 21 Ore. 136, s. c. 27 Pac. R. 91; Unfried *v.* Baltimore, etc., R. Co., 34 W. Va. 260, s. c. 12 S. E. R. 512; St. Louis, etc., R. Co. *v.* Triplett, 54 Ark. 289, s. c. 15 S. W. R. 831, 11 L. R. A. 773; Higgins *v.* Missouri, etc., R. Co., 104 Mo. 413, s. c. 16 S. W. R. 409; Corcoran *v.* Delaware, etc., R. Co., 126 N. Y. 673, s. c. 27 N. E. R. 1022; Ford *v.* Lake Shore, etc., R. Co., 117 N. Y. 638, s. c. 41 Am. & Eng. R. Cas. 369; Waller *v.* Southwestern, etc., R. Co., 2 Hurl. & C. 102; Wilson *v.* Madison, etc., R. Co., 18 Ind. 226; Capper *v.* Louisville, etc., R. Co., 103 Ind. 105; Cassiday *v.* Maine Cent. R. Co., 76 Me. 488; Seaver *v.* Boston, etc., R. Co., 14 Gray 466; Chicago, etc., R. Co. *v.* Geary, 110 Ill. 383; Kirk *v.* Atlanta, etc., R. Co., 94 N. Car. 625, s. c. 55 Am. R. 621; Ewald *v.* Chicago, etc., R. Co., 70 Wis. 420, s. c. 36 N. W. R. 12. But see, Pike *v.* Chicago, etc., R. Co., 41 Fed. R. 95; Schlereth *v.* Missouri, etc., R. Co., 115 Mo. 87, s. c. 19 S. W. R. 1134; Torian's, Admr. *v.* Richmond, etc., R. Co., 84 Va. 192, s. c. 4 S. E. R. 339; Miller *v.* Missouri, etc., R. Co., 109 Mo. 350, s. c. 19 S. W. R. 58; Daniel *v.* Chesapeake, etc., R. S. W. Co., 36 W. Va. 397, s. c. 15 S. E. R. 162, 16 L. R. A. 383; Pool *v.* Southern, etc., R. Co., 7 Utah 303, s. c. 26 Pac. R. 654; Bean *v.* Western, etc., R. Co., 107 N. C. 731, s. c. 12 S. E. R. 600; Louisville, etc., R. Co. *v.* Davis, 91 Ala. 487, s. c. 8 So. R. 552.

[2] Northern Pacific R. Co. *v.* Peterson,

the doctrine asserted in the Ross case and assert a rule which is in line with that asserted by most of the state courts. The decisions referred to adjudge that the foreman of a gang of men is a fellow-servant, not a superior agent. The court said: "The general rule is that those entering the service of a common master become thereby engaged in a common service and are fellow-servants, and *prima facie* the common master is not liable for the negligence of one of his servants which has resulted in an injury to a fellow-servant."[1]

162 U. S. 346, s. c. 16 Sup. Ct. R. 843; Northern Pacific, etc., R. Co. *v.* Charless, 162 U. S. 359, s. c. 16 Sup. Ct. R. 848. The judgments in the cases of Northern Pacific *v.* Peterson, 51 Fed. R. 182, and Northern Pacific R. Co. *v.* Charless, 51 Fed. R. 562, were reversed. With the reversal of those cases many other cases must fall, for many are built on the Ross case, and, indeed, have gone much beyond it. The cases of Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, s. c. 13 Sup. Ct. R. 914; Howard *v.* Denver, etc., R. Co., 26 Fed. R. 837; Northern Pac. R. Co. *v.* Hambly, 154 U. S. 349, s. c. 14 Sup. Ct. 983, and Central Railroad Co. *v.* Keegan, 160 U. S. 259, s. c. 16 Sup. Ct. R. 269, are approved in the cases first cited. The case of Cleveland, etc., R. Co. *v.* Brown, 56 Fed. R. 804, heretofore cited, is overturned by the recent decisions and a decision in the same case has been announced declaring a radically different rule from that originally asserted. Cleveland, etc., R. Co. *v.* Brown, 73 Fed. R. 970.

[1] It was also held in Northern Pac. R. Co. *v.* Charless, 162 U. S. 359, 16 Sup. Ct. R. 848, that negligence in running a hand-car was not the negligence of the employer, inasmuch as it was "not the neglect of any duty which the company, as master, was bound itself to perform." This is in harmony with the doctrine that the master's duty does not extend to matters of detail in the operation of the railroad which we have heretofore discussed.

CHAPTER LII.

EMPLOYERS' LIABILITY ACTS.

§ 1334. Changes in the law of master and servant by legislation—Generally.
1335. Validity of statutes.
1336. Invalid legislation.
1337. Construction of employers' liability statutes—Generally.
1338. Construction of employers' liability acts—Definitions.
1339. The effect of the statute upon the contractual element in the relation of employer and employe.
1340. Railroad companies owning lines partly within the state and partly within other states.
1341. Railroad operated by receivers.
1342. The relation of master and servant must exist.
1343. Care required by statute of employer respecting machinery and appliances.
1344. Who are within the statute.
1345. Assumption of risks—Effect of the statute.
§ 1346. Who are fellow-servants under employers' liability acts.
1347. Defects in appliances or machinery.
1348. Latent defects—Rule under the statute.
1349. Rule where the defect is not attributable to the negligence of the employer.
1350. Presumption of negligence.
1351. Selection of co-employes.
1352. Superintendents within the meaning of the employers' liability acts.
1353. What constitutes negligence in superintendence.
1354. Cars—Trains—Meaning of term "cars" as used in statutes enlarging liabilities of railroad companies.
1355. Use and operation of railway—Meaning of term.
1356. "Charge and control."
1357. Contributory negligence—Doctrine of as affected by the statute.
1358. Contracts waiving right of action invalid.

§ 1334. **Changes in the law of master and servant by legislation—Generally.**—In England and in many of the American states great changes in the law of master and servant have been made by legislative enactments. The statutes of the different states differ in many respects but all proceed upon the

same general lines. These statutes are usually denominated "Employers' Liability Acts,"[1] and some of them limit the right of contract and essentially, as it seems to us, violate the provisions of the constitution. The courts, however, have been strongly inclined to sustain laws regulating the subject of master and servant, and have upheld statutes that are certainly of questionable validity. But the courts have in some cases refused to sustain legislation upon this subject and overthrown statutes which unduly abridged the right of contract.[2] Many duties have been added to those imposed upon the employer by the common law, and the obligations and liabilities of classes of employers enlarged and increased.[3] While the statutes work radical changes in the law of master and servant and greatly abridge the defense of common employment they do not, as a general rule, entirely abrogate it, for such statutes are to be construed according to the ordinary canons of statutory construction, and under those canons the common law rules may be considered in connection with the statute and are not to be regarded as swept away unless the statute expressly or impliedly so provides.[4] It has been held that it is erroneous to charge the jury that a railroad company is liable "to any person in its employment." The doctrine of the case referred

[1] The term "Employers' Liability Acts" is used by us as applying generally to statutes enjoining duties upon the employer creating new obligations and adding new or additional liabilities.

[2] *Post*, § 1336.

[3] It has been held that a statute relating to railroad companies does not apply to street railway companies. Funk *v.* St. Paul, etc., R. Co., (Minn), 63 N. W. R. 1099. So, it has been held that a corporation chartered for the purpose of conducting the business of manufacturing lumber is not a railroad within the meaning of the statute, although it is authorized to use, and does use, locomotives and cars. Ellington *v.* Beaver Dam, etc., Co., 93 Ga. 53, s. c. 19 S. E. R. 21. See, also, Beeson *v.* Busenbark, 44 Kan. 669, s. c. 25 Pac. R. 48, 10 L. R. A. 839. In another case it was held that a railroad company operating several lines is within the statute. Moran *v.* Eastern, R. Co., 48 Minn. 46, s. c. 50 N. W. R. 930, citing Schneider *v.* Chicago, etc., R. Co., 42 Minn. 68, s. c. 43 N. W. R. 783.

[4] In Caron *v.* Boston, etc., R. Co., 164 Mass. 523, s. c. 42 N. E. R. 112, it was said: "The statute is to be fairly construed (Ryalls *v.* Mechanics' Mills, 150 Mass. 190, 22 N. E. R. 766), and, while it removes the defense of common employment in some cases it does not extinguish it altogether."

to we believe to be sound, for, as elsewhere indicated, we think it clear that the defense of common employment is not entirely extinguished but remains as at common law, except in so far as it is clearly taken away by the statute.[1]

§ 1335. **Validity of statutes.**—We have at another place referred to cases affirming that statutes declaring who shall not be deemed fellow servants and prescribing the duties and liabilities of employers are constitutional.[2] To the authorities cited others may be added.[3] It seems difficult in those states having constitutions prohibiting the enactment of local or special laws to support the decisions which adjudge valid statutes which apply only to railroad companies, since the singling out of one class of corporations appears very much as if it were special legislation. The reasoning by which the decisions are supported is that railroads are a peculiar class of corporations requiring legislation of a different character from that required by other corporations. It is also argued that such statutes meet "a particular necessity,"[4] and cases of what seems to us an essentially different nature are adduced in support of the legislation.[5] There is good ground for affirming that the reasoning is not sound for the subject of the legislation is the relation of master and servant and the law governing the contracts which create the relation ought, on principle, as we venture to say, to be the same as to all persons. The question, however, is settled so far as judicial decisions can settle

[1] Western, etc., R. Co. *v.* Vandiver, 85 Ga. 470, s. c. 11 S. E. R. 781. As bearing upon the construction of the Georgia statute the court cited Central Railroad *v.* Sears, 59 Ga. 436; Central Railroad Co. *v.* Kelly, 58 Ga. 107; Central Railroad Co. *v.* Kenney, 58 Ga. 485; Savannah, etc., R. Co. *v.* Barber, 71 Ga. 644; Central R. Co. *v.* Small, 80 Ga. 519, s. c. 5 S. E. R. 794.

[2] *Ante*, § 668, p. 968.

[3] Chicago, etc., R. Co. *v.* Pontious, 157 U. S. 209; Minneapolis, etc., R. Co. *v.* Herrick, 127 U. S. 210; Chicago, etc., R. Co. *v.* Stahley, 62 Fed. R. 363; Bucklew *v.* Central, etc., R. Co., 64 Iowa 603; Chicago, etc., R. Co. *v.* Pontious, 52 Kan. 264; McAunich *v.* Mississippi, etc., R. Co., 20 Iowa 338; Ditberner *v.* Chicago, etc., R. Co., 47 Wis. 138.

[4] Missouri Pacific R. Co. *v.* Mackey, 127 U. S. 205.

[5] Missouri Pacific R. Co. *v.* Humes, 115 U.S. 512; Barbier *v.* Connolly, 113 U. S. 27; Soon Hing *v.* Crowley, 113 U. S. 703.

it and such statutes must be regarded as constitutional.[1] It is held in a Minnesota case that a statute applying only to railroad companies, in order to be constitutional, must be confined to the "peculiar hazards incident to the use and operation of railroads." There is very great force in the reasoning of the court in the case referred to, and it seems to us that it should command respect and produce conviction, but the majority of the cases widely depart from the doctrine of the case under immediate mention, and in doing so, as we believe, run counter to just principles.[2]

§ 1336. **Invalid legislation.**—The legislatures of some of the states have enacted statutes so clearly in violation of the constitution that the courts have unhesitatingly overthrown them. Thus, a statute which makes it a criminal offense to employ an alien laborer has been held to be unconstitutional.[3] So, a statute which requires a corporation to furnish a discharged employe with a statement of the reasons for which he was discharged has been adjudged to violate the constitution and to be void.[4] It has been held that a statute which singles out a

[1] The cases which deny the power to limit the right to contract in cases of particular corporations seem to us to oppose the doctrine of the cases to which we have referred, and so do other cases. State *v.* Tolle, 71 Mo. 645; State *v.* Herrmann, 75 Mo. 340; State *v.* Goodwill, 33 W. Va. 179, s. c. 10 S. E. R. 285. *In re* Jacobs, 98 N. Y. 98; People *v.* Gillson, 109 N. Y. 389, s. c. 17 N. E. R. 343; Ritchie *v.* People, 155 Ill. 98, s. c. 40 N. E. R. 454; Sharer *v.* Pennsylvania Co., 71 Fed R. 931; State *v.* Julow, (Mo.) 31 S. W. R. 781; State *v.* Loomis, 115 Mo. 307, s. c. 22 S. W. R. 350; Godcharles *v.* Wigeman, 113 Pa. St. 431, 6 Atl. R. 354; Smith *v.* Louisville, etc., R. Co., 75 Ala. 449. See cases cited, *ante*, § 665. See, generally, Commonwealth *v.* Perry, 155 Mass. 117, s. c. 28 N. E. R. 1126; Cooley's Const. Lim., 391.

[2] Johnson *v.* St. Paul, etc., R. Co., 43 Minn. 222, s. c. 45 N. W. R. 156, 8 L. R. A. 419. In the case cited it was said: "It is sometimes loosely stated that special legislation is not class if all persons brought under its influence are treated alike under the same conditions. But this is only half the truth. Not only must it treat alike under the same conditions all who are brought within its influence, but in its classification it must bring within its influence all who are in the same condition."

[3] People *v.* Warren, 34 N. Y. Supp. 942.

[4] Wallace *v.* Georgia, etc., R. Co., 94 Ga. 732, s. c. 22 S. E. R. 579. In Crall *v.* Toledo, etc., R. Co., 7 Ohio Cir. Ct. 132, s. c. 34 Am. Law Register & Review, 635, it was held that the penalty provided by the statute could not be recovered by an employe, but no

class of corporations and requires the employer to limit a day's work to a specified number of hours is invalid.[1] In another case it was held that a statute which prohibited the employment of females by one class of employers was unconstitutional because it was a special law.[2] In a Missouri case a statute making it unlawful for an employer to require an employe to withdraw from a labor organization was held to be unconstitutional.[3] In many other cases laws have been held void upon the ground that they violate the constitutional provisions protecting the right of contract and are special laws within the prohibition of the constitution.[4]

§ 1337. **Construction of employer's liability statutes—Generally.**—Many of the cases give a very liberal construction to statutes enlarging the liability of employers, holding, that, as in favor of employes, such statutes are remedial and are to be liberally construed so as to advance the remedy.[5] But such statutes are in derogation of the common law, add duties and increase liabilities, so that it seems to us that while the construction is not to be technically strict there is no valid reason for construing them with the same liberality that statutes truly remedial are construed. Such statutes as those we are considering do not simply create new remedies but, on the contrary, they create new rights and provide for new obligations

decision as to the validity of the statute was given.

[1] *In re* Eight-Hour Bill, 21 Colo. 29, s. c. 39 Pac. R. 328; Low *v.* Rees Printing Co., 41 Neb. 127, s. c. 59 N. W. R. 362; Wheeling, etc., Co. *v.* Gilmore, 8 Ohio Cir. C. 658, s. c. 1 Ohio Dec. 390.

[2] Ritchie *v.* People, 155 Ill. 98, s. c. 27 Chicago Legal News, 270, 40 N. E. R. 454.

[3] State *v.* Julow, (Mo.) 31 S. W. R. 781. In State *v.* Nelson, (Ohio St.) 39 N. E. R. 22, 10 Lewis' Am. R. R. & Corp. R. 771, it was held that a statute requiring screens to be put up for the protection of motormen on street railways was valid, but that case is a type of a different class of cases from those referred to in the text. See State *v.* Hoskins, 60 Minn. 168, s. c. 59 N. W. R. 545.

[4] *Ante*, §§ 660, 665. Janes *v.* Reynolds, 2 Tex. 250; Wynehamer *v.* People, 13 N. Y. 378; Vanzant *v.* Vaddel, 2 Yerg. 259; Ramsey *v.* People, 142 Ill. 380, s. c. 32 N. E. R. 364; Harding *v.* People, (Ill.) 43 N. E. R. 624.

[5] Gibbs *v.* Great Western, etc., R. Co., L.R.12 Q. B. D. 208; Ryalls *v.* Mechanics' Mills, 150 Mass. 190; Coughlin *v.* Tow Boat Co., 151 Mass. 92; Clark *v.* Merchants, etc., 151 Mass. 352.

which were unknown to the common law. It is going far enough, as we think, to say that such statutes shall be reasonably construed according to the ordinary canons of construction, and it is going too far to give them a liberal construction upon the theory that they are to be regarded as purely remedial statutes.[1] If statutes such as those we are dealing with simply affected the remedy it would apply to pending cases, but certainly it will not be seriously insisted that they have any such effect, for to give them such an effect would be to add obligations not existing when the right of action accrued. Such statutes can not have a retroactive operation but can only operate prospectively.[2] If the relation of master and servant is created, it must, as it seems to us, be governed by the law in force at the time the relation is created, except where, after a change of the law, the relation is continued. We suppose that if the relation continues after the enactment of a statute changing the obligations and liabilities of employers and employes the rights of parties would be determined upon the rules of law prescribed by the statute as to accidents occurring subsequent to the enactment of the statute, but as to accidents occurring prior to the enactment of the statutes the rights of the parties would be determined by the rules of the common law.

§ 1338. **Construction of employers' liability acts—Definitions.**—The courts have often been called upon to define the meaning of terms employed by the legislature in statutes regulating the subject of employer and employe, and we shall in

[1] In Beeson *v.* Busenbark, 44 Kan. 669, s. c. 10 L. R. A. 839, the court quoted the familiar statement that: "As a rule of exposition statutes are to be construed in reference to the principles of the common law, for it is not to be presumed that the legislature intended to make any innovation further than the case absolutely required. The law rather infers that the act did not intend to make any alteration other than what is specified and besides what has been plainly announced, for if the legislature had that design it is natural that they would have expressed it." The court cited the cases of Missouri, etc., R. Co. *v.* Haley, 25 Kan. 35; Missouri Pacific R. Co. *v.* Mackey, 33 Kan. 298; Bucklew *v.* Central, etc., R. Co., 64 Iowa 603; Kansas, etc., R. Co. *v.* Fitzsimmons, 18 Kan. 34; St. Louis, etc., R. Co. *v.* Willis, 38 Kan. 330.

[2] See Alabama, etc., R. Co. *v.* Carroll, 97 Ala. 126, s. c. 11 So. R. 803.

this section refer to some of the cases in which definitions are given, but shall do so briefly, for we have touched upon the subject in several other places. It has been held that a car attached to a trolley and propelled by steam over rails is not "a locomotive engine" within the meaning of the statute.[1] A locomotive in a roundhouse, although resting on rails, but temporarily in the roundhouse for the purpose of being repaired is not a locomotive "upon a railroad."[2] Cars connected in a train have been held to be machinery,[3] but this seems to us a questionable ruling. The term "ways and works," has been held not to embrace temporary structures.[4] But it has been held that staging used by workmen in the discharge of the duties of their service was part of the employer's "ways, works or machinery."[5] Foreign cars have been held to be part of employer's "ways, works or machinery" within the meaning of the statute.[6] The term "employer" means the person by whom the plaintiff was hired, although the hirer may make use of appliances owned by a third person. Thus where a municipal corporation hired a railroad train and used it on a temporary

[1] Murphy *v.* Wilson, 52 L. J. (Q. B.) 524.

[2] Perry *v.* Old Colony R. Co., 164 Mass. 296, s. c. 41 N. E. R. 289. The court quoted from Thyng *v.* Fitchburg R. Co., 156 Mass. 18, the following: "The statute seems chiefly to contemplate the damages from a locomotive engine or train as a moving body, and to provide against the negligence of those who in whole or in part control its movements."

[3] Georgia, etc., R. Co. *v.* Brooks, 84 Ala. 138, s. c. 4 So. R. 289. See Seavly *v.* Central, etc., Co., 111 Mass, 540.

[4] Burns *v.* Washburn, 160 Mass. 457, s. c. 36 N. E. R. 199; Lynch *v.* Allyn, 160 Mass. 248, s. c. 35 N. E. R. 550, citing Howe *v.* Finch, 17 Q. B. D. 187; Willets *v.* Watt, L. R. (1892) 2 Q. B. 92; O'Connor *v.* Neal, 153 Mass. 281, s. c. 26 N. E. R. 857; May *v.* Whittier Machine Co., 154 Mass. 29, s. c. 27 N. E. R. 768; Regan *v.* Donovan, 159 Mass. 1, s. c. 33 N. E. R. 702, and denying Brannigan *v.* Robinson, L. R. (1892) 1 Q. B. 344. Upon the question whether a defect is obvious the cases of Griffin *v.* Railway Co., 124 Ind. 326, s. c. 24 N. E. R. 888, and Swanson *v.* City of Lafayette, 134 Ind. 625, s. c. 33 N. E. R. 1033, were cited. Upon the question of negligence of superintendent, Connolly *v.* City of Waltham, 156 Mass. 358, and Willets *v.* Watt, *supra*, were cited.

[5] Prendible *v.* Connecticut, etc., Co., 160 Mass, 131, s. c. 35 N. E. R. 675.

[6] Bowers *v.* Connecticut, etc., R. Co., 162 Mass. 312, s. c. 38 N. E. R. 508, citing Coffee *v.* New York, etc., R. Co., 155 Mass. 21, s. c. 28 N. E. R. 1128; Fay *v.* Minneapolis, etc., R. Co., 30 Minn. 231, s. c. 15 N. W. R. 241; Spaulding *v.* Flynt, etc., Granite Co., 159 Mass. 587; Alabama, etc., R. Co. *v.* Carroll, 97 Ala. 126.

track constructed on its own property, it was held to be engaged in operating a railroad, and that it was liable as the operator of a railroad to an employe who received an injury while riding on the train.[1] A connecting track used by the employer but owned by a different railroad company is held not to be one of its "ways,"[2] and a like ruling was made as to a track owned by a shipper.[3] The term "a person who is in superintendence" has been defined to mean "a person whose sole or principal duty is that of superintendence and who is not ordinarily engaged in manual labor."[4]

§ 1339. **The effect of the statute upon the contractual element in the relation of employer and employe.**—There is real difficulty in solving the question as to whether the provisions of the statute enter into the contract upon which the relation of employer and employe is based. If such statutes are to be regarded as simply inflicting penalties by way of punishment, then it is doubtless true that they do not enter into the contract, but if they are to be considered as providing new obligations, then, under familiar general rules, such provisions become factors in every contract creating the relation of master and servant. If such statutes simply prescribe penalties,

[1] Coughlan *v.* City of Cambridge, (Mass.) 44 N. E. R. 218, citing Hasty *v.* Sears, 157 Mass. 123, s. c. 31 N. E. R. 759; Ward *v.* New England Fibre Co., 154 Mass. 419, s. c. 28 N. E. R. 299; Clapp *v.* Kemp, 122 Mass. 481; Johnson *v.* Boston, 118 Mass. 114; Rourke *v.* Colliery Co., 2 C. P. Div. 205; Connolly *v.* City of Waltham, 156 Mass. 368, s. c. 31 N. E. R. 302; Hennessy *v.* City of Boston, 161 Mass. 502, s. c. 37 N. E. R. 668; Driscoll *v.* City of Fall River, 163 Mass. 105, s. c. 39 N. E. R. 1003; McCann *v.* City of Waltham, 163 Mass. 344.

[2] Trask *v.* Old Colony R. Co., 156 Mass. 298, s. c. 31 N. E. R. 6. The court cited approvingly, Roberts Employer's Liability, 249, 250.

[3] Engel *v.* New York, etc., R. Co., 160 Mass. 260, s. c. 35 N. E. R. 547. In the case cited it was suggested that the owner of the track, the shipper, might be liable and the court referred to the cases of Finnegan *v.* Gas Works Co., 158 Mass. 311, s. c. 34 N. E. R. 523; Osborne *v.* Morgan, 130 Mass. 102, 104. For other cases illustrating the meaning of the terms "ways, works, machinery and plant," see Brouillette *v.* Connecticut, etc., R. Co., 162 Mass. 198, s. c. 38 N. E. R. 507; Shea *v.* Wellington, 163 Mass. 364; Louisville, etc., Co. *v.* Pearson, 97 Ala. 211, s. c. 12 So. R. 176.

[4] Kellard *v.* Rooke, L. R. 21 Q. B. D. 365.

by way of punishment, then, under well-settled rules, they can have no extra territorial force, and yet it is very generally held that actions based upon the rights they create may be maintained in other states.[1] The federal courts have uniformly held that questions arising out of the relation of master and servant are questions of general law upon which the federal tribunals will not follow the state decisions if opposed to their convictions, but it is also held that where there is a state statute the federal courts will enforce it and adopt the construction given it by the state courts, although the rules it prescribes are opposed to the law as previously declared by those courts.[2] It is also held that the federal courts sitting in one state may enforce the right of an employe to recover damages given him by the statute of the state in which the accident occurred.[3] It is not easy to understand how these decisions can be supported, if the theory that employers' liability acts affect only the remedy or simply denounce penalties is correct. There is, we are persuaded, reason for affirming that the provisions of the statute do enter into the contract, but the decisions are probably against this view.[4] It does not follow from an affirmance of the proposition that the statutory provisions enter into the contract that the law of another state may not be of controlling influence; on the contrary, that law must, upon familiar principles, be the governing law so far as concerns the performance of the contract in the state where that law prevails.[5] If, for instance, a railroad company of Pennsylvania, extending

[1] In treating of the subject of the conflict of law we have referred to the authorities.

[2] Northern Pacific, etc., R. Co. *v.* Hogan, 63 Fed. R. 102; Bucher *v.* Cheshire, etc., R. Co., 125 U. S. 555; Detroit *v.* Osborne, 135 U. S. 492; Griffin *v.* Overman, etc., 61 Fed. R. 568.

[3] Texas, etc., R. Co. *v.* Cox, 145 U. S. 593, s. c. 12 Sup. Ct. R. 905, citing Dennick *v.* Railroad Co., 103 U. S. 11; and reviewing Willis *v.* Railroad Co., 61 Tex. 432; Railway Co. *v.* Richards, 68 Tex. 375, s. c. 4 S. W. R. 627; St. Louis, etc., R. Co. *v.* McCormick, 71 Tex. 660, s. c. 9 S. W. R. 540; Turner *v.* Cross, 83 Tex. 218, s. c. 18 S. W. R. 578; Railway Co. *v.* Collins, 84 Tex. 121, s. c. 19 S. W. R. 365.

[4] Alabama, etc., R. Co. *v.* Carrol, 97 Ala. 126, s. c. 11 So. R. 803, 38 Am. St. R. 163; Chicago, etc., R. Co. *v.* Doyle, 60 Miss. 977, 984.

[5] Whitford *v.* Panama, etc., R. Co., 23 N. Y. 465; Gray *v.* Jackson, 51 N. H. 9, s. c. 12 Am. R. 1.

through New York, requires the performances of duties in New York, the law of that state as to the performance of duties there is the law of the contract. It seems to us that the view we have outlined is the correct one, and that the decisions which hold that the statutes simply punish negligence are unsound.

§ 1340. **Railroad companies owning lines partly within the state and partly within other states.**—It has been held that a statute applying in general terms to railroad companies applies to all railroad companies any part of whose lines extend into the state where the injury complained of was received, "within or without the state."[1] One of the judges dissented, and with much force argued that the statute did not apply to injuries occurring in another state. In the same case it was held that the provision of the statute making the existence of a defect *prima facie* evidence of negligence governed although the accident occured in another state.[2]

§ 1341. **Railroads operated by receivers.**—There is conflict upon the question whether statutes defining the duties and liabilities of railroad companies to their employes apply to receivers operating railroads under order of court. There are cases directly affirming that they do,[3] but other cases positively assert that they do not.[4] We think that ordinarily such statutes do apply to receivers. A receiver to a great extent takes the corporate property and rights as it was held by the corporation and hence takes it subject to the restrictions and burdens imposed by law. If he undertakes to operate the rail-

[1] Pennsylvania *v.* McCann, (Ohio) 42 N. E. R. 768.

[2] Smith *v.* Wabash, etc., R. Co., 141 Ind. 92; Johnson *v.* Chicago, etc., R. Co., 91 Iowa 248, s. c. 59 N. W. R. 66; Knight *v.* Railroad Co., 108 Pa. St. 250; Bridges *v.* Asheville, etc., R. Co., 25 S. Car. 24, s. c. 3 S. E. R. 860. See *infra*, Conflict of Law.

[3] Hornsby *v.* Eddy, 56 Fed. R. 461, 5 C. C. A. 460; Rouse *v.* Hornsby, 67 Fed. R. 219. See Little *v.* Dusenbury, 46 N. J. Law 614; Murphy *v.* Holbrook, 20 Ohio St. 137; Paige *v.* Smith, 99 Mass. 395; Sloan *v.* Central, etc., R. Co., 62 Iowa 728, s. c. 11 Am. & Eng. R. Cas. 145.

[4] Campbell *v.* Cook, 86 Tex. 630, s. c. 26 S. W. R. 486; Turner *v.* Cross, etc., 83 Tex. 218; Clyde *v.* Richmond, etc., R. Co., 59 Fed. R. 394; Henderson *v.* Walker, 55 Ga. 481.

road he must do it upon the terms and conditions which the law prescribes, and the law as to the duty to employes operates upon him substantially as it did upon the railroad corporation to whose rights he succeeded.[1]

§ 1342. **The relation of master and servant must exist.**— In order to entitle an injured person to the benefit of an employers' liability act, the relation of employer and employe must exist at the time the injury is received. The effect of some of the statutes is to almost entirely abrogate the common law rule exonerating the master from liability for the negligence of a fellow-servant, but such statutes do not extend to persons not in the service of the employer, while the effect of other statutes is to abrogate the rule in the cases specified. It seems to us that the ordinary rules for the construction of statutes must apply to such legislative enactments as we are here considering, and that when specific cases are enumerated other cases are excluded.[2] It makes no difference in what capacity the servant is engaged, the master is liable for the negligence of a fellow-servant in those states where there is not an enumeration of the cases in which the employer shall be liable for the negligence of his employes.[3] A person who is sent by a contractor to perform service with workmen in his employment, is held to be an employe within the statute.[4] So it has been held that a minor is an employe, although his name is not on the pay-roll and his father receives his wages.[5] In another case it was held that a watchman who undertook to couple cars was an employe while engaged in that duty by direction of the conductor.[6] But whether the watchman was

[1] *Ante*, § 577, p. 815.

[2] Dixon *v.* Western Union Telegraph Co., 68 Fed. R. 630; Hittinger *v.* Westford, 135 Mass. 258.

[3] Larson *v.* Illinois, etc., R. Co., 81 Iowa 91, s. c. 58 N. W. R. 1076; Davie *v.* Cochrane, etc., Co., 164 Mass. 453, s. c. 41 N. E. R. 678, citing Linnehan *v.* Rollins, 137 Mass. 123; Harkins *v.* Sugar Refining, etc., Co., 122 Mass. 400; Morgan *v.* Sears, 159 Mass. 570, s. c. 35 N. E. R. 101; Reagan *v.* Casey, 160 Mass. 374, s. c. 36 N. E. R. 58.

[4] Wild *v.* Waygood, L. R. (1892) 1 Q. B. 783.

[5] Tennessee, etc. R. Co. *v.* Hayes, 97 Ala. 586, s. c. 12 So. R. 98, citing Wood Master and Servant, § 305, 14 Am. & Eng. R. Cas. 752.

[6] Georgia, etc., R. Co. *v.* Propst, 85

an employe or a mere volunteer, must, as we suppose, depend upon the authority of the conductor, for if the conductor had no authority to require the watchman to couple cars, the watchman was not an employe. The employer is not liable where the acts of negligence which caused the injury to the employe were committed prior to the time the relation of employer and employe began.[1]

§ 1343. **Care required by statute of employer respecting machinery and appliances.**—The rule under the statute is, as at common law, that the employer must exercise reasonable care to provide safe machinery and appliances and to keep them in a safe condition for use.[2] The employer is not bound to procure the best machinery. The statute does not require that the employer should discard machinery and appliances in order to procure new improved machinery or appliances.

§ 1344. **Who are within the statute.**—It is obvious that general rules can not be safely stated for determining who are and who are not within the statute, for the provisions of the statutes vary so much that what would be true under one statute would not be so under other statutes. We can not safely do much more than direct attention to the decisions of the courts. A brakeman injured by the negligence of an engineer in starting a train without giving a signal is entitled to recover provided he, the brakeman, is not guilty of contributory negligence.[3] The Georgia courts hold that the statute of that state is not limited to any particular class of employes[4] and that

Ala. 203, s. c. 4 So. R. 711; Georgia, etc., R. Co. *v.* Propst, 83 Ala. 518, s. c. 3 So. R. 764.

[1] O'Connor *v.* Rich, 164 Mass. 560, 42 N. E. R. 111, citing Killea *v.* Faxon, 125 Mass. 485; Moynihan *v.* Hills Co., 146 Mass. 586, s. c. 16 N. E. R. 574; Wilson *v.* Merry, L. R. 1 H. L. 326.

[2] O'Maley *v.* South Boston, etc., Co., 158 Mass. 135; Richmond, etc., R. Co. *v.* Bivins, 103 Ala. 142, s. c. 15 So. R. 515; Wilson *v.* Louisville, etc., R. Co., 85 Ala. 269, s. c. 4 So. R. 701.

[3] Kruse *v.* Chicago, etc., R. Co., 82 Wis. 568, s. c. 52 N. W. R. 755. See, generally, McKnight *v.* Chicago, etc., R. Co., 44 Minn. 141, s. c. 46 N. W. R. 294. See Morgan *v.* London, etc., Co., L. R. 12 Q. B. D. 201, 13 Q. B. D. 832, for a decision as to who is a workman within the meaning of the English statute. See, also, Jackson *v.* Hill & Co., L. R. 13 Q. B. D. 618.

[4] Thompson *v.* Central, etc., R. Co., 54 Ga. 509; Georgia Railroad *v.* Ivey, 73 Ga. 499; Georgia, etc., R. Co. *v.* Goldwire, 56 Ga. 196.

the statute is valid, but it seems to us that these courts go rather too far. In one of the reported cases it is held that a brakeman injured while shifting cars used by a steel company is not within a statute providing that an employe engaged in or about the roads, works, depots or premises of a railroad company assumes the risk of negligence by the employes of such company.[1] The ground upon which the decision was rested, shortly stated, is that the plaintiff was not on the premises of the railroad company. Where the work on which the employe is engaged is connected with the railroad only by irrelevant and immaterial circumstances "the case," it is said, "is not within the statute."[2] It has been held that a section man unloading ties from a car is within a statute imposing a liability for the negligence of fellow-servants.[3] The Canadian courts give rather a broader effect to the statutes than the American courts and indicate that all persons rendering any service are within the statute.[4] It is held that the case of a section man injured while engaged in loading a car with iron rails by the negligence of another section man in letting one of the rails fall is not within a statute giving a right of action to an employe for injuries from dangers peculiar to the operation of a railroad.[5] A wiper of engines is held to be within the Iowa statute and it is also held that a wiper who is discharging the duties of another employe is not to be regarded

[1] Spisak *v.* Baltimore, etc., R. Co., 152 Pa. St. 281, s. c. 25 Atl. R. 497. The court cited and distinguished Kirby *v.* Pennsylvania R. Co., 76 Pa. St. 506; Cummings *v.* Pittsburgh, etc., R. Co., 92 Pa. St. 82; Richter *v.* Pennsylvania Co., 104 Pa. St. 511; Christman *v.* Philadelphia, etc., R. Co., 141 Pa. St. 604, s. c., 21 Atl. R. 738; Ricard *v.* North Pennsylvania R. Co., 89 Pa. St. 193; Baltimore, etc., R. Co. *v.* Colvin, 118 Pa. St. 230, 12 Atl. R. 337.

[2] Spisak *v.* Baltimore, etc., R. Co., 152 Pa. St. 281, s. c. 25 Atl. R. 497; Richter *v.* Pennsylvania Co., 104 Pa. St. 511; Christman *v.* Philadelphia, etc., R. Co., 141 Pa. St. 604, s. c. 21 Atl. R. 738.

[3] Atchison, etc., R. Co. *v.* Brassfield, 51 Kan. 167, s. c. 32 Pac. R. 814.

[4] LeMay *v.* Canadian, etc., R. Co., 17 Ont. App. 293, s. c. 44 Am. & Eng. R. Cas. 627.

[5] Pearson *v.* Chicago, etc., R. Co., 47 Minn. 9, s. c. 49 N. W. R. 302; citing Lavallee *v.* St. Paul, etc. R. Co., 40 Minn. 249, s. c. 41 N. W. R. 974; Johnson *v.* St. Paul, etc., R. Co., 43 Minn. 222, s. c. 45 N. W. R. 156; Smith *v.* St. Paul, etc., R. Co., 44 Minn. 17,

as a volunteer.[1] A person employed by a railroad company to remove snow from its tracks is held to be within the provisions of a statute giving a right of action to employes who are engaged in the business of operating railroads, or, who are, by the nature of their employment, exposed to the hazards incident to moving trains.[2] It is held in several Iowa cases that an employe not engaged in duties connected with the movement of trains is not within the statute,[3] but there is confusion and conflict in the Iowa cases.[4] It has been held that a private detective in walking along the track, according to the directions of the company, is within the statute,[5] and it has also been held that a person working with a ditching machine transported on the cars of the company is an employe that the statute protects.[6]

§ 1345. **Assumption of risks—Effect of the statute.**—The courts generally hold that the common law doctrine of the assumption of risks is in some respects, but not in all, materially changed by the statutes enlarging the liabilities of employers. There can, of course, be no doubt that to a very great extent the common law doctrine that employes assume the risk

s. c. 46 N. W. R. 149. But see Blomquest *v.* Great Northern R. Co., (Minn.) 67 N. W. R. 804.

[1] Whalen *v.* Chicago, etc., R. Co., 75 Iowa 563, s. c. 38 Am. & Eng. R. Cas. 141. In a note to the case cited in the Am. & Eng. R. Cas. (p. 143), the Iowa statute is copied. It seems to us that some of the statements of the opinion in the case referred to upon the subject of the duty to volunteers are rather too broad.

[2] Smith *v.* Humeston, etc., R. Co., 78 Iowa 583, s. c. 43 N. W. R. 545, 41 Am. & Eng. R. Cas. 278, citing Deppe *v.* Chicago, etc., R. Co., 36 Iowa 52; Malone *v.* Burlington, etc., R. Co., 65 Iowa 417, 17 Am. & Eng. R. Cas. 644; Luce *v.* Chicago, etc., R. Co., 67 Iowa 75; Smith *v.* Burlington, etc., R. Co., 59 Iowa 73, 6 Am. & Eng. R. Cas. 149; Stroble *v.* Chicago, etc., R. Co., 70 Iowa 555, 28 Am. & Eng. R. Cas. 510.

[3] Potter *v.* Chicago, etc., R. Co., 46 Iowa 399; Schroeder *v.* Chicago, etc., R. Co., 41 Iowa 344; Smith *v.* Burlington, etc., R. Co., 59 Iowa 73, 6 Am. & Eng. R. Cas. 149.

[4] Haden *v.* Sioux City, etc., R. Co., (Iowa) 60 N. W. R. 537; Butler *v.* Chicago, etc., R. Co., 87 Iowa 206, s. c. 54 N. W. R. 208; *post*, § 1356.

[5] Pyne *v.* Chicago, etc., R. Co., 54 Iowa 223.

[6] Nelson *v.* Chicago, etc., R. Co., 73 Iowa 576. See, generally, the Iowa cases cited in note to this section, and also *post*, § 1356, note.

of injuries from the negligence of fellow-servants is essentially changed, although not in all the states entirely abrogated. Where the statute enumerates the cases in which the master shall be liable for the negligence of co-employes, the common law rule must, as we believe, still prevail as to the cases not enumerated. Some of the courts hold that the employe does not assume the risk from a breach of duty expressly enjoined by statute.[1] In our opinion both principle and authority require the conclusion that an employe who knows of defects and is aware of the danger from them, voluntarily continues in the service and makes no complaint, is not entitled to recover.[2] The safety of passengers and employes makes it the duty of railroad employes to make reasonable complaint where they have full knowledge of defects and possess the means and opportunity of complaining to their employer.

[1] Baddely *v.* Earl Granville, L. R. 19 Q. B. D. 423; Yarmouth *v.* France, L. R. 19 Q. B. D. 647; Thomas *v.* Quartermaine, L. R. 18 Q. B. D. 685; Weblen *v.* Ballard, L. R. 17 Q. B. D. 122; Mobile, etc., R. Co. *v.* Holborn, 84 Ala. 133; Highland Ave. R. Co. *v.* Walters, 91 Ala. 435, s. c. 8 So. R. 357. The later Alabama cases hold a doctrine essentially different from that asserted in the earlier cases, (Birmingham R. Co. *v.* Allen, 99 Ala. 359, s.c. 13 So. R. 8) and the cases of Mobile, etc., R. Co. *v.* Holborn, 84 Ala. 133, s. c. 4 So. R. 146; Highland Ave. R. Co. *v.* Walters, 91 Ala. 435, s. c. 8 So. R. 357, are overruled. The English cases are reviewed in Birmingham, etc., R. Co. *v.* Allen, and it is said that they go no further than to adjudge that mere knowledge of defects is not itself sufficient to defeat a recovery, but the knowledge may be such as to establish contributory negligence.

[2] Larkin *v.* New York, etc., R. Co., (Mass.) 44 N. E. R. 122; Malcom *v.* Fuller, 152 Mass. 160; Yarmouth *v.* France, 19 Q. B. D. 647; Ryalls *v.* Mechanics' Mills, 150 Mass. 190, s. c. 22 N. E. R. 766; Mellor *v.* Merchants, etc., Co., 150 Mass. 362, s. c. 23 N. E. R. 100; Louisville, etc., R. Co. *v.* Banks, 104 Ala. 508, s. c. 16 So. R. 547; Louisville, etc., R. Co. *v.* Stutts, 105 Ala. 368, s.c. 17 So. R. 29; O'Maley *v.* South Boston, etc., Co., 158 Mass. 135, s. c. 32 N. E. R. 1119; Toomey *v.* Donovan, 158 Mass. 232; Pingree *v.* Leyland, 135 Mass. 398; Moulton *v.* Gage, 138 Mass. 390; Gleason *v.* New York, etc., R. Co., 159 Mass. 68; Connelly *v.* Hamilton, etc., Co., 163 Mass. 156; Cassaday *v.* Boston, etc., R. Co., 164 Mass. 168, s. c. 41 N. E. R. 129; Sullivan *v.* Fitchburg R. Co., 161 Mass. 125; East Tennessee, etc., R. Co. *v.* Turvaville, 97 Ala. 122; Goldthwait *v.* Haverhill, etc., R. Co., 160 Mass. 554; Louisville, etc., R. Co. *v.* Hall, 91 Ala. 112, s. c. 8 So. R. 371; Lynch *v.* Boston, etc., R. Co., 159 Mass. 536, s. c. 34 N. E. R. 1072; Caron *v.* Boston, etc., R. Co., 164 Mass. 523, s. c. 42 N. E. R. 112; Lothrop *v.* Fitchburg, etc., R. Co., 150 Mass. 423, s. c. 23 N. E. R. 227; Boyle *v.* New York, etc., R. Co.,

§ 1346. **Who are fellow-servants under employers' liability acts.**—It is not possible to lay down general rules which will apply to all cases for the reason that there is a difference in the language of the various statutes and for the additional reason that there is a diversity of opinion. We shall, therefore, refer to the adjudged cases without special comment and shall not undertake to formulate general rules. In one of the cases it is held that under a statute providing that "all persons who are engaged in the common service of railway corporations working together at the same time and place are fellow-servants," a station agent is not the fellow-servant of trainmen.[1] Under the same statute it has been held that a hostler, whose duty it was to bring engines into a roundhouse and take them out when required, was the fellow-servant of a boiler washer whose duty it was to clean out the boiler.[2] A wiper in a roundhouse has been held not to be a fellow-servant with an employe engaged in unloading gravel,[3] and a wiper in a roundhouse has been held to be entitled to recover for injuries caused by the negligence of other employes.[4] Negligence of a brakeman has been held to make the company liable to a yard workman.[5] It is held that a foreman with authority to hire and discharge employes is a co-employe with the men who work under him within the meaning of the Iowa statute.[6] Under the Ohio

151 Mass. 102, s. c. 23 N. E. R. 827; Goddard *v.* McIntosh, 161 Mass. 253, s. c. 37 N.E. R. 169; Watts *v.* Boston Towboat Co., 161 Mass. 378, s. c. 37 N. E. R. 197. In Cassaday *v.* Boston, etc., R. Co., 164 Mass. 198, it was said: "On the question whether the plaintiff took the risk there is no difference whether the action is brought at common law or under the statute." The following cases and authorities were cited: Fisk *v.* Fitchburg R. Co., 158 Mass.238, s. c. 33 N. E. R. 510; Daigle *v.* Lawrence Manufacturing Co., 159 Mass. 378, s. c. 34 N. E. R. 458; Kleineist *v.* Kunhardt, 160 Mass. 230, s. c. 35 N. E. R. 458; Roberts Liability and Duty of Employers, 136, 146, 160, 161, 240; Buswell Personal Injuries, §§ 207, 209.

[1] Gulf, etc., R. Co. *v.* Calvert, (Tex. Civ. App.) 32 S. W. R. 246.

[2] Missouri, etc., R. Co. *v.* Whitaker, (Tex. Civ. App.) 33 S. W. R. 716.

[3] Nichols *v.* Chicago, etc., R. Co., 60 Minn. 319, s. c. 62 N. W. R. 386.

[4] Chicago, etc., R. Co. *v.* Pontious, 157 U. S. 209, s. c. 15 Sup. Ct. R. 585. See Chicago, etc., R. Co. *v.* Stahley, 62 Fed. R. 363, 11 C. C. A. 88.

[5] Promer *v.* Milwaukee, etc. R. Co., 90 Wis. 215, s. c. 63 N. W. R. 90.

[6] Houser *v.* Chicago, etc., R. Co., 60 Iowa 230, s. c. 46 Am. R. 65.

statute an engineer in charge of an engine is not a co-employe of a brakeman of another train but he is a superior of the fireman of the locomotive.[1] A person employed to carry water for workmen engaged in operating a train has been held to be within the protection of the statute.[2] The fellow-servant rule is not, as elsewhere shown, entirely abrogated, so that employes may still be co-employes and governed by the common law rule.[3]

§ 1347. **Defects in appliances or machinery—What are within meaning of the statute.**—Many of the statutes make the employer liable for defects in machinery and appliances, and the question as to what is a defect within the meaning of the statute has arisen in some of the cases. It is held that although machinery is perfect of its kind and in good repair, but unsuitable for the purpose for which employes were required to use it, there is nevertheless a defect within the meaning of the statute.[4] It has been held that where the draw-bar of an engine is placed too low there is a defect.[5] Temporary obstructions, as a stone on a scaffold, are not defects in "ways, works or machinery."[6] In some instances it has been held that whether a defect exists is a question of fact for the jury.[7]

[1] Cincinnati, etc., R. Co. *v.* Margrat, 51 Ohio St. 130, s. c. 37 N. E. R. 11.

[2] Missouri, etc., R. Co. *v.* Haley, 25 Kan. 35, s. c. 5 Am. & Eng. R. 594. For other cases under the Kansas statute see Union, etc., Co. *v.* Thomason, 25 Kan. 1, s. c. 5 Am & Eng. R. Cas. 589; Atchison, etc., R. Co. *v.* Koehler, 37 Kan. 463, s. c. 31 Am. & Eng. R. Cas. 312.

[3] McMaster *v.* Illinois Central R. Co., 65 Miss. 264, s. c. 4 So. R. 59; Chicago, etc., R. Co. *v.* Doyle, 60 Miss. 977, s. c. 8 Am. & Eng. R. Cas. 171.

[4] Geloneck *v.* Dean, etc., Co., (Mass.) 43 N. E. R. 85. The court said that: "An unsuitableness of ways, works or machinery for work intended to be done and actually done by means of them is a defect, within the meaning of the statute."

[5] Lawless *v.* Connecticut, etc., R. Co., 136 Mass. 1; Bowers *v.* Connecticut River, etc., R. Co., 162 Mass. 312, s. c. 38 N. E. R. 508.

[6] Carroll *v.* Willcutt, 163 Mass. 221, s. c. 39 N. E. R. 1016, citing Lynch *v.* Allyn, 160 Mass. 248, s. c. 35 N. E. R. 550; Burns *v.* Washburn, 160 Mass. 457, s. c. 36 N. E. R. 199; Prendible *v.* Connecticut Manufacturing Co., 160 Mass. 131, s. c. 35 N. E. R. 675. See *ante*, § 1338; McGiffin *v.* Palmer, etc., Co, L. R. 10 Q. B. D. 5.

[7] Graham *v.* Boston, etc., R. Co., 156 Mass. 4, s. c. 30 N. E. R. 359; Birmingham, etc., Co. *v.* Allen, 99 Ala. 359, s. c. 13 So. R. 8.

§ 1348. **Latent defects—Rule under the statute.**—The rule in regard to the employer's liability for latent defects is substantially the same under the statute as at common law. If the hidden defect is one not discoverable by reasonable care in performing the duty of inspection, the employer is not liable.[1] If, however, there is a duty to inspect, and that duty is not performed, the employer is liable, if the defect is such as a reasonably careful inspection would have disclosed.

§ 1349. **Rule where the defect is not attributable to the negligence of the employer.**—The common law, as we have seen, did not hold an employer liable for an injury to an employe resulting from a defect in machinery or appliances unless there was negligence on the part of the employer. As this was the settled rule of the common law and as the legislature is held to adopt statutes in view of the common law rules, we think it clear that the mere existence of a defect is not sufficient to charge the employer, except, perhaps, where the statute clearly provides otherwise. Silence upon the subject will not, in our judgment, exclude the rule of the common law, but, of course, an express statutory provision would do so.[2] The common law rule that the defect must be the proximate cause of the injury is enforced,[3] and in other instances reference is made to the common law so that the conclusion that the common law rule that the mere existence of a defect without evidence of negligence on the part of the employer is not enough

[1] See Coffee *v.* New York, etc., R. Co., 155 Mass. 21, s. c. 28 N. E. R. 1128; Ladd *v.* New Bedford Railroad Co., 119 Mass. 412; Louisville, etc., R. Co. *v.* Campbell, 97 Ala. 147, s. c. 12 So. R. 574.

[2] Walsh *v.* Whiteley, L. R., 21 Q. B. D. 371; Wilson *v.* Louisville, etc., R. Co., 85 Ala. 269, s. c. 4 So. R. 625; Seaboard, etc., R. Co. *v.* Woodson, 94 Ala. 143, s. c. 10 So. R. 87; United States, etc., Co. *v.* Weir, 96 Ala. 396. The cases to which we have referred are based on special statutory provisions but they show the full recognition given the common law rules.

[3] Brady *v.* Ludlow, etc., Co., 154 Mass. 468, s. c. 28 N. E. R. 901; Louisville, etc., R. Co. *v.* Binion, 98 Ala. 570, s. c. 14 So. R. 619; Tuck *v.* Louisville, etc., R. Co., 98 Ala. 150, s. c. 12 So. R. 168. In the latter case the court cited Mobile, etc., R. Co. *v.* Holborn, 84 Ala. 133, s. c. 4 So. R. 146; Louisville, etc., R. Co. *v.* Davis, 91 Ala. 487, s. c. 8 So. R. 552; Mobile, etc., R. Co. *v.* George, 94 Ala. 199, s. c. 10 So. R. 145.

to charge the employer is not excluded except where the statute makes the existence of the defect sufficient *prima facie* evidence of negligence. It is held that evidence of subsequent repairs is not competent upon the question of negligence on the part of the employer.[1] There can, of course, be no doubt that the general rules of pleading[2] and evidence apply to actions against employers under the statute except where they are changed by the statute. Thus the burden of proof on the question of the employer's negligence, no statutory provision to the contrary existing, is upon the employe.[3] The courts apply to the question of contributory negligence, so far as involves the burden of proof, the rule which prevailed at common law prior to the enactment of the statute.[4] As we have elsewhere shown, upon the question who has the burden of proof there is stubborn conflict of authority.

§ 1350. **Presumption of negligence.**—Some of the statutes provide that the occurrence of an accident resulting in injury to an employe raises a presumption of negligence on the part of the employe. It has been held that under such a statute

[1] Ashley *v.* Hart, 147 Mass. 573.

[2] Shinners *v.* Proprietors, etc., 154 Mass. 168, s. c. 28 N. E. R. 10. This is the common rule. Nalley *v.* Hartford, etc., R. Co., 51 Conn. 524; Terre Haute, etc., R. Co. *v.* Clem, 123 Ind. 15, s. c. 23 N. E. R. 965; Hodges *v.* Percival, 132 Ill. 53, s. c. 23 N. E. R. 423; Columbia, etc., R. Co. *v.* Hawthorne, 144 U. S. 202; Ely *v.* St. Louis, etc., R. Co., 77 Mo. 34. See authorities cited, note, Elliott's Roads and Streets, 647. See as to complaint or declaration, McNamara *v.* Logan, 100 Ala. 187, s. c. 14 So. R. 175; Louisville, etc., R. Co. *v.* Coulton, 86 Ala. 129, s. c. 5 So. R. 458.

[3] Regan *v.* Donovan, 159 Mass. 1, 33 N. E. R. 702; Louisville, etc., R. Co. *v.* Binion, 98 Ala. 570, s. c. 14 So. R. 619. In the first case cited the court said, speaking of the defendants, that: "Proof of mere knowledge on their part that the steps were movable, without any evidence to show that movable steps were unsafe in themselves or unsuitable for the place, or that the defendants knew or had reason to suppose that the owner would leave them insecure is not sufficient to sustain the burden of proof." See, also, Louisville, etc., R. Co. *v.* Campbell, 97 Ala. 147, s. c. 12 So. R. 574.

[4] Shea *v.* Boston, etc., R. Co., 154 Mass. 31, s. c. 27 N. E. R. 672, citing Hinckley *v.* Cape Cod R. Co., 120 Mass. 257; Crafts *v.* Boston, 109 Mass. 519; Guffin *v.* Boston, etc., R. Co., 148 Mass. 143, s. c. 19 N. E. R. 166. For cases holding burden on the defendant, Bromley *v.* Birmingham, etc., R. Co., 95 Ala. 397, s. c. 11 So. R. 341; Moffatt *v.* Tenney, 17 Colo. 189, s. c. 30 Pac. R. 348; Guffin *v.* Overman, etc., Co., 61 Fed. R. 568.

the presumption does not arise unless the plaintiff has shown that he was not guilty of contributory negligence.[1] We can not perceive upon what principle there can be a presumption of negligence on the part of the employer in the absence of a statute providing that the occurrence of an accident shall be *prima facie* evidence of negligence, for the established common law rule is that there is no such presumption, and a rudimental principle of law and logic is that "wrong is not to be presumed."

§ 1351. **Selection of co-employes.**—In some of the statutes it is provided that an employer shall not be liable for the negligence of a co-employe unless he has been guilty of negligence in selecting or keeping in service such co-employe. It has been held under such a statute that it is incumbent upon the plaintiff to prove that the co-employe was incompetent, and that the employer knew, or ought to have known, that the co-employe was incompetent.[2] This is substantially the common law rule but is not the rule under most of the statutes, for the general rule under those statutes is that care in the selection of co-employes will not exonerate the employer from liability.[3] In a case where a sectionman was injured while riding on a hand-car, by being pushed off the car, the decision was that

[1] Georgia, etc., R. Co. *v.* Cosby, (Ga.) 22 S. E. R. 912. See Maloy *v.* Port Royal, etc., R. Co., (Ga.) 22 S. E. R. 588. We have elsewhere referred to decisions holding that the common law doctrine of contributory negligence prevails unless clearly changed by statute. *Ante*, § 1315. See, also, Duval *v.* Hunt, 34 Fla. 85, s. c. 15 So. R. 876.

[2] Gier *v.* Los Angeles, etc., R. Co., 108 Cal. 129, s. c. 41 Pac. R. 22. But see Culver *v.* Alabama, etc., R. Co., (Ala.) 18 So. R. 827, for a decision holding the master liable, although he had used care in selecting fellow-servants. The statutes are, however, essentially different.

[3] Northern Pacific R. Co. *v.* Behling, 57 Fed. R. 1037, 6 C. C. A. 681; Unfried *v.* Baltimore, etc., R. Co., 34 W. Va. 260, s. c. 12 S. E. R. 512; Georgia, etc., R. Co. *v.* Brown, 86 Ga. 320, s. c. 12 S. E. R. 812; Hissong *v.* Richmond, etc., R. Co., 91 Ala. 514, s. c. 8 So. R. 776; Louisville, etc., R. Co. *v.* Markee, 103 Ala. 160, s. c. 15 So. R. 511; Rine *v.* Chicago, etc., R. Co., 100 Mo. 228, s. c. 12 S. W. R. 640, 41 Am. & Eng. R. Cas. 555. See, generally, Chambliss *v.* Mary Lee, etc., R. Co., 104 Ala. 665, s. c. 16 So. R. 572.

the railroad was liable under the statute.[1] A similar decision was made in an Alabama case.[2]

§ 1352. **Superintendents within the meaning of employers' liability acts.**—Under many of the statutes the question whether an employe is under superintendence or whether he receives an injury while acting in obedience to the orders or directions of a superintendent is often one of importance and difficulty. The term "superintendent" has, as a general rule, a wider meaning under an employers' liability act than that assigned it at common law. In some cases an employe occupying the position of a foreman and who would not be regarded as a superior agent or vice principal at common law is a superintendent under the statute in such a sense as to make the common master responsible for his negligence.[3] Under the Massachusetts statute a railroad company is held not to be liable for the errors of an employe although he does occasionally perform acts of superintendence.[4] In the case just referred to it is said:[5] "The law recognizes that an employe may have two duties, that he may be a superintendent for some purposes and also an ordinary workman, and that if negligent in the latter capacity the employer is not answerable." The familiar rule is that where a right is given by a statute a plaintiff who seeks to avail himself of such a right must make a case within the statute, and it is therefore correctly held that where the statute makes the liability of the employers depend upon the fact that the employe whose negligence caused the injury was a superintendent that fact must be affirmatively proved by the plaintiff.[6]

[1] Steffenson *v.* Chicago, etc., R. Co., 45 Minn. 355, s. c. 47 N. W. R. 1068. See, generally, Hall *v.* Chicago, etc., R. Co., 46 Minn. 439, s. c. 49 N. W. R. 239.

[2] Richmond, etc., R. Co. *v.* Hammond, 93 Ala. 181, s. c. 9 So. R. 577.

[3] Kansas City, etc., R. Co. *v.* Burton, 97 Ala. 240, s. c. 12 So. R. 88, 53 Am. & Eng. R. Cas. 115.

[4] Cashman *v.* Chase, 156 Mass. 342, s. c. 31 N. E. R. 4.

[5] In the case referred to the court cited: Shaffers *v.* General, etc., Navigation Co., L. R. 10 Q. B. D. 356; Osborne *v.* Jackson, L. R. 11 Q. B. D. 619; Kellard *v.* Rooke, L. R. 19 Q. B. D. 585, and L. R. 21 Q. B. D. 367.

[6] Fitzgerald *v.* Boston, etc., R. Co., 156 Mass. 293, s. c. 31 N. E. R. 7. In

§ 1353. **What constitutes negligence in superintendence.**—The plaintiff has the burden of proving in order to make a case under the statutes that the person whose negligence caused the injury was a superintendent and at the time the accident occurred was engaged in the duty of superintendence.[1] The negligence of a person in charge and control in the capacity of a superintendent may consist in the omission to use ordinary care to keep appliances, works and ways in a reasonably safe condition for use by employes whose duty is to work with such machinery or appliances.[2] The failure of an employe in charge or control to exercise ordinary care to make the place where other employes are required to work reasonably safe may constitute negligence,[3] and so negligence may consist in placing appliances in unsafe positions so as to endanger the safety of employes.[4] The superintendent is bound to exercise reasonable care and the employer can not escape liability for his negligence upon the ground that due care was exercised in employing him.[5]

§ 1354. **Cars—Trains—Meaning of term "cars" as used in statutes enlarging liabilities of railroad companies.**—The term

the case cited the court referred to Hodgkins *v.* Eastern R. Co., 119 Mass. 419; Connors *v.* Holden, 152 Mass. 598, s. c. 26 N. E. R. 137, and quoted with approval from a text writer the following: "The negligence complained of must occur not only during the superintendence but substantially in the exercise of it." Roberts Liability of Employers, 265, 266. See, also, Ashley *v.* Hart, 147 Mass. 573.

[1] *Ante*, §1352; Shaffers *v.* General, etc., Navigation Co., L. R. 10 Q. B. D. 356; Kellard *v.* Rooke, L. R. 19 Q. B. D. 585; Dantzler *v.* De Bardeleben, etc., Co., 101 Ala. 309, s. c. 14 So. R. 10; Shepard *v.* Boston, etc., R. Co., 158 Mass. 174 s. c. 33 N. E. R. 508, (citing Clifford *v.* Old Colony, etc., R. Co., 141 Mass. 564, 6 N. E. R. 751); McCauley *v.* Norcross, 155 Mass. 584, s. c. 30 N. E. R. 464. See Hennessy *v.* Boston, 161 Mass. 502, s. c. 37 N. E. R. 668; McPhee *v.* Scully, 163 Mass. 216; Shea *v.* Wellington, 163 Mass. 364; Osborne *v.* Jackson, L. R. 11 Q. B. D. 619.

[2] Seaboard, etc., Co. *v.* Woodson, 94 Ala. 143, s. c. 10 So. R. 87; Hall *v.* Posey, 79 Ala. 84; Louisville, etc., R. Co. *v.* Coulton, s. c. 86 Ala. 129, s. c. 5 So. R. 458; Western, etc., R. Co. *v.* Lazarus, 88 Ala. 453, s. c. 6 So. R. 877.

[3] Hennessy *v.* Boston, 161 Mass. 502, s. c. 37 N. E. R. 668.

[4] Collier *v.* Coggins, 103 Ala. 281, s. c. 15 So. R. 578; Kansas City, etc., R. Co. *v.* Burton, 97 Ala. 240.

[5] Malcom *v.* Fuller, 152 Mass. 160, s. c. 25 N. E. R. 83.

"cars" when employed in an employers' liablity act may be taken to mean any kind of a vehicle other than a locomotive or tender, used by a railroad company for the transportation of passengers, employes or property upon and along its tracks. The term is not confined to coaches nor to freight cars but embraces all kinds of cars. A hand-car is "a car" within the meaning of the statute.[1] A locomotive and one or more cars coupled to it constitute a train within the meaning of the Massachusetts statute,[2] but in order to constitute a train it is not necessary that the cars should be attached to a locomotive or that two or more cars should be coupled together at the precise time of the occurrence of the accident.[3] A single car on its way to be returned to its owner is held not to be part of the ways, works or machinery of a railroad company.[4]

§ 1355. **Use and operation of railway—Meaning of term.**—Some of the statutes use the term "any wrongs connected with the use and operation of any railway," and controversy has arisen as to the meaning to be ascribed to the term. In one of the cases where an employe engaged in elevating coal into a shed was injured, it was held that the plaintiff was not within the statute;[5] but in a later case, in the same court, a somewhat different view was taken, and it was held that a sectionman injured while using a hand-car was within the statute, and

[1] Kansas City, etc., R. Co. *v.* Crocker, 95 Ala. 412, s. c. 11 So. R. 262. See Richmond, etc., R. Co. *v.* Hammond, 93 Ala. 181, 9 So. R. 577. In the case first cited the court referred to the definitions of the word car given in Webster's dictionary and in the Century dictionary and among other things, said: "It is not necessary that the car be connected in any way with a locomotive, or with other cars forming a train."

[2] Dacey *v.* Old Colony R. Co., 153 Mass. 112, s. c. 26 N. E. R. 437.

[3] Devine *v.* Boston, etc., R. Co., 159 Mass. 348, s. c. 34 N. E. R. 539; Caron *v.* Boston, etc., R. Co., 164 Mass. 523, s. c. 42 N. E. R. 112. The rule under the English act is the same as that stated in the text. Cox *v.* Great Western, etc., R. Co., L. R. 9 Q. B. D. 106; Roberts Employers' Liability, (3rd ed.) 300.

[4] Coffee *v.* New York, etc., R. Co., 155 Mass. 21, s. c. 28 N. E. R. 1128, 48 Am. & Eng. R. Cas. 370.

[5] Stroble *v.* Chicago, etc., R. Co., 70 Iowa 555, s. c. 31 N. W. R. 63, citing Foley *v.* Chicago, etc., R. Co., 64 Iowa 644, s. c. 21 N. W. R. 124; Malone *v.* Burlington, etc., R. Co., 65 Iowa 417, s. c. 21 N. W. R. 756.

that the statute was not confined to cases of employes engaged in moving trains, as held in the earlier case.[1] The doctrine declared in the case last referred to was asserted in a case in which it was held that a sectionman injured while on a hand-car by his feet catching in the rails of the track was entitled to recover.[2]

§ 1356. **"Charge and control."**—It often becomes important to determine the meaning of the words "charge and control," for cases sometimes turn upon the meaning to be ascribed to those words. In one of the English cases it was suggested that probably the words are intended to mean different things, but there was no authoritative decision upon the question.[3] The Massachusetts decisions, however, hold the words to be "explanatory of each other."[4] The American cases hold that it is not necessary, in order to bring a case within the statute, that the "charge or control" should be permanent, but that it is sufficient to show that the "charge or control" was in the

[1] Larson *v.* Illinois Cent. R. Co., 91 Iowa 81, s. c. 58 N. W. R. 1076.

[2] Chicago, etc., R. Co. *v.* Artery, 137 U. S. 507, s. c. 11 Sup. Ct. R. 129. In the case cited the court reviewed the cases of Schroeder *v.* Chicago, etc., R. Co., 47 Iowa 375; Pyne *v.* Chicago, etc., R. Co., 54 Iowa 223, 6 N. W. R. 281; Smith *v.* Burlington, etc., R. Co., 59 Iowa 73, 12 N. W. R. 763; Malone *v.* Burlington, etc., Ry. Co., 61 Iowa 326, 16 N. W. R. 203; Foley *v.* Chicago, etc., R. Co., 64 Iowa 644, 21 N. W. R. 124; Malone *v.* Burlington, etc., R. Co., 65 Iowa 417, 21 N. W. R. 756; Luce *v.* Chicago, etc., R. Co., 67 Iowa 75, 24 N. W. R. 600; Matson *v.* Chicago, etc., R. Co., 68 Iowa 22; Stroble *v.* Railroad Co., 70 Iowa 555; Pierce *v.* Central, etc., Ry. Co., 73 Iowa 140, 34 N. W. R. 783; Nelson *v.* Chicago, etc., R. Co., 73 Iowa 576, 35 N. W. R. 611, and Rayburn *v.* Central Railroad Co., 74 Iowa 637. It seems to us that the earlier Iowa cases hold that an employe not engaged in moving or operating trains is not within the statute and that the later cases have to some extent, at least, departed from that doctrine. Haden *v.* Sioux City R. Co., (Iowa) 60 N. W. R. 537; Butler *v.* Chicago, etc., R. Co., 87 Iowa 206, s. c. 54 N. W. R. 208.

[3] Gibbs *v.* Great Western, Ry. Co., L. R. 11 Q. B. D. 22 and L. R. 12 Q. B. D. 208; Roberts Employers' Liability, (3d ed.) 293, 294.

[4] Caron *v.* Boston, etc., R. Co., 164 Mass. 523, s. c. 42 N. E. R. 112, citing Davis *v.* New York, etc., R. Co., 159 Mass. 532, s. c. 34 N. E. R. 1070; Lynch *v.* Boston, etc., R. Co., 159 Mass. 536, s. c. 34 N. E. R. 1072; Devine *v.* Boston, etc., R. Co., 159 Mass. 348, s. c. 34 N. E. R. 539; Donahoe *v.* Old Colony, etc., R. Co., 153 Mass. 356, s. c. 26 N. E. R. 868; Thyng *v.* Fitchburg R. Co., 156 Mass. 13, s. c. 30 N. E. R. 169.

employe whose negligence caused the injury at the time the accident occurred.[1] The English authorities seem to lay down a somewhat different doctrine.[2] It has been held that it can not be determined as matter of law who is in charge or control at a particular time, and that the question is one of fact for the jury,[3] but we think there may be cases in which the question may be one of law. The rank of the person to whom charge or control is given is not important, for the important element is the fact of actual charge and control. A brakeman or other subordinate employe may be a person in charge or control.[4] A conductor of a train may be in charge or control, although he may be temporarily absent from the train.[5] It is held that the charge and control must exist at the time the injury is inflicted.[6] A foreman of a gang of men may be a person in charge or control of a car.[7]

§ 1357. **Contributory negligence—Doctrine of as affected by the statute.**—We have elsewhere treated of the effect of statutes upon the doctrine of contributory negligence,[8] and we do not deem it necessary to add very much to what was there said. It seems very clear to us that the statute can not be held to abrogate a rule so long and so firmly established as the rule upon the subject of contributory negligence, unless the statute by express words or clear and unmistakable implication abrogates

[1] Steffe *v.* Old Colony, etc., R. Co., 156 Mass. 262, s. c. 30 N. E. R. 1137; Louisville, etc., R. Co. *v.* Richardson, 100 Ala. 232, s. c. 14 So. R. 209.

[2] Gibbs *v.* Great Western, etc., R. Co., L. R. 12 Q. B. 208, and L. R. 11 Q. B. D. 22.

[3] Louisville, etc., R. Co. *v.* Richardson, 100 Ala. 232, s. c. 14 So. R. 209, citing Louisville, etc., R.Co. *v.* Mothershed, 97 Ala. 261, s. c. 12 So. R. 714.

[4] Steffe *v.* Old Colony R. Co., 156 Mass. 262, s. c. 30 N. E. R. 1137, citing Cox *v.* Great Western, etc., R. Co., L. R. 9 Q. B. D. 106; Roberts Employers' Liability, 294

[5] Donahoe *v.* Old Colony R. Co., 153 Mass. 356, s. c. 26 N. E. R. 868.

[6] Chicago, etc., R. Co. *v.* Touhy, 26 Ill. App. 99.

[7] Kansas City, etc., R. Co.*v.* Crocker, 95 Ala. 412, s. c. 11 So. R. 262.

[8] *Ante*, § 1315. For the rule under the Georgia statute, see Campbell *v.* Atlanta, etc., R. Co., 53 Ga. 488; Central, etc., R. Co. *v.* Kelly, 58 Ga. 107; Thompson *v.* Central R. Co., 54 Ga. 509; Central, etc., R. Co. *v.* Mitchell, 63 Ga. 173, s. c. 1 Am. & Eng. R. Cas. 145.

the rule. Our conclusion is well fortified by authority and rests on sound principle.[1]

§ 1358. **Contracts waiving right of action invalid.**—The Alabama court holds a contract on the part of an employe not to hold the employer responsible for injuries resulting from the negligence of other employes to be invalid.[2] The English cases assert a different doctrine.[3] In Massachusetts it is held that the employe may effectively contract that the employer shall not be responsible for obvious defects.[4]

[1] Murphy *v.* Chicago, etc., R. Co., 45 Iowa 661; Geyette *v.* Fitchburg R. Co., 162 Mass. 549, s. c. 39 N. E. R. 188, citing (Chandler *v.* New York, etc., R. Co., 159 Mass. 589, s. c. 35 N. E. R. 89; Tyndale *v.* Old Colony R. Co., 156 Mass. 503, s. c. 31 N. E. R. 655; Felt *v.* Boston, etc., R. Co., 161 Mass. 311, s. c. 37 N. E. R. 375; Irwin *v.* Alley, 158 Mass. 249, s. c. 33 N. E. R. 517, and distinguishing Maguire *v.* Fitchburg Railroad Co., 146 Mass. 379, s. c. 15 N. E. R. 904; Maher *v.* Boston, etc., R. Co., 158 Mass. 36, s. c. 32 N. E. R. 950; Thyng *v.* Fitchburg Railroad Co., 156 Mass. 13, s. c. 30 N. E. R. 169); Columbus, etc., R. Co. *v.* Bridges, 86 Ala. 448, s. c. 5 So. R. 864; Columbus, etc., R. Co. *v.* Bradford, 86 Ala. 574, s. c. 6 So. R. 90; Richmond, etc., R. Co. *v.* Thomason, 99 Ala. 471; Memphis, etc., R. Co. *v.* Graham, 94 Ala. 545, s. c. 10 So. R. 283; Louisville, etc., R. Co. *v.* Orr, 91 Ala. 548, s. c. 8 So. R. 360; Weblin *v.* Ballard, L. R. 17 Q. B. D. 122; Trinity, etc., R. Co. *v.* Mitchell, 72 Tex. 609, s. c. 10 S. W. R. 698. Duty of employe is to adopt the safer of two lines of conduct. Chase *v.* Burlington, etc., R. Co., 76 Iowa 675, s. c. 38 Am. & Eng. R. Cas. 148; Tennessee, etc., Co. *v.* Herndon, 100 Ala. 451.

[2] Hissong *v.* Richmond, etc., R. Co., 91 Ala. 514, s. c. 8 So. R. 776.

[3] Griffiths *v.* Earl of Dudley, 9 Q. B. D. 357.

[4] O'Maley *v.* South Boston, etc., Co., 158 Mass. 135, s. c. 32 N. E. R. 1119.

CHAPTER LIII.

INJURIES RESULTING IN DEATH.

§ 1359. Introductory.
1360. Constitutional questions.
1361. Construction of statutes.
1362. Limiting the right to sue—Designating the forum.
1363. Instantaneous death.
1364. Statutes have no extra-territorial effect.
1365. The right and the remedy.
1366. Conflict of law.
1367. Who may recover—Generally.
1368. Who may recover—Illustrative cases.
1369. What must be shown to constitute a cause of action.
1370. Year and a day.
§ 1371. Actions for injuries causing death are transitory.
1372. Actions by administrators and executors.
1373. Limitations—Time within which actions must be brought.
1374. Statutes do not deny the right to rely upon defense of contributory negligence.
1375. One recovery merges cause of action.
1376. Release—Compromise.
1377. Avoiding releases and compromises.
1378. Measure of damages.

§ 1359. **Introductory.**—As is well known the right of action for damages for injuries resulting in death is purely statutory. At common law no action could be maintained.[1] It is said, however, that such a right existed under the civil law.[2] The act of the British Parliament, generally known as "Lord Campbell's Act," gave a right of action and the provisions of that act, but much varied in form, if not in substance, have been incorporated in statutes of the American states.[3] It was

[1] Higgins *v.* Butcher, Yelverton 89; Weems *v.* Mathieson, 4 Macqu. H. L. C. 215; Carey *v.* Berkshire R. Co., 1 Cush. 475; Insurance Co. *v.* Brame, 95 U. S. 754; City of Eureka *v.* Merrifield, 53 Kan. 794, s. c. 37 Pac. R. 113; Eden *v.* Lexington, etc., R. Co., 14 B. Monr. 204. But see, Stanly *v.* Bircher, 78 Mo. 245; Shields *v.* Yonge, 15 Ga. 349.

[2] Hubgh *v.* New Orleans, etc., R. Co., 6 La. Ann. 495; Hermann *v.* New Orleans, etc., R. Co., 11 La. Ann. 5. See Canadian, etc., R. Co. *v.* Robinson, 14 Can. Sup. Ct. 105; The Harrisburg, 119 U. S. 199, s. c. 7 Sup. Ct. R. 140.

[3] Mr. Tiffany has collected these statutes. Death by Wrongful Act, §§ 34, 59.

held under the common law rule that although no action could be maintained for causing death an action would lie in the proper case for the loss of services during the period intervening between the injury and the death.[1] As the right of action is purely statutory the plaintiff who seeks to enforce it must state such facts as clearly bring his case within the statute. The allegations of the complaint or declaration must show that the plaintiff is entitled to maintain the action,[2] and, where it is essential to a right of recovery that there should be beneficiaries of a designated class, the fact that there are such beneficiaries must be properly averred.[3] Where the law requires the performance of acts as conditions precedent to the right of recovery performance of such conditions must, as a general rule, be averred and proved.[4]

[1] Baker *v.* Bolton, 1 Campb. 493; Davis *v.* Railway Co., 53 Ark. 117, s. c. 13 S. W. R. 801. See "Statutory Liability for Causing Death," 28 Am. Law. Reg. (N. S.) 328, 585; Cooley on Torts, 264.

[2] Frazier *v.* Georgia, etc., R. Co., 96 Ga. 785, s. c. 22 S. E. R. 936; Orgall *v.* Burlington, etc., R. Co., 46 Neb. 4, s. c. 64 N. W. R. 450; Holston *v.* Coal & Iron Co., 95 Tenn. 521, s. c. 32 S. W. R. 486. See, generally, Close *v.* McIntire, 120 Ind. 262, s. c. 22 N. E. R. 128; Louisville, etc., R. Co. *v.* Berg, (Ky.) 32 S. W. R. 616; Hicks *v.* New York, etc., R. Co., 164 Mass. 424, s. c. 41 N. E. R. 721; Sawyer *v.* Perry, 88 Me. 42, s. c. 33 Atl. R. 660. See as to pleading negligence, Northern, etc., R. Co. *v.* Craft, 69 Fed. R. 124.

[3] Indianapolis, etc., R. Co. *v.* Keely, 23 Ind. 133; Stewart *v.* Terre Haute, etc., R. Co., 103 Ind. 44, s. c. 2 N. E. R. 208; Commonwealth *v.* Eastern R. Co., 5 Gray 473; Commonwealth *v.* Boston, etc., R. Co., 121 Mass. 36; Harvey *v.* Baltimore, etc., R. Co., 70 Md. 319, s. c. 17 Atl. R. 88; State *v.* Grand Trunk, etc., R. Co., 60 Me. 145; Muhl *v.* Michigan Southern, etc., R. Co., 10 Ohio St. 272; Missouri Pacific R. Co. *v.* Barber, 44 Kan. 612, s. c. 24 Pac. R. 969; Barnum *v.* Chicago, etc., R. Co., 30 Minn. 461, s. c. 16 N. W. R. 364; Seresen *v.* Northern Pac. R. Co., 45 Fed. R. 407; Warren *v.* Englehart, 13 Neb. 283, s. c. 13 N. W. R. 401; Conlin *v.* Charleston, etc., R. Co., 15 Rich. Law 201; Lilly *v.* Charlotte, etc., R. Co., 32 S. Car. 142, s. c. 10 S. E. R. 932; East Tennessee, etc., R. Co. *v.* Lilly, 90 Tenn. 563, s. c. 18 S. W. R. 243; Northern Pac. R. Co. *v.* Ellison, 3 Wash. 225, s. c. 28 Pac. R. 333; Woodman *v.* Chicago, etc., R. Co., 23 Wis. 400. But see Kessler *v.* Smith, 66 N. Car. 154; Columbus, etc., R. Co. *v.* Bradford, 86 Ala. 574, s.c. 6 So. R. 90; Alabama, etc., R. Co. *v.* Waller, 48 Ala. 459. Some of the cases hold that it is not necessary to give names of beneficiaries. Conant *v.* Griffin, 48 Ill. 410; Jeffersonville, etc. R. Co. *v.* Hendricks, 41 Ind. 48. See Howard *v.* Delaware, etc., R. Co., 40 Fed. R. 195.

[4] Allen *v.* Atlantic, etc., R. Co., 54 Ga. 503. See Cuttingham *v.* Weeks, 54 Ga. 275. It has been held that the

§ 1360. **Constitutional questions.** — The question as to whether the provision of the New York constitution forbidding a limitation upon the amount of recovery in actions for injuries resulting in death can have a retrospective operation has been before the courts of that state and the decisions are in direct conflict. In one of the cases it was held that the provision only operates prospectively,[1] but in another case it is held that it has a retroactive operation.[2] In our opinion the case last mentioned is not well decided. It may be doubted whether an enactment changing the measure of liability could, in any event, be valid as against prior contracts, rights and obligations, but however this may be, it seems quite clear that the provision in the New York constitution must, upon principle, be held to operate prospectively. There are many analogous cases holding that such provisions can not be given a retroactive effect.[3] Statutes giving a right of action in cases of death caused by negligence have been uniformly upheld, and the contention that such enactments violate the contract contained in corporate charters denied. Some of the cases place

plaintiff is not required to prosecute a wrong-doer although the wrong which caused the injury was felonious. Lofton *v.* Vogles, 17 Ind. 105. See, also, Pettingill *v.* Rideout, 6 N. H. 454; Newell *v.* Cowan, 30 Miss. 492; Chick *v.* Southeastern, etc., R. Co., 57 Ga. 357; Sawtell *v.* Western, etc., R. Co., 61 Ga. 567; Dodson *v.* McCauley, 62 Ga. 130; South Carolina R. Co. *v.* Nix, 68 Ga. 572; Western, etc., R. Co. *v.* Meigs, 74 Ga. 857.

[1] O'Reilly *v.* Utah, etc., Co., 87 Hun 406, 34 N. Y. Supp. 358, citing New York, etc., R. Co. *v.* Van Horn, 57 N. Y. 473; Endlich Inter. of Stat., sec. 271; Potter's Dwarris on Stat., 162; Sedgwick Stat. and Const. Law, p. 180, 680.

[2] Isola *v.* Webber, 34 N. Y. Supp. 77; Smith *v.* Metropolitan, etc., R. Co., 35 N. Y. Supp. 1062. The cases of Denver, etc., R. Co. *v.* Woodward, 4 Colo. 1 and 162; Linden *v.* Kansas, etc., R. Co., 4 Colo. 433, go far in support of O'Reilly *v.* Utah, etc., Co., 87 Hun 406, 34 N. Y. Supp. 358, and are opposed to the doctrine of Isola *v.* Webber, 24 N. Y. Supp. 77. This is true of the case of Chicago, etc., R. Co. *v.* Pounds, 11 Lea 130.

[3] In Shreveport *v.* Cole, 129 U. S. 36, s. c. 5 Sup. Ct. R. 210, the court thus stated the rule: "Constitutions as well as statutes are construed to operate prospectively, unless on the face of the instrument or enactment, the contrary intention is manifested beyond reasonable doubt." See Cooley Const. Lim, (3d ed.) 62. See, also, Chicago, etc., R. Co. *v.* Pounds, 11 Lea 130.

the doctrine upon the ground that there is no creation of new duties and nothing more than the creation of a new remedy for the breach of a previously existing duty.[1] Such statutes have been held valid although made to apply exclusively to one class of corporations,[2] but this doctrine has been challenged in an opinion of much strength.[3] It is settled that such statutes do not contravene the commerce clause of the federal constitution.[4] It is held that where the constitution confers upon an administrator the right to sue he may maintain an action although no statute had been enacted conferring or regulating the right.[5]

§ 1361. **Construction of statutes.**—The authorities are not in harmony upon the question whether a statute giving a right of action for death is or is not to be strictly construed. The scale is almost in equipoise, and it is difficult to say on which side the weight of authority is.[6] It seems to us that as such statutes are in derogation of the common law they should receive a strict construction; not, indeed, a construction so strict as that given penal statutes, except in cases where punitive damages are given, but where damages not simply compensatory are given, then, it seems to us, the statute should be con-

[1] Boston, etc., R. Co. *v.* State, 32 N. H. 215; Board, etc., *v.* Scearce, 2 Duv. 576; Southwestern, etc., R. Co. *v.* Paulk, 24 Ga. 356.

[2] Schoolcroft *v.* Louisville, etc., R. Co., 92 Ky. 233, s. c. 17 S. W. R. 567, citing Railway Co. *v.* Mackey, 127 S. 205, s. c. 8 Sup. Ct. R. 1161; Railway Co. *v.* Beckwith, 129 U. S. 27, 9 Sup. R. 207; Boston, etc., R. Co. *v.* State, 32 N. H. 215; Carroll *v.* Missouri, etc., R. Co., 88 Mo. 239. See Chiles *v.* Drake, 2 Metcf. (Ky.) 146.

[3] Smith *v.* Louisville, etc., R. Co., 75 Ala. 449.

[4] Sherlock *v.* Alling, 93 U. S. 999.

[5] Thomas *v.* Royster, (Ky.) 32 S. W. R. 613. The constitutional provision was held to be self-executing.

[6] Holding that the statute is to receive a liberal construction. Hayes *v.* Williams, 17 Colo. 465, s. c. 30 Pac. R. 352; Soule *v.* New York, etc., R. Co., 24 Conn. 575; Lamphear *v.* Buckingham, 33 Conn. 237; Merkle *v.* Bennington Township, 58 Mich. 156; Bolinger *v.* St. Paul, etc., R. Co., 36 Minn. 418, s. c. 31 N. W. R. 856. Holding that the statute should be strictly construed. Thornburg *v.* American, etc., Co., 141 Ind. 443, s. c. 40 N. E. R. 1062, and cases cited. Pittsburg, etc., R. Co. *v.* Hine, 25 Ohio St 629; Jackson *v.* St. Louis, etc., R. Co., 87 Mo. 422. See 3 Wood on Railroads, (Minor's ed.) 1826; Tiffany, Death by Wrongful Act, § 32.

strued according to the canons of construction applicable to penal statutes. Where a punishment is denounced and the recovery is not confined to compensatory damages the statute is in effect penal and not simply remedial.[1] It is held by the federal courts that the statute does not create a new cause of action,[2] but this seems to be contrary to the doctrine of the English courts.[3] There is, as it seems to us, difficulty in maintaining the doctrine of the federal courts. If a new right is not given, then it can hardly be true that the limitation forms part of the right and yet it is uniformly held that it does form part of the right itself.[4] If there is no new right created, then it is difficult to sustain the decisions which hold that the law of the place of the accident governs,[5] for if there be nothing more than a remedy created, the statute of a foreign jurisdiction could not govern the courts of the place where the cause is tried. A statute giving a right of action for death caused by wrongful act is to be construed as including negligent acts of omission as well as of commission.[6] We suppose that the

[1] Board *v.* Scearce, 2 Duv. 576; Burns *v.* Grand Rapids, etc., R. Co., 113 Ind. 169.

[2] Bigelow *v.* Nickerson, 70 Fed. R. 113; Nickerson *v.* Bigelow, 62 Fed. R. 900; The Robert Holland, 59 Fed. R. 200; The City of Norwalk, 55 Fed. R. 98. In the case last cited the court quoted with approval the statement in the opinion in Steamboat Co. *v.* Chase, 16 Wall. 532, that, "The statute does no more than take the case out of the operation of the common law maxim that an action for death dies with the person."

[3] Pym *v.* Great Northern, etc., R. Co., 4 Best & S. 396; Canadian, etc., R. Co. *v.* Robinson, 19 Can. Sup. Ct. 292, s. c. 54 Am. & Eng. R. Cas. 49; Seward *v.* Vera Cruz, L. R. 10 App. Cas. 59; Blake *v.* Midland R. Co., 18 Q. B. 93, 21 L. J. Q. B. 233. See Russell *v.* Sunbury, 37 Ohio St. 372; Hamilton *v.* Jones, 125 Ind. 176, s. c. 25 N. E. R. 192.

[4] *Post*, § 1373.

[5] *Post*, § 1366. It is also true that the doctrine of the federal court is antagonistic to the rule that where the death is instantaneous there can be recovery, for there was no right in the decedent to recover damages had he survived and therefore none in his representatives after his death. Kearney *v.* Boston, etc., R. Co., 9 Cush. 108; Hansford *v.* Payne, 11 Bush. 380; Hollenbeck *v.* Berkshire, etc., R. Co., 9 Cush. 478; Mulchahey *v.* Washburn, etc., Co., 145 Mass. 281; Whitford *v.* Panama, etc., R. Co., 23 N. Y. 465. *Post*, § 1363.

[6] American, etc., R. Co. *v.* Johnson, 60 Fed. R. 503. It is held that the Rhode Island statute does not embrace mere passive negligence or acts of omission. Myette *v.* Gross, 18 R. I. 729, s. c. 30 Atl. R. 602, citing Bradbury *v.* Furlong, 13 R. I. 15.

term "wrongful," as ordinarily employed, is to be taken as meaning actionable wrong, and that whether the act which causes death be a culpable breach of duty by failing or neglecting to do what the law requires or doing what the law forbids, there is a right of recovery. But so much depends upon the language of the particular statute that only very general statements can be safely made. The term "heirs at law" has been held to mean the widow and children,[1] and in another case it was held that the term "heirs" includes all persons capable of inheriting from the deceased generally.[2]

§ 1362. **Limiting the right to sue—Designating the forum.** —The statute which gives a right to sue may limit the time in which the action shall be brought, may limit the amount of recovery, and may also limit the persons who shall receive the damages recovered. Upon the propositions stated there is no diversity of opinion. How much further the state may go in limiting the right is a question, which, in some of its phases, may fairly admit of debate. There is reason for affirming that the power to give or withhold the principal thing carries with it the power to annex the incidents. It would seem therefore, that the power of the state to give or withhold includes the power to provide the forum on which the remedy for the enforcement of the newly given right shall be sought. But it has been held by an able court, not however without a vigorous dissent, that the provision of a statute which assumes to confine the right to sue for causing death by wrongful act to the state courts and thus exclude the jurisdiction of the federal courts is invalid, the theory of the decision being that the state can not exclude the jurisdiction of the federal tribunals. That the state can not exclude the jurisdiction of the federal courts where the right to be vindicated is a general one is entirely clear, but it is not so clear that where a statute gives an entirely new right—one of its own creation—that did not exist

[1] St. Louis, etc., R. Co. *v.* Needham, 52 Fed. R. 371.

[2] Redfield *v.* Oakland, etc., R. Co., 110 Cal. 277, s. c. 42 Pac. R. 822.

at common law the state legislature may not prescribe the terms and conditions upon which it may be enforced.[1]

§ 1363. **Instantaneous death.**—Some of the courts hold that where death is instantaneous no action can be maintained by the personal representatives of the deceased,[2] but there is authority holding that the action will lie although death is instantaneous.[3] Much, however, depends upon the wording and intent of the particular statute involved. A distinction is made by some of the courts between cases where the statute confers the right of action upon personal representatives and cases where the right is conferred upon the widow or children of the deceased person.[4] Very subtle and fine-drawn distinctions are made in considering the question whether death was or was not instantaneous, and it is held that it can not be concluded that the death was not instantaneous although there were spasmodic muscular movements after the injury.[5]

[1] Bigelow *v.* Nickerson, 70 Fed. R. 113. In the case cited, Showalter, J., dissented, and referred in support of his dissent to Dudley *v.* Mayhew, 3 N. Y. 9; Chandler *v.* Hanna, 73 Ala. 390; Dickinson *v.* Van Wormer, 39 Mich. 141; Janney *v.* Buell, 55 Ala. 408; Phillips *v.* Ash, 63 Ala. 414; Vestry of St. Pancras *v.* Batterbury, 2 C. B. (N. S.) 477; Hollister *v.* Hollister Bank, 2 Keyes (N. Y.) 245; Sutherland Stat. Const., § 399.

[2] McVey *v.* Illinois Cent. R. Co., (Miss.) 19 So. R. 209 (citing Illinois, etc., R. Co. *v.* Pendergrass, 69 Miss. 425, s. c. 12 So. R. 954; Vicksburg, etc., R. Co. *v.* Phillips, 64 Miss. 693, s. c. 2 So. R. 537); Sawyer *v.* Perry, 88 Me. 42, s. c. 33 Atl. R. 660. See Belding *v.* Black Hills, etc., R. Co., 3 So. Dak. 369, s. c. 53 N.W. 750; State *v.* Maine, etc., R. Co., 60 Me. 490; State *v.* Grand Trunk, etc., R. Co., 61 Me. 114; Commonwealth *v.* Metropolitan, etc., R. Co., 107 Mass. 236.

[3] Brown *v.* Buffalo, etc., R. Co., 22 N. Y. 191; Nashville, etc., R. Co. *v.* Prince, 2 Heisk. 580; Fowlkes *v.* Nashville, etc., R. Co., 5 Baxter 663; Conners *v.* Burlington, etc., Ry. Co., 71 Iowa 490, s. c. 32 N. W. R. 465; Worden *v.* Humeston, etc., Ry. Co., 72 Iowa 201, s. c. 33 N. W. R. 629; Cooley on Torts, 310; Tiffany, Death by Wrongful Act, §§ 73, 74; Buswell, Personal Injuries, §§ 18, 19.

[4] See cases cited from Mississippi reports in the first note to this section.

[5] Kearney *v.* Boston, etc., R. Co., 9 Cush. 108; Bancroft *v.* Boston, etc., R. Co., 11 Allen 34; Hollenbeck *v.* Berkshire R. Co., 9 Cush. 478, Mulchahey *v.* Washburn, etc., Co., 145 Mass. 281. It was held in Dietrich *v.* Northampton, 138 Mass. 14, that a child prematurely born, which lived a very few minutes after its birth was not a "person" within the meaning of the statute. See Sawyer *v.* Perry, 88 Me. 42, s. c. 33 Atl. R. 660, for a definition of the term "immediate death."

§ 1364. **Statutes have no extra territorial effect.**—It is elementary learning that a statute has no force beyond the territorial limits of the state by which it was enacted. This rule applies to cases of personal injuries made actionable by legislation.[1] If there is no legislation giving a right of action, then no such right exists unless it is given by the common law. If the common law makes the wrong actionable, or if it is made actionable by the statutes of the state in which the wrong is committed, then, as we shall presently see, a remedy will generally be supplied by the state where the action is brought. Where the statute of the state in which the injury was received is not pleaded the rule in cases where the action is brought in another state is that the court will presume that the common law was in force.[2]

§ 1365. **The right and the remedy.**—The rule is that the law of the forum governs as to the remedy, including the mode of proceeding and all matters therewith directly connected.[3] It is obvious that a foreign state or nation can not prescribe rules of procedure for the government of other states or nations, so that the rules of procedure, including the rules of evidence, are those prescribed by the law of the forum.[4]

[1] Knight *v.* West Jersey R. Co., 108 Pa. St. 250, s. c. 26 Am. & Eng. R. Cas. 485; De Harn *v.* Mexican, etc., R. Co., 86 Tex. 68; Willis *v.* Missouri Pac. Ry. Co., 61 Tex. 432, s. c. 23 Am. & Eng. R. Cas. 379; Texas, etc., R. Co. *v.* Richards, 68 Tex. 375. See Johnson *v.* Chicago, etc., R. Co., 91 Iowa 248, s. c. 59 N. W. R. 66; Boyce *v.* Wabash, etc., Ry. Co., 63 Iowa 70, s. c. 23 Am. & Eng. R. Cas. 172; Morris *v.* Chicago, etc., Ry. Co., 65 Iowa 727, s. c. 19 Am. & Eng. R. Cas. 180; McCarthy *v.* Chicago, etc., Ry. Co., 18 Kan. 46; Needham *v.* Grand Trunk Ry. Co., 38 Vt. 294.

[2] Burdict *v.* Missouri, etc., R. Co., 123 Mo. 221, s. c. 27 S. W. R. 453; Le Forest *v.* Tolman, 117 Mass. 109; Hyde *v.* Wabash, etc., Ry. Co., 61 Iowa 441, s. c. 15 Am. & Eng. R. Cas. 503; Davis *v.* New York, etc., R. Co., 143 Mass. 301, s. c. 28 Am. & Eng. R. Cas. 223; Wooden *v.* Western, etc., R. Co., 126 N. Y. 10.

[3] Dulin *v.* McCaw, 39 W. Va. 721, s. c. 20 S. E. R. 681; Hurley *v.* Missouri, etc., R. Co., 57 Mo. App. 675; Herrick *v.* Minneapolis, etc., R. Co., 31 Minn. 11, s. c. 16 N. W. R. 413; Helton *v.* Alabama, etc., R. Co., 97 Ala. 275; Higgins *v.* Central, etc., R. Co., 155 Mass. 176, 181.

[4] In Richmond, etc., R. Co. *v.* Mitchell, 92 Ga. 77, s. c. 18 S. E. R. 290, it is said: "Touching the evidence requisite to make a *prima facie* case in behalf of the plaintiff, the court gave in charge to the jury the law applicable in this state between the parties

But the state or nation may enact laws governing the conduct and prescribing the responsibility for wrongs of persons within its jurisdiction. It is true that there is no absolute right in any person to an enforcement of such laws by the courts of other states or nations, but upon the principle of comity such laws are generally enforced. We do not mean, of course, that one state will enforce the penal laws of another state, for it is well settled that the penal laws of a state can only be enforced by its own courts.[1] The ruling in Pennsylvania is that the person entitled to sue in the state where the injury was received is the person who must sue, although the action is brought in another state. The theory of the court was that the question of who may sue is not a question of remedy merely but pertains to the right.[2] This, we believe, to be sound doctrine, for as a new right was created all incidents, whether in the form of limitations as to the amount of recovery, or as to who may be beneficiaries, travel with the right into the foreign jurisdiction.

§ 1366. **Conflict of law.**—The general rule is that the right to recover for damages resulting from personal injuries is governed by the law of the place where the injury was received and not by the law of the forum.[3] This well-known general rule applies, as we have shown, to actions brought to recover

where the action is against a railroad company. This was correct although the injury sued for was sustained in the state of Alabama. The quantity or degree of evidence requisite to sustain the action or to change the burden of proof is determined by the law of the forum, and not by the law of the place where the cause of action arose." See, also, Smith *v.* Wabash, etc., R. Co., 141 Ind. 92; Johnson *v.* Chicago, etc., R. Co., 91 Iowa 248, s. c. 59 N. W. R. 66; Knight *v.* West Jersey, etc., R. Co., 108 Pa. St. 250; Pennsylvania Co. *v.* McCann, (Ohio St.) 42 N. E. R. 768.

[1] Gwin *v.* Breedlove, 2 How. 29; Gwin *v.* Barton, 6 How. 7; Huntington *v.* Attrill, 118 N. Y. 365.

[2] Usher *v.* West Jersey, etc., R. Co., 126 Pa. St. 206, s. c. 17 Atl. R. 597; Derr *v.* Lehigh Valley, etc., R. Co., 158 Pa. St. 365, s. c. 27 Atl. R. 1002. The same doctrine is declared in Oates *v.* Union Pacific R. Co., 104 Mo. 514, s. c. 24 Am. St. R. 348. In the case last cited the court distinguishes the case of Vawter *v.* Missouri, etc., R. Co., 84 Mo. 679, s. c. 54 Am. R. 105.

[3] Northern, etc., R. Co. *v.* Mase, 63 Fed. R. 114. See Conflict of Laws, Concerning Actions for Death, 35 Central L. J. 185.

damages for injuries causing death. The rule now generally approved is that the courts of one state will enforce the statutes of another state giving civil rights unless such statutes are in conflict with the laws or policy of the state in which the action is brought.[1] There is, however, authority to the contrary.[2] Some of the courts hold that the statutes of the state in which the injury was received must be similar to those of the state in which the action is brought.[3] A peculiar case came under judgment in South Carolina. In that case the action was brought in South Carolina for an injury received in North Carolina. The law of North Carolina provided that a child could only be held to the exercise of care according to its age; the trial court charged that the case was governed by the law

[1] Dennick *v.* Railroad Co., 103 U. S. 11; Northern, etc., R. Co. *v.* Mase, 63 Fed. 114; Theroux *v.* Northern, etc., R. Co., 64 Fed. R. 84; Northern, etc., R. Co. *v.* Babcock, 154 U. S. 190, s. c. 14 Sup. Ct. R. 978; Texas, etc., R. Co. *v.* Cox, 145 U. S. 593, s. c. 12 Sup. Ct. R. 905; South Carolina, etc., R. Co. *v.* Nix, 68 Ga. 572; Cincinnati, etc., R. Co. *v.* McMullen, 117 Ind. 439, s. c. 10 Am. St. R. 67; Boyce *v.* Wabash, etc., R. Co., 63 Iowa 70, s. c. 50 Am. R. 730; Chicago, etc., R. Co. *v.* Doyle, 60 Miss. 977; Leonard *v.* Columbia, etc., R. Co., 84 N. Y. 48, s. c. 38 Am. R. 491; O'Reilly *v.* New York, etc., R. Co., 16 R. I. 388, s. c. 17 Atl. R. 906, 29 Cent. L. J. 210, 6 L. R. A. 719; Missouri, etc., R. Co. *v.* Lewis, 24 Neb. 848, s. c. 40 N. W. R. 401; Higgins *v.* Central, etc., Ry. Co., 155 Mass. 176, s. c. 29 N. E. R. 534; Hanna *v.* Grand Trunk, etc., R. Co., 41 Ill. App. 116; McMaster *v.* Illinois, etc., R. Co., 65 Miss. 264, s. c. 7 Am. St. R. 653, 4 So. R. 59; Nelson *v.* Chesapeake, etc., R. Co., 88 Va. 971, s. c. 14 S. E. R. 838, 54 Am. & Eng. R. Cas. 82; Stoeckman *v.* Terre Haute, etc., R. Co., 15 Mo. App. 503; Walsh *v.* New York, etc., R. Co., 160 Mass. 571; Texas, etc., R. Co. *v.* Richards, 68 Tex. 375, 4 S. W. R. 627. In Northern, etc., R. Co. *v.* Babcock, 154 U. S. 190, s. c. 14 Sup. Ct. R. 978, the doctrine of Judge Rorer that the law of the forum and of the place of the injury must concur is expressly denied. An extreme application of the rule was made in Mexican, etc., R. Co. *v.* Jackson, (Tex.) 32 S. W. R. 230.

[2] McCarthy *v.* Chicago, etc., R. Co., 18 Kan. 46, s. c. 26 Am. R. 742; Richardson *v.* New York, etc., R. Co., 98 Mass. 85; Woodard *v.* Michigan, etc., Ry. Co., 10 Ohio St. 121; Armstrong *v.* Beadle, 5 Sawyer 484. See Anderson *v.* Milwaukee, etc., Ry. Co., 37 Wis. 321; Mackay *v.* Central R. Co., 14 Blatch. 65, 4 Fed. R. 617; Bruce *v.* Cincinnati, etc., R. Co., 83 Ky. 174; Vawter *v.* Missouri, etc., R. Co., 84 Mo. 679, s. c. 54 Am. R. 105; Ash *v.* Baltimore, etc., R. Co., 72 Md. 144, s. c. 20 Am. St. R. 461; Phillips *v.* Eyre, L. R. 6 Q. B. 1, 28, 29. See, St. Louis, etc., R. Co. *v.* McCormick, 71 Tex. 660, s. c. 9 S. W. R. 540.

[3] Wooden *v.* Western, etc., R. Co., 126 N. Y. 10, s. c. 26 N. E. R. 1050, 22 Am. St. R. 803.

of North Carolina, and this was held to be correct.[1] The case referred to is very near the line, if, indeed, it is not unsound, for the question would seem to be one of evidence and hence to pertain to the remedy and not the right.[2] It seems to us, as we have elsewhere indicated, that where punitive damages are given the statute can not have an extra territorial effect.

§ 1367. **Who may recover—Generally.**—To determine who may recover for the death of a human being, the statute in force at the place where the accident occurred must be consulted. It is, therefore, not possible to state anything more than general rules without considering the different statutes, and that would be foreign to our purpose. It may, of course, be safely said that those persons, and only those persons, to whom the statute gives the right of action can recover, for there is no general or common law right.[3] It is an established rule of the common law[4] that there can be no liability for injury resulting from negligence, unless there is a breach of a specific duty owing to the person who sustains an injury, and the general principle must apply to statutes giving a right of action for wrongfully causing death, in the sense that the right created by the statute must be shown to be in the person or persons by whom the action is prosecuted,[5] for it is only as to such persons that there is a duty to respond in damages.

[1] Bridger *v.* Asheville, etc., R. Co., 25 S. Car. 24, s. c. 3 S. E. R. 860, citing Atlanta Ry. Co. *v.* Tanner, 68 Ga. 384; Atchison, etc., R. Co. *v.* Moore, 29 Kan. 632.

[2] See *ante*, § 1365.

[3] Western Union Tel. Co. *v.* McGill, 57 Fed. R. 699 (citing St. Louis, etc., Ry. Co. *v.* Needham, 52 Fed. R. 371, 3 C. C. A. 129; Dickins *v.* New York, etc., R. Co., 23 N. Y. 158; Drake *v.* Gilmore, 52 N. Y. 389; Trafford *v.* Adams Express Co., 8 Lea 96; Blake *v.* Midland Ry. Co., 10 Eng. Law & Eq. 437; Safford *v.* Drew, 3 Duer 627; Burke *v.* Cork, etc., R. Co., 10 Cent. L. J. 48; Duckworth *v.* Johnson, 4 Hurl. & N. 653; Jeffersonville, etc., R. Co. *v.* Swayne, 26 Ind. 477; Perry *v.* St. Joseph, etc., R. Co., 29 Kan. 420; Kansas Pac. Ry. Co. *v.* Cutter, 19 Kan. 83); "The Alaska," 130 U. S. 201, s. c. 9 Sup. Ct. R. 461; Thornburg *v.* American, etc., Co., 141 Ind. 443, s. c. 40 N. E. R. 1062.

[4] O'Donnell *v.* Providence, etc., R. Co., 6 R. I. 211; Smith *v.* Tripp, 13 R. I. 152; Atkinson *v.* Newcastle, etc., Co., L. R. 2 Exch. Div. 441; Metallic, etc., Co. *v.* Fitchburg R. Co., 109 Mass. 277, s. c. 12 Am. R. 689; Holland *v.* Sparks, 92 Ga. 753.

[5] Clay *v.* Central, etc., R. Co., 84 Ga. 345; Daniels *v.* Savannah, etc., R. Co.,

§ 1368. **Who may recover—Illustrative cases.**—We shall not attempt to give all the cases which consider and decide who may maintain an action, but shall refer to such cases as seem to most clearly outline the rulings of the courts upon the general subject, premising our reference by the statement that the statutes vary so much that it is exceedingly difficult to extract general rules or to select the cases which best outline the views of the courts. The husband of the mother of an illegitimate child is not entitled to maintain an action for the death of the child under the provisions of a statute vesting the right of action in a father.[1] The English courts have held that a bastard is not a child within the meaning of Lord Campbell's act,[2] and a Canadian court has held that the mother of an illegitimate child has no right of action.[3] Some of the American courts have asserted the same general doctrine,[4] but others have adopted a different rule.[5] We incline to the opinion that where the right of action is given, as it is by some of the statutes, for the benefit of "dependents," a mother of a bastard might recover, in the proper case, and so might the bastard in the case of the death of the mother. It has been held, under a statute giving a right of action to children, that a child born after the death of a father may sue.[6] Many of the statutes provide that the father may sue, or if the father be

86 Ga. 236; Augusta, etc., R. Co. *v.* Glover, 92 Ga. 132; Atlanta, etc., R. Co. *v.* Gravitt, 93 Ga. 369, s. c. 20 S. E. R. 550, 26 L. R. A. 553.

[1] Thornburg, *v.* American, etc., Co., 141 Ind. 443, s. c. 41 N. E. R. 1062.

[2] Dickinson *v.* Northeastern R. Co., 2 Hurl. & Colt 735. See Clarke *v.* Carfin Coal Co., L. R. (1891) A. C. 412.

[3] Gibson *v.* Midland R. Co., 2 Ont. R. 658.

[4] Harkins *v.* Philadelphia R. Co., 15 Phila. 286. In Marshall *v.* Wabash R. Co., 46 Fed. R. 269, the court said that a bastard was not a "child" within the meaning of the statute, and referred to Barns *v.* Allen, 9 Am. Law. Reg. 747, but, as it was held that the court had no jurisdiction (which holding, by the way, was erroneous), the statement that an illegitimate child was not within the statute was mere *obiter dictum*.

[5] Muhl *v.* Michigan, etc., R. Co., 10 Ohio St. 272.

[6] Texas, etc., R. Co. *v.* Robertson, 82 Tex. 657, s. c. 27 Am. St. R. 929, 17 S. W. R. 1041; Nelson *v.* Galveston, etc., R. Co., 78 Tex. 621, s. c. 14 S. W. R. 1041, 11 L. R. A. 391, 22 Am. St. R. 81. As to suits by children, see Barker *v.* Hannibal, etc., R. Co., 91 Mo. 86, 14 S. W. R. 280.

dead, the mother may sue for the death of a minor child.[1] Generally the provisions of the statutes are that the action shall be brought by the personal representatives of the deceased person in cases of adults, but in some others the right to sue is vested in the widow,[2] or husband.[3] Some of the statutes provide that the remedy shall be by indictment, but even when by indictment the proceeding is treated as a civil one.[4] Some of the statutes give a right of action in favor of a person who was dependent upon the person whose death was caused by the wrongful act of another, and in such cases the right to sue turns upon the solution of the question whether the plaintiff was dependent upon the deceased, the general rule being that if the plaintiff received any material aid from the deceased, and there is such kinship as entitles him or her to such aid, there is a right to sue.[5] A wife who leaves her husband and

[1] Atlanta, etc., R. Co. *v.* Gravitt, 93 Ga. 369, s. c. 20 S. E. R. 550, 26 L. R. A. 553; Gulf, etc., R. Co. *v.* Southwick, (Tex. Civ. App.) 30 S. W. R. 592; Kerr *v.* Pennsylvania R. Co., 169 Pa. St. 95, s. c. 32 Atl. R. 96; Illinois, etc., R. Co. *v.* Hunter, 70 Miss. 471, s. c. 12 So. R. 482.

[2] McDonald *v.* McDonald, 96 Ky. 209, 28 S. W. R. 482; Wright *v.* Woods, 96 Ky. 56, 27 S. W. R. 979; Canadian, etc., R. Co. *v.* Robinson, 19 Can. S. C. 292.

[3] Ferguson *v.* Washington, etc., R. Co., (D. C. App.) 23 Wash. Law R. 407.

[4] State *v.* Grand Trunk, etc., R. Co., 60 Me. 145; Commonwealth *v.* Boston, etc., R. Co., 134 Mass. 211; Commonwealth *v.* Sanford, 12 Gray 174; Commonwealth *v.* East Boston, etc., Co., 13 Allen 589; Commonwealth *v.* Boston, etc., R. Co., 121 Mass. 36; Commonwealth *v.* Boston, etc., Co., 133 Mass. 383; State *v.* Manchester, etc., R. Co., 52 N. H. 528; State *v.* Grand Trunk, etc., R. Co., 58 Me. 176; Baltimore, etc., R. Co. *v.* State, 81 Md. 371, s. c. 32 Atl. R. 201.

[5] Augusta, etc., R. Co. *v.* Glover, 92 Ga. 132, s. c. 18 S. E. R. 406; Schnatz *v.* Philadelphia, etc., R. Co., 160 Pa. St. 602, s. c. 28 Atl. R. 952; Baltimore, etc., R. Co. *v.* State, 81 Md. 371, s. c. 32 Atl. R. 201; Duval *v.* Hunt, 34 Fla. 85, s. c., 15 So. R. 876; Gulf, etc., R. Co. *v.* Southwick, (Tex. Civ. App.) 30 S. W. R. 592; St. Louis, etc., R. Co. *v.* Henson, 58 Fed. R. 531, 7 C. C. A. 349; Richmond, etc., R. Co. *v.* Johnston, 89 Ga. 560, s. c. 15 S. E. R. 908; Clay *v.* Central, etc., R. Co., 84 Ga. 345, s. c. 10 S. E. R. 967, 42 Am. & Eng. R. Cas. 76; Smith *v.* East, etc., R. Co., 84 Ga. 183, s. c. 10 S. E. R. 602. See Petrie *v.* Columbia, etc., R. Co., 29 S. Car. 303, s. c. 7 S. E. R. 515; Daly *v.* New Jersey, etc., Co., 155 Mass. 1, s. c. 29 N. E. R. 507; Hodnett *v.* Boston, etc., R. Co., 156 Mass. 86, s. c. 30 N. E. R. 224; Chicago, etc., R. Co. *v.* Branyan, 10 Ind. App. 570, s. c. 37 N. E. R. 190; San Antonio, etc., R. Co. *v.* Long, 87 Tex. 148, s. c. 27 S. W. R. 113, 24 L. R. A. 637; St. Louis, etc., R. Co. *v.* Johnston, 78 Tex. 536, 15 S. W. R. 104; Howard *v.* Delaware, etc., Co., 40 Fed. R. 195, s.

becomes an inmate of a brothel is not entitled to the benefit of the statute,[1] but it has been held that the fact that she was not living with her husband will not defeat a recovery.[2] Where the right of action is given to a minor child, the general rule is that a guardian can not maintain an action.[3]

§ 1369. **What must be shown to constitute a cause of action.**—We shall not undertake to state in detail what must be shown in order to constitute a cause of action under the statutes but will state in outline what facts are generally regarded as essential to give a right of recovery. The general rule is that the plaintiff must show that the death of the decedent was caused by the wrongful act of the defendant, and in actions against railroad companies this ordinarily depends upon whether there was or was not negligence on the part of the company or its employes, the rule being, in the absence of statutory provisions to the contrary, that the burden is on the plaintiff to affirmatively prove the negligence of the defendant and that such negligence was the proximate cause of the injury. To establish negligence there must be evidence of an actionable breach of duty.[4] In many jurisdictions, as we have elsewhere shown, the burden is on the plaintiff upon the question of the contributory negligence, but in many others it is on the defendant. The death must be shown to have been caused by the wrongful act of the defendant. It has been held that where a person already mortally wounded was injured by the negligence of another there could be no recovery as it could not be said that death was caused by the wrongful act.[5]

c. 41 Am. & Eng. R. Cas. 473, 6 L. R. A. 75.

[1] Fort Worth, etc., R. Co. *v.* Floyd, (Tex. Civ. App.) 21 S. W. R. 544.

[2] Dallas, etc., R. Co. *v.* Spicker, 61 Tex. 427.

[3] Louisville, etc., R. Co. *v.* Goodykoontz, 119 Ind. 111, s. c. 21 N. E. R. 472.

[4] Chandler *v.* New York, etc., R. Co., 159 Mass. 589; Irwin *v.* Alley, 158 Mass. 249; Riley *v.* Connecticut, etc., R. Co., 135 Mass. 292, s. c. 15 Am. & Eng. R. Cas. 181; Missouri, etc., R. Co. *v.* Moseley, 57 Fed. R. 921; Jackson *v.* St. Louis, etc., R. Co., 87 Mo. 422; Railway Co. *v.* Valleley, 32 Ohio St. 345; Haley *v.* Chicago, etc., R. Co., 21 Iowa 15; Palmer *v.* New York, etc., R. Co., 112 N. Y. 234, s. c. 19 N. E. R. 678.

[5] Jackson *v.* St. Louis, etc., R. Co., 87 Mo. 422, s. c. 25 Am. & Eng. R. Cas. 327. But it is well settled that a re-

The question as to what may be deemed sufficient evidence that the wrong was the proximate cause of death was considered in a Tennessee case, and it was held that it was proper to instruct the jury that "if the death was hastened or occurred sooner by reason of the injury than it otherwise would, then the injury was the cause of the death."[1] Where, however, the injured person was ill or wounded prior to the infliction of the wrong by the defendant that fact must exert an important influence upon the question of the amount of the recovery especially in jurisdictions where only compensatory damages can be awarded for pecuniary loss. There must be evidence of the existence of persons designated by the statute as beneficiaries, and in some states evidence that there were persons dependent upon the decedent for support.[2]

§ 1370. **Year and a day.**—The rule which prevails at com-

covery may be had for the aggravation of existing injuries. Louisville, etc., R. Co. *v.* Wood, 113 Ind. 544; Fitzpatrick *v.* Great Western, etc., R. Co., 12 U. C. Q. B. 645; Louisville, etc., R. Co. *v.* Falvey, 104 Ind. 409; Terre Haute, etc., R. Co. *v.* Buck, 96 Ind. 346, s. c. 49 Am. R. 168; Baltimore, etc., R. Co. *v.* Reaney, 42 Md. 117; Lapleine *v.* Morgan's, etc., Co., 40 La. Ann. 661, s. c. 1 L. R. A. 378; Baltimore, etc., R. Co. *v.* Kemp, 61 Md. 74; Mobile, etc., R. Co. *v.* McArthur, 43 Miss. 180; Driess *v.* Frederich, 73 Tex. 460; Allison *v.* Chicago, etc., R. Co., 42 Iowa 274; Dickson *v.* Hollister, 123 Pa. St. 421; Quackenbush *v.* Chicago, etc., R. Co., 73 Iowa 458; Stewart *v.* City of Ripon, 38 Wis. 584; Ehrgott *v.* Mayor, 96 N. Y. 264, s. c. 48 Am. R. 622; Barbee *v.* Reese, 60 Miss. 906. See Beauchamp *v.* Saginaw, etc., Co., 50 Mich. 163, s. c. 45 Am. R. 30; Pullman, etc., Co. *v.* Barker, 4 Colo. 344, s. c. 34 Am. R. 89. But where there is an existing injury there can only be a recovery for the aggravation caused by the wrong of the defendant. Whelan *v.* New York, etc., R. Co., 38 Fed. R. 15; Bray *v.* Latham, 81 Ga. 640; Robinson *v.* Waupaca, 77 Wis. 544.

[1] Louisville, etc., R. Co. *v.* Northington, 91 Tenn. 56, s. c. 16 L. R. A. 268.

[2] *Ante*, § 1367. League *v.* Railroad, 91 Tenn. 458, s. c. 19 S. W. R. 430; Barnum *v.* Chicago, etc., R. Co., 30 Minn. 461, s. c. 16 N. W. R. 364; Daly *v.* New Jersey, etc., R. Co., 155 Mass. 1, s. c. 29 N. E. R. 507; Hodnett *v.* Boston, etc., R. Co., 156 Mass. 86, s. c. 30 N. E. R. 224; Railroad Co. *v.* Barron, 5 Wall. 90, 106; Pennsylvania R. Co. *v.* McCloskey, 23 Pa. St. 526. See, generally, Miller *v.* Southwestern R. Co., 55 Ga. 143; Kansas, etc., R. Co. *v.* Miller, 2 Colo. 442; Chicago, etc., R. Co. *v.* Morris, 26 Ill. 400; Serensen *v.* Northern Pac. R. Co., 45 Fed. R. 407; Grotenkemper *v.* Harris, 25 Ohio St. 510.

mon law that in order to sustain a prosecution for the killing of a human being death must occur within "a year and a day" does not apply to statutes providing for the recovery of damages in cases where death is caused by a wrongful act.[1] In the case referred to the court considered the English authorities and declared that, while applicable to criminal prosecutions, they were wholly inapplicable to civil proceedings. The reasoning of the court is well sustained and seems to us to justly apply to all statutes giving a right of action in cases of death by wrongful act, and not to be confined to the statute of Indiana.

§ 1371. **Actions for injuries causing death are transitory.** —Actions for injuries causing death are transitory and not local. They may be brought against railroad companies in any county where the law provides for suing railroad companies and where service of summons can be effectively made, or, in cases where the statute permits and the company is a non-resident, where property can be seized under a writ of attachment, but in the latter class of cases no personal judgment can be obtained against the company unless by appearance or in some other mode it submits its person to the jurisdiction of the court out of which the attachment issues. The federal courts may take jurisdiction in a proper case either by original action therein or by removal from the state court in the proper case.[2] A foreign administrator can not sue in a fed-

[1] Louisville, etc., R. Co. *v.* Clarke, 152 U. S. 230, s. c. 14 Sup. Ct. R. 579. The court reviewed the cases of Pittsburgh, etc., R. Co. *v.* Vining, 27 Ind. 513; Mayhew *v.* Burns, 103 Ind. 328, s. c. 2 N. E. R. 793; Hanna *v.* Jeffersonville, etc., R. Co., 32 Ind. 113; Burns *v.* Grand Rapids, etc., R. Co., 113 Ind. 169, s. c. 15 N. E. R. 230, and Hecht *v.* Ohio, etc., R. Co., 132 Ind. 507, s. c. 32 N. E. R. 302; Read *v.* Great Eastern Railway Co., L. R. 3 Q. B. 555; Littlewood *v.* Mayor, 89 N. Y. 24, and held that: "The right of a personal representative to bring an action for the exclusive benefit of the widow and children, or next of kin, of one whose death was caused by the wrongful act or omission of another, depends upon the existence or non-existence of a right in the decedent immediately before his death to have maintained an action on account of such act or omission." See Schlichting *v.* Wintgen, 25 Hun 626.

[2] Railway Co. *v.* Whitton, 13 Wall. 270 (citing Paul *v.* Virginia, 8 Wall. 168; Ohio, etc., R. Co. *v.* Wheeler,

eral court for the recovery of damages for causing death under a state statute which authorizes foreign administrators to sue for the recovery of "debts due their decedent."[1] In one of the reported cases it was held that in transitory actions the general rule is that the action may be brought wherever the wrongdoer can be found, and under this rule it was decided that an action will lie in Texas for injuries received in Kansas, although neither of the parties is a resident of Texas.[2]

§ 1372. **Actions by administrators and executors.**—The general theory of the statutes granting a right to personal representatives to sue is that the action is for the benefit of the persons designated, that the amount recovered does not become assets of the decedent's estate, and that the personal representative is a mere conduit for the transmission of the amount recovered.[3] It follows from this general doctrine that there

1 Black 286; Railroad Co. *v.* Harris, 12 Wall. 65); Steamboat Co. *v.* Chase, 16 Wall. 522; Dennick *v.* Railroad Co., 103 U. S. 11. In Lung Chung *v.* Northern, etc., R. Co., 19 Fed. R. 254, it was held that the cause of action arose at the place of death and not where letters of administration were granted. It was held in the case of Goff *v.* Norfolk, etc., R. Co., 36 Fed. R. 299, that the fact that the administrator was selected in order to give the federal court jurisdiction does not affect the question. Harper *v.* Norfolk R. Co., 36 Fed. R. 102. The case last cited is wrong upon the question of pleading. Serensen *v.* Northern, etc., R. Co., 45 Fed. R. 407. The provisions of a state statute excluding the jurisdiction of the federal courts are held to be invalid. Railway Co. *v.* Whitton, 13 Wall. 270; Goldey *v.* Morning News, 156 U. S. 518, 15 Sup. Ct. R. 559; Union Bank *v.* Jolly, 18 How. U. S. 503; Barron *v.* Burnsides, 121 U. S. 186, 7 Sup. Ct. 931; Hyde *v.* Stone, 20 How. 170; Payne *v.* Hook, 7 Wall. 425; Dennistoun *v.* Draper, 5 Blatch. C. C. 336; Southern, etc., R. Co. *v.* Denton, 146 U. S. 202; Kern *v.* Huidekoper, 103 U. S. 485, 492; Bigelow *v.* Nickerson, 70 Fed. R. 113. The case last cited contains a valuable collection of cases upon the subject of injuries on navigable waters.

[1] Maysville, etc., Co. *v.* Marvin, 59 Fed. R. 91, reversing Marvin *v.* Maysville, etc., R. Co., 49 Fed. R. 436, citing Noonan *v.* Bradley, 9 Wall. 394; Louisville, etc., R. Co. *v.* Case, 9 Bush 728; Louisville, etc., R. Co. *v.* Sanders, 86 Ky. 259, s. c. 5 S. W. R. 563.

[2] Missouri, etc., R. Co. *v.* Thompson, (Tex. Civ. App.) 33 S. W. R. 718.

[3] Drake *v.* Gilmore, 52 N. Y. 389; Trafford *v.* Adams Express Co., 8 Lea 96, 111; Dickins *v.* New York, etc., R. Co., 23 N. Y. 158; St. Louis, etc., R. Co. *v.* Needham, 52 Fed. R. 371; Jeffersonville, etc., R. Co. *v.* Swayne, 26 Ind. 477; Perry *v.* St. Joseph, etc.,

must be beneficiaries such as the statute designates. Where provision is made for a specified class of persons only the persons designated are entitled to the avails of the recovery.[1] Many of the statutes give a right of action to personal representatives for the benefit of the "next of kin," and there is some diversity of opinion as to who can be regarded as the "next of kin."[2] Whether a foreign administrator can maintain the action depends upon the provisions of the statute, but the views of the courts as to the construction the statute should receive are not harmonious. We refer to some of the decided cases without criticism or comment.[3]

R. Co., 29 Kan. 420; Lucus *v.* New York, etc., R. Co., 21 Barb. 245; State *v.* Gilmore, 24 N. H. 461; Johnston *v.* Cleveland, etc., R. Co., 7 Ohio St. 336; Commonwealth *v.* Eastern R. Co., 5 Gray 473; Woodard *v.* Michigan, etc., R. Co., 10 Ohio St. 121; Union, etc., R. Co. *v.* Dunden, 37 Kan. 1, s. c. 14 Pac. R. 501; Blake *v.* Midland, etc., Ry. Co., 10 Eng. Law & Eq. 437; Chicago, etc., Ry. Co. *v.* Morris, 26 Ill. 400; Duckworth *v.* Johnson, 4 Hurl. & N. 653; Western Union Tel. Co. *v.* McGill, 57 Fed. R. 699; Baltimore, etc., R. Co., *v.* Then, 159 Ill. 135, 42 N. E. R. 971.

[1] See cases cited in preceding note. See, also, *ante*, §1359. As elsewhere said the action can only be maintained by the person or persons authorized by statute. See, also, Berry *v.* Louisville, etc., R. Co., 128 Ind. 484; "The Alaska," 130 U. S. 201, s. c. 9 Sup. Ct. R. 461; Frazier *v.* Georgia, etc., R. Co., 96 Ga. 785, 22 S. E. R. 936.

[2] In Western Union Tel. Co. *v.* McGill, 57 Fed. R. 699, it was held, reversing the judgment of the circuit court, that a widower is not entitled to share as a beneficiary under a statute providing that the recovery should be for the exclusive benefit of the widow and children, if any, or the next of kin. It is held by some of the courts that the husband is included within the term "next of kin." Steel *v.* Kurtz, 28 Ohio St. 191; East Tennessee, etc., R. Co. *v.* Lilly, 90 Tenn. 563, s. c. 18 S. W. R. 243; Bream *v.* Brown, 5 Cold. 168; Trafford *v.* Adams Express Co., 8 Lea 96. Other courts hold a different doctrine. Dickins *v.* New York, etc., R. Co., 23 N. Y. 158; Warren *v.* Englehart, 13 Neb. 283, s. c. 13 N. W. R. 401, citing Woodward *v.* Chicago, etc., R. Co., 23 Wis. 400; Commonwealth *v.* Boston, etc., R. Co., 11 Cush. 512; Safford *v.* Drew, 3 Duer 627; Indianapolis, etc., R. Co. *v.* Keely, 23 Ind. 133. But see Drake *v.* Gilmore, 52 N. Y. 389.

[3] Brown *v.* Louisville, etc., R. Co., (Ky.) 30 S. W. R. 639; Maysville, etc., R. Co. *v.* Marvin, 59 Fed. R. 91 (reversing Marvin *v.* Maysville, etc., R. Co., 49 Fed. R. 436); Southwestern, etc., R. Co. *v.* Paulk, 24 Ga. 356; Jeffersonville, etc., R. Co. *v.* Hendricks, 26 Ind. 228; Wabash, etc., R. Co. *v.* Shacklett, 10 Ill. App. 404; Union, etc., R. Co. *v.* Shacklett, 119 Ill. 232; Kansas, etc., R. Co. *v.* Cutter, 16 Kan. 568; Hulbert *v.* City of Topeka, 34 Fed. R. 510; Limekiller *v.* Hannibal, etc., R. Co., 33 Kan. 83, s.

§ 1373. **Limitations—Time within which action must be brought.**—Where the injury is received in the state where the action is brought it is, of course, governed by the statute of limitations of that state. The action if not brought within the time limited can not be maintained if the proper defense is interposed.[1] Where the injury is received in one state and the action is brought in another it would seem that there would be difficulty in solving the question as to what statute governs, that of the forum or that of the place where the injury was received, but upon that question the authorities are well agreed. The federal courts hold that the statute of the place where the injury was received governs,[2] and the same doctrine is laid down by other courts.[3] The theory is that the limitation inheres in the right itself, and it is only on this theory that the doctrine can be supported for ordinarily the limitation of actions pertains to the remedy rather than the primary right.[4] It is

c. 5 Pac. R. 401; Stewart *v.* Baltimore, etc., R. Co., (D. C. App.) 23 Wash. L. Rep. 247.

[1] It is generally held that as the time within which the action is brought is part of the right the objection that it is not brought within the time limited need not be presented by plea or answer. See authorities cited in the notes to this section. See, also, Jeffersonville, etc., R. Co. *v.* Hendricks, 41 Ind. 48. In Georgia *v.* Chicago, etc., R. Co., 51 Wis. 603, s. c. 8 N. W. R. 374, it is held that a complaint which shows that the action was not brought within the time limited is bad on demurrer. The court cited Howell *v.* Howell, 15 Wis. 55.

[2] Theroux *v.* Northern Pac. R. Co., 64 Fed. R. 84; Boyd *v.* Clark, 8 Fed. R. 849; The Harrisburg, 119 U. S. 199, s. c. 7 Sup. Ct. R. 140; Munos *v.* Southern, etc., R. Co., 51 Fed. R. 188.

[3] Eastwood *v.* Kennedy, 44 Md. 563; Pittsburgh, etc., R. Co. *v.* Hine, 25 Ohio St. 629; O'Shields *v.* Georgia, etc., Ry. Co., 83 Ga. 621, s. c. 10 S. E. R. 268; Cavanagh *v.* Ocean, etc., Co., 13 N. Y. Supp. 540; Hill *v.* New Haven, 37 Vt. 501; Taylor *v.* Cranberry, etc., Co., 94 N. Car. 525; Hanna *v.* Jeffersonville, etc., R. Co., 32 Ind. 113; Bonnell *v.* Jewett, 24 Hun 524; Best *v.* Town of Kinston, 106 N. Car. 205, s. c. 10 S. E. R. 997; Benjamin *v.* Eldridge, 50 Cal. 612. See Louisville, etc., Co. *v.* Sanders, 86 Ky. 259, s. c. 5 S. W. R. 563; Nelson *v.* Galveston, etc., R. Co., 78 Tex. 621, s. c. 14 S. W. R. 1021; Conger *v.* Grand Trunk, etc., R. Co., 13 Ont. 160; Zimmer *v.* Grand Trunk, etc., R. Co., 19 Ont. App. 693; North Shore, etc., R. Co. *v.* McWillie, 17 Can. Sup. Ct. 511; Selma, etc., R. Co. *v.* Lacey, 49 Ga. 106; Wingert *v.* Carpenter, 101 Mich. 395, s. c. 59 N.W. R. 662.

[4] Johnston *v.* Canadian, etc., R. Co., 50 Fed. R. 886; Williams *v.* St. Louis, etc., R. Co., 123 Mo. 573, 27 S. W. R. 387; Munos *v.* Southern, etc., R Co., 51 Fed. R. 188.

held that where the right is fully barred by the statute of limitations during the life of the decedent no action can be maintained after his death by his personal representatives,[1] and this is in harmony with the doctrine that a recovery by the decedent in his lifetime bars his representatives.[2]

§ 1374. **Statutes do not deny the right to rely upon the defense of contributory negligence.**—The creation of the right to maintain an action for the recovery of damages for causing the death of another does not deprive the defendant of the defense of contributory negligence.[3] In many jurisdictions the plaintiff can not recover unless he affirmatively proves that the negligence of the deceased person did not proximately contribute to the injury,[4] and we suppose that in no case does the mere

[1] Canadian, etc., R. Co. *v.* Robinson, 19 Can. Sup. Ct. 292, s. c. 54 Am. & Eng. R. Cas. 49.

[2] *Post*, § 1375. In Canadian *v.* Robinson, 19 Can. Sup. Ct. 292, s. c. 54 Am. & Eng. R. Cas. 49, Taschereau, J., said: "And one of these rules, I would say to-day an uncontroverted one—is that under the act the widow or other relatives therein mentioned have no action if at the time of his death the deceased had none." The cases of Read *v.* Great Eastern, etc., R. Co., L. R. 3 Q. B. 555; Haigh *v.* Royal Mail, etc., Co., 52 L. J. Q. B. 640; Armsworth *v.* Southeastern R. Co., 11 Juris. 758; Tucker *v.* Chaplin, 2 C. & K. 730; Boulter *v.* Webster, 11 L. T. N. S. 598; Griffiths *v.* Earl of Dudley, L. R. 9 Q. B. D. 357; Beven on Negligence, 185.

[3] In Passamaneck *v.* Louisville R. Co., (Ky.) 32 S. W. R. 620, it was held that the provision of the Kentucky constitution did not exclude the defense of contributory negligence. The English rule is that the defense still exists under the statute. Senior *v.* Ward, 1 E. & E. 385; Canadian Pacific R. Co. *v.* Robinson, 19 Can. Sup. Ct. 292, s. c. 54 Am. & Eng. R. Cas. 49.

[4] See, generally, as to the effect of contributory negligence: Seats *v.* Georgia, etc., R. Co., 86 Ga. 811, s. c. 13 S. E. R. 88; Price *v.* Richmond, etc., R. Co., 33 S. Car. 556, s. c. 12 S. E. R. 413; Tucker *v.* Chaplin, 2 Car. & K. 730; Senior *v.* Ward, 1 El. & El. 385; Holland *v.* Tennessee, etc., R. Co., 91 Ala. 444, s. c. 8 So. R. 524; Little Rock, etc., R. Co. *v.* Cavenesse, 48 Ark. 106, s. c. 2 S. W. R. 505; Jackson *v.* Crilly, 16 Colo. 103, s. c. 26 Pac. R. 331; Baltimore, etc., R. Co. *v.* Sherman, 30 Grat. 602; Baltimore, etc., R. Co. *v.* State, 29 Md. 252; Michigan, etc., R. Co. *v.* Campau, 35 Mich. 468; Carney *v.* Chicago, etc., R. Co., 46 Minn. 220, s. c. 48 N. W. R. 912; Abend *v.* Terre Haute, etc., R. Co., 111 Ill. 202; Karle *v.* Kansas City, etc., R. Co., 55 Mo. 476; Hamilton *v.* Delaware, etc., R. Co., 50 N. J. Law 263, s. c. 13 Atl. R. 29; Wilds *v.* Hudson River R. Co., 29 N. Y. 315; Fulmer *v.* Illinois, etc., R. Co., 68 Miss. 355, s. c. 8 So. R. 517; Evansville, etc., R. Co. *v.* Lowdermilk, 15 Ind. 120; Pennsylvania Co. *v.* Meyers, 136 Ind. 242, s. c. 36 N. E. R. 32.

creation of the right to maintain an action abrogate or change the ordinary rules of pleading and evidence, and that unless the defense of contributory negligence is clearly excluded it exists, as at common law.[1] The rule that the defense of contributory negligence is not taken away in any case, unless the statute clearly so provides, is a general rule applicable to all classes of actions in which at common law the defense of contributory negligence was a valid and effective one, for the settled doctrine is that the rules of the common law are not abrogated except in cases where the intention to abrogate them is clearly manifested.[2]

§ 1375. **One recovery merges cause of action.**—Where the deceased in his lifetime brings an action and recovers damages for the injury sustained his representatives can not maintain an action for damages where death results from the same injury for which the former recovery was had.[3] The wrongful

[1] *Ante*, § 1315; Helfrich *v.* Ogden, etc., R. Co., 7 Utah 186, s. c. 26 Pac. R. 295; Noyes *v.* Southern, etc., R. Co., (Cal.) 24 Pac. R. 927; Rowland *v.* Cannon, 35 Ga. 105; Pennsylvania, etc., R. Co. *v.* Zebe, 33 Pa. St. 318; Pennsylvania R. Co. *v.* Bell, 122 Pa. St. 58, s. c. 15 Atl. R. 561; Quinn *v.* New York, etc., R. Co., 56 Conn. 44, s. c. 12 Atl. R. 97; Newman *v.* Chicago, etc., R. Co., 80 Iowa 672, s. c. 45 N. W. R. 1054; Murray *v.* Pontchartrain R. Co., 31 La. Ann. 490; Nashville, etc., R. Co. *v.* Smith, 6 Heisk. 174.

[2] See, *ante*, § 1315; Lake Erie, etc., R. Co. *v.* Craig, 73 Fed. R. 642, citing Krause *v.* Morgan, (Ohio St.) 40 N. E. R. 886; Cincinnati, etc., R. Co. *v.* Van Horne, 69 Fed. R. 139, 16 C. C. A. 182. In Lake Erie, etc., R. Co. *v.* Craig, *supra*, the statute provided that the failure of a railroad company to block frogs should subject it to punishment and it was held that the statute did not exclude the defense of contributory negligence. The case of Cincinnati, etc., R. Co. *v.* Van Horne, *supra*, does not touch upon the question of contributory negligence, but holds that the failure to obey the statute constitutes negligence on the part of the railroad company.

[3] Hecht *v.* Ohio, etc., R. Co., 132 Ind. 507, s. c. 32 N. E. R. 302; Littlewood *v.* Mayor, 89 N. Y. 547; Read *v.* Great Eastern, etc., R. Co., L. R. 3 Q. B. 555; Griffiths *v.* Earl of Dudley, L. R. 9 Q. B. D. 357; Haigh *v.* Royal, etc., Co., 52 L. J. (N. S.) Q. B. D. 640, see Hegerich *v.* Keddre, 99 N. Y. 258; Fowlkes *v.* Nashville, etc., R. Co., 9 Heisk. 829; Legg *v.* Britton, 64 Vt. 652, s. c. 24 Atl. R. 1016, (disapproving Needham *v.* Grand Trunk, etc., R. Co., 38 Vt. 294); Holton *v.* Daly, 106 Ill. 131; Chicago, etc., R. Co. *v.* O'Connor, 119 Ill. 586, s. c. 9 N. E. R. 263; McCarthy *v.* Chicago, etc., R. Co., 18 Kan. 46; Louisville, etc., R. Co. *v.* McElwain, (Ky.) 34 S. W. R.

injury and the damages constitute the right of action and if there is a judgment the right is therein merged, for the same injury can not be split into fragments. "While the act relates to the remedy it is, nevertheless, in derogation of the common law, because it gives a right of action where none existed at common law, and so it should be strictly construed. A further consideration in favor of a single action is the confusion of damages which would result from the maintenance of two actions. Although they might be theoretically separate, a practical separation would be quite impossible." It seems clear to us that there can only be one recovery and that a recovery adjudicates the whole right.[1] Possibly a different rule may prevail in jurisdictions where rights are severed and concurrent actions given by clear and unequivocal statutory provisions,[2] but this can only be true where the statute makes peculiar provisions upon the subject; so peculiar, indeed, as to clearly contravene the general principles of law, and entirely exclude them from consideration. The fact that an action brought by a deceased person in his lifetime was pending at the time of

236. In the case last cited it was said that, "It was not the intention of the legislature to multiply actions," and the cases of Hansford *v.* Payne, 11 Bush. 380, and Conner *v.* Paul, 12 Bush. 144, were reviewed. But See Leggott *v.* Great Northern, etc., R. Co., L. R., 1 Q. B. D. 599; Hulbert *v.* City of Topeka, 34 Fed. R. 510; Hurst *v.* Detroit, etc., R. Co., 84 Mich. 539, 48 N. W. R. 44.

[1] Lubrano *v.* Atlantic Mills, (R. I.) 32 Atl. R. 205. In the case cited, and from which we have quoted, there is an able discussion of the question and an excellent review of the authorities.

[2] Hedrick *v.* Ilwaco, etc., R. Co., 4 Wash. 400, s. c. 30 Pac. R. 714. The court placed its decision in great part upon the case of Walters *v.* Chicago, etc., R. Co., 36 Iowa 458. In Hartigan *v.* Southern, etc., R. Co., 86 Cal. 142, s. c. 24 Pac. R. 851, it was held that under a statute providing that the action may be brought by the heirs or by the personal representative a judgment in an action by the former would merge the right of action. In Munro *v.* Pacific, etc., Co., 84 Cal. 515, s. c. 34 Pac. R. 303, 305, the court quoted from the opinion in Blake *v.* Midland R. Co., 18 Q. B. 93, the statement that the statute "gives to the representative a totally new right," and cited approvingly Franklin *v.* Southeastern R. Co., 3 Hurl. & N. 211; Dalton *v.* Southeastern R. Co., 4 C. B. (N. S.) 296; Bradshaw *v.* Lancashire etc., R. Co., L. R. 10 C. P. 189; Leggott *v.* Great Northern R. Co., L. R., 1 Q. B. D. 599; Pym *v.* Great Northern R. Co., 2 Best & S. 759; Safford *v.* Drew, 3 Duer 627. See Putnam *v.* Southern, etc., R. Co., 21 Ore. 230, 27 Pac. R. 1033, 44 Alb. L. J. 517.

his death will not bar an action brought after his death by his legal representatives.[1]

§ 1376. **Release—Compromise.**—Where the injured person, after the accident and prior to his death, executes a valid release, his representatives can not maintain an action.[2] A plea of accord and satisfaction is sufficient to bar the action.[3] There is some diversity of opinion as to whether a beneficiary can execute an effective release or whether it must be executed by the administrator, but we suppose that much depends upon the provisions of the statute involved in the particular case. It has been held that where the action must be brought by an administrator the widow, although the sole beneficiary, can not compromise the case,[4] but in other jurisdictions a different rule prevails.[5] Where the beneficiary is given the right to sue and is vested with the whole interest, then, as it seems to us, it is entirely clear that he may make an effective com-

[1] Indianapolis, etc., R. Co. *v.* Stout, 53 Ind. 143; International, etc., R. Co. *v.* Kuehn, 70 Tex. 582, s. c. 8 S. W. R. 484.

[2] Price *v.* Richmond, etc., R. Co., 33 S. Car. 556, s. c. 12 S. E. R. 413, s. c. 26 Am. St. R. 700; Dibble *v.* New York, etc., R. Co., 25 Barb. 183. Mr. Freeman regards the case of Price *v.* Richmond, etc., R. Co., 33 S. Car. 556, as in conflict with Donahue *v.* Drexler, 82 Ky. 157, 56 Am. R. 886.

[3] Read *v.* Great Eastern, etc., R. Co., L. R. 3 Q. B. 555, 37 L. J. Q. B. 278; Guldager *v.* Rockwell, 14 Colo. 459, s. c. 24 Pac. R. 556. In the last named case the court directed a verdict for the defendant upon the answer of accord and satisfaction. Upon the question of directing a verdict the court cited, Trippe *v.* Fiske, 4 Colo. 24; Behrens *v.* Kansas, etc., R. Co., 5 Colo. 400; Schwenke *v.* Union, etc., R. Co., 12 Colo. 341, s. c. 21 Pac. R. 43; Lord *v.* Pueblo, etc., Refining Co., 12 Colo. 390, s. c. 21 Pac. R. 148.

[4] Yelton *v.* Evansville, etc., R. Co., 134 Ind. 414, s. c. 21 L. R. A. 158, 33 N. E. R. 629; Dowell *v.* Burlington, etc., R. Co., 62 Iowa 629; Long *v.* Morrison, 14 Ind. 595, s. c. 77 Am. Dec. 72.

[5] Schmidt *v.* Deegan, 69 Wis. 300. In Southern Pac. R. Co. *v.* Tomlinson, (U. S.) 16 Sup. Ct. R. 1171, it is held that where there is a right in one of several to sue but the amount of recovery is to be apportioned among all the party having a right to sue can not remit part of the amount, reversing Tomlinsin *v.* Southern Pacific R. Co., (Ariz.) 33 Pac. 710, citing Houston, etc., R. Co. *v.* Bradley, 45 Tex. 171; March *v.* Walker, 48 Tex. 372; Houston, etc., R. Co. *v.* Moore, 49 Tex. 31; Galveston, etc., R. Co. *v.* La Gierse, 51 Tex. 189; East Line, etc., R. Co. *v.* Culberson, 68 Tex. 664, s. c. 5 S. W. R. 820; St. Louis, etc., R. Co. *v.* Needham, 52 Fed. R. 371, 10 U. S. App. 339.

promise.[1] The question is not, as a general rule, as to the right to compromise, but as to who has the authority to make a compromise. In jurisdictions where the right to sue is vested in the personal representatives the safe course, and, perhaps, the only rightful course, is for the administrator acting under the approval of the court to make the adjustment.[2] We are not, at this place, it may be well to say, treating of contracts made in advance stipulating for exoneration from liability for injuries resulting from negligence but of contracts made after the injury was received. As to contracts made prior to the time the injury is received it is to be said that the rule generally supported by the American decisions is that such contracts are against public policy, and, therefore, ineffective.[3]

[1] Holder *v.* Railroad, 92 Tenn. 141, s. c. 36 Am. St. R. 77; Greenlee *v.* East Tennessee, etc., R. Co., 5 Lea 418; Stephens *v.* Railway Co., 10 Lea 448; Webb *v.* Railway Co., 88 Tenn. 119; Knoxville, etc., R. Co. *v.* Acuff, 92 Tenn. 26; Webb *v.* East Tennessee, etc., R. Co., 88 Tenn. 119; Western, etc., R. Co. *v.* Strong, 52 Ga. 461; Hendricks *v.* Western, etc., R. Co., 52 Ga. 467; Natchez, etc., Co., *v.* Mullins, 67 Miss. 672, s. c. 7 So. R. 542; Stuebing *v.* Marshall, 10 Daly (N. Y. C. P.) 406. But see Maney *v.* Chicago, etc., R. Co., 49 Ill. App. 105.

[2] South, etc., R. Co. *v.* Sullivan, 59 Ala. 272; Hartigan *v.* Southern, etc., R. Co., 86 Cal. 142, s. c. 24 Pac. R. 851; Henchey *v.* Chicago, 41 Ill. 136; Washington *v.* Louisville, etc., R. Co., 34 Ill. App. 658; Natchez, etc., Co. *v.* Mullins, 67 Miss. 672; Rogers *v.* Zook, 86 Ind. 237; Hulbert *v.* City of Topeka, 34 Fed. R. 510. See, generally, Woerner on Administration, § 326, p. 683; Owen *v.* Brockschmidt, 54 Mo. 285; McNamara *v.* Slavens, 76 Mo. 329. As to the effect of release upon right of beneficiary who executes it, see, Davis *v.* St. Louis, etc., R. Co., 53 Ark. 117, s. c. 13 S. W. R. 801, 7 L. R. A. 283; Vicksburg, etc., R. Co. *v.* Phillips, 64 Miss. 693, s. c. 2 So. R. 537; Needham *v.* Grand Trunk, etc., R. Co., 38 Vt. 294; Earl *v.* Tupper, 45 Vt. 275. But in Legg *v.* Britton, 64 Vt. 652, s. c. 24 Atl. R. 1016, the doctrine of the earlier Vermont cases is disapproved.

[3] Roesner *v.* Hermann, 8 Fed. R. 782; Annas *v.* Milwaukee, etc., R. Co., 67 Wis. 46, s. c. 30 N. W. R. 282; Alabama, etc., R. Co. *v.* Carroll, 97 Ala. 126; Commonwealth *v.* Vermont, etc., R. Co., 108 Mass. 7; Railway Co. *v.* Spangler, 44 Ohio St. 471; Little Rock, etc., R. Co. *v.* Ewbanks, 48 Ark. 460, s. c. 3 S. W. R. 808; Railroad Co. *v.* Lockwood, 17 Wall 357; Railroad Co. *v.* Stevens, 95 U. S. 655; Mobile, etc., R. Co. *v.* Hopkins, 41 Ala. 486; Rose *v.* Des Moines, etc., R. Co., 39 Iowa 246; Kansas, etc., R. Co. *v.* Peavey, 29 Kan. 169, s. c. 34 Kan. 472; Purdy *v.* Rome, etc., R. Co., 125 N. Y. 209. But see, Great Western, etc., R. Co. *v.* Bishop, 50 Ga. 465; Fulton, etc., Mills Co. *v.* Wilson, 89 Ga. 318; Haigh *v.* Royal Mail, etc., R. Co., 52 L. J. Q. B. 640.

§ 1377. **Avoiding releases and compromises.**—A release executed by an injured person during life or by his personal representatives after death may, of course, be avoided and annulled in cases where it was procured by fraud.[1] There is no conflict upon the proposition that courts will, in the proper case, relieve against the release or compromise of a claim for damages resulting from negligence, but there is conflict upon the question whether the person who receives money or property as a consideration for the release is bound to tender it back. Some of the cases hold that he is not bound to tender it back,[2] others that the amount received by him will be credited to the defendant upon the judgment that may be recovered by the plaintiff, and still others that what is received must be tendered back.[3] In one of the reported cases it was held that where the injured person had property destroyed in the same accident in which he received his injury and believed the representation that the money paid him was for the property and not on account of the personal injury he was not bound to

[1] Jones *v.* Alabama, etc., R. Co., 72 Miss. 32, s. c. 16 So. R. 379; Byers *v.* Nashville, etc., R. Co., 94 Tenn. 345, s. c. 29 S. W. R. 128; Union, etc., R. Co. *v.* Harris, 63 Fed. R. 800; Albrecht *v.* Milwaukee, etc., R. Co., 87 Wis. 105.

[2] O'Brien *v.* Chicago, etc., R. Co., 89 Iowa 644, s. c. 57 N. W. R. 425, (citing Hendrickson *v.* Hendrickson, 51 Iowa 68, 50 N. W. R. 287; Citizens' Bank *v.* Barnes, 70 Iowa 412, s. c. 30 N. W. R. 857, and approving Gulliher *v.* Chicago, etc., R. Co., 59 Iowa 416, 13 N. W. R. 429; Wallace *v.* Chicago, etc., Ry. Co., 67 Iowa 547, 25 N. W. R. 772); Chicago, etc., Ry. Co. *v.* Lewis, 109 Ill. 120; Chicago, etc., R. Co. *v.* Doyle, 18 Kan. 58; Allerton *v.* Allerton, 50 N. Y. 670; Kley *v.* Healy, 127 N. Y. 555, s. c. 28 N. E. R. 593; International, etc., R. Co. *v.* Brazzil, 78 Tex. 314, s. c. 14 S. W. R. 609; Star, etc., Co. *v.* Sibley, 57 Ill. App. 315. See Boikens *v.* New Orleans, etc., R. Co., (La.) 19 So. R. 737, where the amount paid the injured person was under the peculiar provisions of the release held to be a donation.

[3] Gibson *v.* Western, etc., R. Co., 164 Pa. St. 142, s. c. 30 Atl. R. 308, 44 Am. St. R. 586, 40 Cent. L. J. 233; Vandewelden *v.* Chicago, etc., R. Co., 61 Fed. R. 54; Strodder *v.* Southern, etc., Co., 94 Ga. 626, s. c. 19 S. E. R. 1022. In Louisville, etc., R. Co. *v.* Herr, 135 Ind. 591, it is held that there must be a disaffirmance and the clear implication is that there must be a restoration of the thing received as the consideration for the release. See International, etc., R. Co. *v.* Brazzil, 78 Tex. 314, s. c. 14 S. W. R. 609, 44 Am. & Eng. R. Cas. 437; Louisville, etc., R. Co. *v.* Faylor, 126 Ind. 126, 131.

tender it back.[1] It has also been held that a release specifying certain injuries does not operate upon a claim for personal injuries not known to the parties at the time the release was executed.[2] The doctrine of the majority of the cases seems to us to be erroneous. We can see no reason why such a case should not fall within the general rule that one who receives a thing of value must tender it back in order to be entitled to a recovery on the original claim. The rule which we venture to criticize is productive of evil consequences inasmuch as it tends to prevent the compromise of controversies and to increase litigation. So, too, it arms a plaintiff with the means of prosecuting an action against the person with whom he effected a settlement and this is unjust. Some of the courts hold that a release is effective until annulled by a court of equity.[3] The party who assails the release must, as is well known, affirmatively establish its invalidity, and this, where fraud is relied on, can only be done by proving some artifice, trick or some fraudulent misrepresentation of a fact or facts.[4]

[1] Bliss *v.* New York, etc., R. Co., 160 Mass. 447, s. c. 36 N. E. R. 65, 9 Lewis' Am. R. & Corp. Rep. 484, 39 Am. St. R. 504. See Mullen *v.* Old Colony R. Co., 127 Mass. 86, s. c. 34 Am. R. 349; Drohan *v.* Lake Shore, etc., R. Co., 162 Mass. 435.

[2] Union, etc., R. Co. *v.* Artist, 60 Fed. R. 365. But where specific injuries are not designated and others are feared, a release will include all injuries from the same cause. Eccles *v.* Union, etc., R. Co., 7 Utah 335, s. c. 26 Pac. R. 924.

[3] Homuth *v.* Metropolitan, etc., R. Co., 129 Mo. 629, s. c. 31 S. W. R. 903. Of course, a release fairly obtained and supported by a valuable consideration is effective. Retzer *v.* Jacob Dold Packing Co., 58 Mo. App. 264; Sykora *v.* Case, etc., Co., 59 Minn. 130, s. c. 60 N. W. R. 1008.

[4] Spitze *v.* Baltimore, etc., R. Co., 75 Md. 162, s. c. 23 Atl. R. 307, 48 Am. & Eng. R. Cas. 495; Doty *v.* Chicago, etc., R. Co., 49 Minn. 499, s. c. 52 N. W. R. 135; Albrecht *v.* Milwaukee, etc., Ry. Co., 87 Wis. 105, s. c. 58 N. W. R. 72; Thomas *v.* Chicago, etc., R. Co., 49 Mo. App. 110; Nelson *v.* Minneapolis, etc., R. Co., (Minn.) 63 N. W. R. 486; Homuth *v.* Metropolitan, etc., R. Co., 129 Mo. 629, s. c. 31 S. W. R. 903. See Union, etc., R. Co. *v.* Harris, 158 U. S. 326, s. c. 15 Sup. Ct. R. 843. Citing Chicago, etc., Ry. Co. *v.* Lewis 109 Ill. 120; Chicago, etc., R. Co. *v.* Doyle, 18 Kan 58; Lusted *v.* Chicago, etc., Ry. Co. 71 Wis. 391, 36 N. W. R. 857; Dixon *v.* Brooklyn, etc., R. Co., 100 N. Y. 170, 3 N. E. R. 65; Illinois, etc., R. Co. *v.* Welch, 52 Ill. 183; Mateer *v.* Missouri, etc., R. Co., 105 Mo. 320, s. c. 16 S. W. R. 839; Stone *v.* Chicago, etc., R. Co., 66 Mich. 76, s. c. 33 N. W. R. 24; Smith *v.* Occidental, etc., Steamship Co., 99 Cal. 462, s. c. 34 Pac. R.

It is held that if a release, although under seal, is shown to be without consideration it will not defeat a recovery.[1]

§ 1378. **Measure of damages.**—It may be safely said that the general rule is that in actions to recover for injuries resulting in death the amount of the recovery is to be measured by the pecuniary loss sustained by the persons for whose benefit the statute gives a right of recovery.[2] In some of the states provision is made for exemplary damages, and, of course, in such states the general rule we have stated does not apply. The right to recover is not in whole or in part defeated by the fact that the beneficiaries received money on policies of life insurance taken out by the decedent.[3] Life tables are admissible in evidence,[4] but such tables are not to be taken as fixing the ex-

84. See National, etc., Co. *v.* Carlson, 47 Ill. App. 178.

[1] Wabash, etc., R. Co. *v.* Brow, 65 Fed. R. 941, 13 C. C. A. 222.

[2] The decisions are very numerous and we cite very few of the great number. Blake *v.* Midland, etc., R. Co., 18 Q. B. 93; Railrod Co. *v.* Barron, 5 Wall. 90; Baltimore, etc., R. Co. *v.* Mackey, 157 U. S. 72; Pennsylvania Co. *v.* Roy, 102 U. S. 451; Louisville, etc., R. Co. *v.* Trammell, 93 Ala. 350; Bromly *v.* Birmingham, etc., R. Co., 95 Ala. 397; Farmers', etc., Co. *v.* Toledo, etc., R. Co., 67 Fed. R. 73; Pierce *v.* Conners, 12 Colo. 178, s. c. 37 Pac. R. 721; Huntington, etc., Co. *v.* Decker, 84 Pa. St. 419; Telfer *v.* Northern, etc., R. Co., 30 N. J. L. 188; Chicago, etc., R. Co. *v.* Harwood, 80 Ill. 88; Kansas Pacific, etc., R. Co. *v.* Cutter, 19 Kan. 83; Mynning *v.* Detroit, etc., R. Co., 59 Mich. 257, s. c. 26 N. W. R. 514; Hutchins *v.* St. Paul, etc., R. Co., 44 Minn. 5, s. c. 46 N. W. R. 79; Atchison, etc., R. Co. *v.* Wilson, 48 Fed. R. 57; Pennsylvania, etc., R. Co. *v.* Butler, 57 Pa. St. 335; Galveston, etc., R. Co. *v.* Matula, 79 Tex. 577, s. c. 15 S. W. R. 573; Webb *v.* Denver, etc., R. Co., 7 Utah 17, 24 Pac. R. 616; Louisville, etc., R. Co. *v.* Rush, 127 Ind. 545, 26 N. E. R. 1010; Morgan *v.* Southern, etc., R. Co., 95 Cal. 510, s. c. 30 Pac. R. 603; Kelley *v.* Central, etc., R. Co., 48 Fed. R. 663; Carlson *v.* Oregon, etc., R. Co., 21 Ore. 450, s. c. 28 Pac. R. 497; Ladd *v.* Foster, 31 Fed. R. 827; Klepsch *v.* Donald, 4 Wash. 436, s. c. 30 Pac. R. 991; Pepper *v.* Southern, etc., R. Co., 105 Cal. 389, s. c. 38 Pac. R. 974; Smith *v.* Chicago, etc., R. Co., (S. Dak.) 62 N. W. R. 967; Walker *v.* Lake Shore, etc., R. Co., (Mich.) 62 N. W. R. 1032.

[3] Sherlock *v.* Alling, 44 Ind. 184; Althorf *v.* Wolfe, 22 N. Y. 355; Kellogg *v.* New York, etc., R. Co., 79 N. Y. 72; Pittsburgh, etc., R. Co. *v.* Thompson, 56 Ill. 138; North Pennsylvania R. Co. *v.* Kirk, 90 Pa. St. 15; Carroll *v.* Missouri, etc., R. Co., 88 Mo. 239, s. c. 26 Am. & Eng. R. Cas. 268; Baltimore, etc., R. Co. *v.* Wightman, 29 Gratt. 431; Coulter *v.* Pine Tp., 164 Pa. St. 543, 30 Atl. R. 490.

[4] Louisville, etc., R. Co. *v.* Miller, 141 Ind. 533; Shover *v.* Myrick, 4 Ind. App. 7, 13; Donaldson *v.* Mississippi,

pectancy of life of the particular person. The only legitimate use that can be made of such tables is to aid the jury in ascertaining the probable duration of life, for they do not do more than furnish some evidence upon that question; more than this they can not do. It is proper, as we conceive, and indeed, necessary to instruct the jury as to the effect of life or mortality tables,[1] for while they are instruments of evidence, many other elements enter into the question of the computation of damages. There are many contingencies to be considered as, for instance, the probability of physical ability to labor or conduct business, the exposure to danger, the probability of obtaining employment and the like.[2] Unless instructions are given to the jury justly limiting the effect of mortality tables

etc., R. Co., 18 Iowa 280; Walters *v.* Chicago, etc., R. Co., 41 Iowa 71; Central R. Co. *v.* Crosby, 74 Ga. 737; Central, etc., R. Co. *v.* Richards, 62 Ga. 306; McKigue *v.* City of Janesville, 68 Wis. 50; Scheffler *v.* Minneapolis, etc., R. Co., 32 Minn. 125; Coates *v.* Burlington, etc., R. Co., 62 Iowa 486; Worden *v.* Humeston, etc., R. Co., 76 Iowa 310, 41 N. W. R. 26; Mills *v.* Catlin, 22 Vt. 98; Sauter *v.* New York, etc., R. Co., 66 N. Y. 50; Haden *v.* Sioux City, etc., R. Co., (Iowa) 60 N. W. R. 537; Vicksburg, etc., R. Co. *v.* Putnam, 118 U. S. 545; Gorman *v.* Minneapolis, etc., R. Co., 78 Iowa 509, s. c. 43 N. W. R. 303; Louisville, etc., R. Co. *v.* Mahony, 7 Bush 235; Cooper *v.* Lake Shore, etc., R. Co., 66 Mich. 261, 33 N. W. R. 306; Hunn *v.* Michigan, etc., R. Co., 78 Mich. 513, s. c. 44 N. W. R. 502; Sellars *v.* Foster, 27 Neb. 118, s. c. 42 N. W. R. 907; Mississippi, etc., R. Co. *v.* Ayres, 16 Lea 725; San Antonio, etc., R. Co. *v.* Bennett, 76 Tex. 151, s. c. 13 S. W. R. 319. In Rajnowski *v.* Detroit, etc., R. Co., 74 Mich. 20, s. c. 41 N. W. R. 847, the injured person was a child five years of age and it was held prejudicial error to admit in evidence life tables not giving the expectancy of any person under ten years of age.

[1] Campbell *v.* City of York, (Pa. St.) 33 Atl. R. 879, citing Steinbrunner *v.* Pittsburgh, etc., Ry. Co., 146 Pa. St. 504, s. c. 23 Atl. R. 239; McCue *v.* Knoxville, 146 Pa. St. 580, s. c. 23 Atl. R. 439; Kraut *v.* Frankford, etc., R. Co., 160 Pa. St. 327, s. c. 28 Atl. R. 783.

[2] Savannah, etc., R. Co. *v.* McLeod, 94 Ga. 530, s. c. 20 S. E. R. 434; Railroad Co. *v.* Spence, 93 Tenn. 173, s. c. 23 S. W. R. 211. There can not be any fixed and certain rule where so many contingencies enter into the inquiry. St. Louis, etc., R. Co. *v.* Needham, 52 Fed. R. 371, 378; Vicksburg, etc., R. *v.* Putnam, 118 U. S. 545, s. c. 7 Sup. Ct. R. 1. But see Farmers', etc., Co. *v.* Toledo, etc., R. Co., 67 Fed. R. 73. In Atchison, etc., R. Co. *v.* Hughes, 55 Kan. 491, s. c. 40 Pac. R. 919, it was held that such tables were not indispensable evidence as the jury may base their conclusion upon other facts. See, also, Boswell *v.* Barnhart, 96 Ga. 521, 23 S. E. R. 414.

as evidence the jury are likely to give them undue weight and treat them as conclusive evidence of the duration of the particular life and to leave out of mind elements that justice requires should have due consideration. It is held that it is not necessary that the evidence should supply the jury with the exact data upon which to compute damages,[1] but we suppose there must be, in the absence of statutory provisions to the contrary, some evidence upon which the jury can legally act, for the matter can not be left wholly and entirely to conjecture. Possibly some damages of a nominal character might be awarded in the absence of evidence, but if there be no evidence at all upon the subject a verdict can not go beyond damages of a nominal nature although, perhaps, the recovery would not be limited to strictly nominal damages.[2] It is not necessary that there should be direct evidence of pecuniary loss for that fact may be inferred from circumstances.[3] The capacity to earn money and the amount of the earnings may be shown in evidence,[4] not, however, for the purpose of fixing an absolute standard, for in all cases there are contingencies to be considered such as arise in the life of almost every person.

[1] Baltimore, etc., R. Co. *v.* Then, 159 Ill. 535, 42 N. E. R. 971.

[2] Howard *v.* Delaware, etc., R. Co., 40 Fed. R. 195.

[3] As to when damages are too remote, see Colorado, etc., R. Co. *v.* Lamb, 6 Colo. App. 255, 40 Pac. R. 251; Bonnet *v.* Galveston, etc., R. Co., (Tex.) 33 S. W. R. 334. As to what are not. Catawissa, etc., R. Co. *v.* Armstrong, 52 Pa. St. 282; Castello *v.* Landwehr, 28 Wis. 522; Lake Erie, etc., R. Co. *v.* Mugg, 132 Ind. 168, s. c. 31 N. E. R. 564; Tuteur *v.* Chicago, etc., R. Co., 77 Wis. 505, s. c. 46 N.W. R. 897.

[4] St. Louis, etc., R. Co. *v.* Sweet, 60 Ark. 550, s. c. 31 S. W. R. 571; Baltimore, etc., R. Co. *v.* Mackey, 157 U. S. 72, s. c. 15 Sup. Ct. R. 491; Pennsylvania Co. *v.* Roy, 102 U. S. 451; Lowe *v.* Chicago, etc., R. Co., 89 Iowa 420, s. c. 56 N. W. R. 519; Simonson *v.* Chicago, etc., Ry. Co., 49 Iowa 87; Beems *v.* Chicago, etc., Ry. Co., 58 Iowa 150, s. c. 12 N. W. R. 222. See, generally, Central, etc., R. Co. *v.* Rouse, 80 Ga. 442, 5 S. E. R. 627; Louisville, etc., R. Co. *v.* Orr, 91 Ala. 548, s. c. 8 So. R. 360; Clapp *v.* Railway Co., 36 Minn. 6, s. c. 29 N. W. R. 340; Board *v.* Legg, 110 Ind. 479, s. c. 11 N. E. R. 612; Hogue *v.* Chicago, etc., R. Co., 32 Fed. R. 365.

CHAPTER LIV.

RELIEF DEPARTMENTS AND HOSPITALS.

§ 1379. Power of railroad company to establish relief department.
1380. Relief association not an insurance company.
1381. Effect of rule that company can not contract against negligence.
1382. Contract that employe may elect to accept benefits and thereby release company not void as against public policy.
1383. Consideration and mutuality of contract.
1384. Acceptance of benefits under such contract after injury releases company.
1385. Release of railroad company may be a pre-requisite to action against a relief association.
§ 1386. Suit against company or compromise with it releases the relief association—Beneficiary barred.
1387. Acceptance of benefits by widow or child—When a bar to action against the company.
1388. Hospitals and medical attendance.
1389. When company is liable for negligence of surgeon in its hospital.
1390. When release of claim against company will not include claim for negligent treatment in hospital.

§ 1379. **Power of railroad company to establish relief department.**—Many railroad companies have recently established voluntary relief departments for the accumulation and management of a relief fund out of which definite amounts are to be paid to the employes, who voluntarily become members and contribute thereto, in case of accident or sickness, or to their relatives or other designated beneficiaries in case of their death. In some instances the railroad company takes entire charge of the fund, guarantees the fulfillment of its obligations, and makes the relief department a regular department of its service. It seems to have been assumed in several cases that this is

within the express or implied powers of a railroad company, but we have found only one case in which this phase of the subject was considered, and in that case the court held that as the charter of the company was not before it there was no way of telling whether the company had power to establish and conduct such a department or not, but it could not presume, in the absence of any evidence, that it was *ultra vires*.[1] Much, of course, may depend upon the charter of the particular company and the scheme or plan of the relief association or department, but as the company is benefited as well as the employes and the public, and as the matter is so intimately connected with the operation of the road, we incline to think that the express powers usually granted to railroad companies carry with them the implied power to establish such departments or contribute to such associations within proper limits. At all events one who has voluntarily become a member and received the benefits can not well question the legality of the association and repudiate his contract, upon that ground, after he has been injured and elected to take advantage of its provisions.

§ 1380. **Relief association not an insurance company.**—In one case it is held that a relief association or a railroad company, in so far as its relief department is concerned, is an insurance company; that the member who has paid his premium is entitled to the benefits irrespective of his relation to the railroad company as an employe, and that he can not, therefore, be required to give up his right of action against the railroad company any more than if he had taken a policy in an entirely separate accident or casualty company.[2] The conclusion of the court in this case, however, is opposed to the almost unbroken current of authority. The reasoning also seems to be unsound. If it were sound it would clearly follow that the act of the railroad company in establishing a relief department was *ultra vires*, for a railroad company, with only the ordinary powers of

[1] Chicago, etc., R. Co. *v.* Bell, 44 Neb. 44, s. c. 62 N. W. R. 314, s. c. 11 Lewis' Am. R. & Corp. R. 682. The scheme or plan of the particular relief department in question is fully stated in the opinion in this case.

[2] Miller *v.* Chicago, etc., R. Co., 65 Fed. R. 305.

such a corporation, can not engage in an independent insurance business. But such a relief association or department is not an insurance company.[1]

§ 1381. **Effect of rule that company can not contract against negligence.**—It is a general rule that an employer can not contract in advance that he shall not be liable for his own negligence.[2] Doubtless this rule would, in most jurisdictions, prevent the enforcement by a railroad company of an unconditional contract by a member of a relief association to release the company or not to sue it if he should be injured thereafter by the negligence of the company. If the terms of the contract were such that the mere membership in the association and the right to receive benefits should of themselves release the company from all liability, or if the contract, rules and regulations of the relief association were such as to compel him to accept the benefits and release and discharge the company, they would probably be void as against public policy. This seems to be conceded in all the cases upon the subject. But a contract giving the employe the option to do so, or providing that if he does do so voluntarily after the injury the railroad company shall be released, is a very different thing; and, as we shall show in the next section, the rule to which we have referred is not controlling where one accepts the benefits under such a contract.

§ 1382. **Contract that employe may elect to accept benefits and thereby release company not void as against public policy.**—There is no rule of public policy which forbids or dis-

[1] Johnson *v.* Philadelphia, etc., R. Co., 163 Pa. St. 127, s. c. 29 Atl. R. 854; Donald *v.* Chicago, etc., R. Co., (Iowa) 61 N. W. R. 971. See, also, Commonwealth *v.* Equitable Assn., 137 Pa. St. 412; Northwestern, etc., Assn. *v.* Jones, 154 Pa. St. 99; Vickers *v.* Chicago, etc., R. Co., 71 Fed. R. 139, 141.

[2] Richmond, etc., R. Co. *v.* Jones, 92 Ala. 218, s. c. 9 So. R. 276; Lake Shore Co. *v.* Spangler, 44 Ohio St. 471, s. c. 8 N. E. R. 467; Roesner *v.* Hermann, 8 Fed. R. 782; Bank of Kentucky *v.* Adams Exp. Co., 93 U. S. 174; Kansas Pac. R. Co. *v.* Peavey, 29 Kan. 169; Johnson *v.* Richmond, etc., R. Co., 86 Va. 975, s. c. 11 S. E. R. 829; Clark on Contracts, 468; 1 Jaggard on Torts, 303.

courages the settlement by compromise, in good faith, of a claim for damages after an injury has been inflicted. Such a contract as that to which we referred in the conclusion of the last section does not compel the employe to accept the benefit of the relief fund nor to release the company unless he does so. The contract, or transaction, is, in reality, not concluded until after the injury, and the company is not released until the relief fund is accepted. This completes the transaction, and the contract or release is no more against public policy than any other release or settlement by way of compromise after the injury is inflicted.[1] Indeed, it has been held that a statute prohibiting any such contract with a railroad company, and declaring that all such agreements and stipulations to surrender or waive any right to damages against any railroad company shall be void, is unconstitutional.[2]

[1] Lease *v.* Pennsylvania Co., 10 Ind. App. 47, s. c. 37 N. E. R. 423; Johnson *v.* Philadelphia, etc., R. Co., 163 Pa. St. 127, s. c. 29 Atl. R. 854; Chicago, etc., R. Co. *v.* Bell, 44 Neb. 44, s. c. 62 N. W. R. 314, 11 Lewis' Am. R. & Corp. R. 682; Owens *v.* Baltimore, etc., R. Co., 35 Fed. R. 715; Otis *v.* Pennsylvania Co., 71 Fed. R. 136. In the last case, just cited, the court, in speaking of such a contract, said: "But upon a careful examination it will be seen that it contains no stipulation that the plaintiff should not be at liberty to bring an action for damages in case he sustained an injury through the negligence of the defendant. He still had as perfect a right to sue for his injury as though the contract had never been entered into. Before the contract was entered into, his right of action for an injury resulting from the defendant's negligence was limited to a suit against it for the recovery of damages therefor. By the contract he was given an election either to receive the benefits stipulated for, or to waive his right to the benefits, and pursue his remedy at law. He voluntarily agreed that, when an injury happened to him, he would then determine whether he would accept the benefits secured by the contract, or waive them and retain his right of action for damages. He knew, if he accepted the benefits secured to him by the contract, that it would operate to release his right to the other remedy. After the injury happened, two alternative modes were presented to him for obtaining compensation for such injury. With full opportunity to determine which alternative was preferable, he deliberately chose to accept the stipulated benefits. There was nothing illegal or immoral in requiring him so to do. And it is not perceived why the court should relieve him from his election in order to enable him now to pursue his remedy by an action at law, and thus practically to obtain double compensation for his injury."

[2] Shaver *v.* Pennsylvania R. Co., 71 Fed. R. 931; Cox *v.* Pittsburgh, etc., Ry. Co., 33 Ohio L. J., April, 1895, s. c. 1 Ohio N. P. 213, 2 Ohio Dec. 594.

§ 1383. **Consideration and mutuality of contract.**—By becoming a member of the relief department the employe receives benefits, if he chooses to accept them and release the company, not only where he is injured by the negligence of the company but also where the company is guilty of no negligence, and, indeed, for mere sickness, with causing which the company has nothing to do. All this he may receive without the expense and uncertainty of litigation with the company. The railroad company's contribution to the association and its guaranty of its obligations also constitute a consideration moving to every member of the association. It can not be said, therefore, that there is no consideration for the agreement of the employe, nor can it be said that there is no mutuality in the contract.[1] Indeed, under the old equity rule, which has been adopted in most of the states, a promise to one for the benefit of a third person may be enforced by the latter, no matter whether the consideration moves directly from him or not, and where the contract is completed by accepting benefits from the relief fund after the injury has been inflicted it would be a strange doctrine that would permit the employe to repudiate it upon the ground of want of consideration or mutuality.

§ 1384. **Acceptance of benefits under such contract after injury releases the company.**—It is well settled by the almost unruffled current of authority that the voluntary acceptance of benefits from a relief association, after an injury has been inflicted, under an agreement made upon becoming a member of the association that such acceptance shall operate as a release of the railroad company, or the acceptance of such benefits and the execution of a release in consideration thereof, does operate to release the company.[2] Indeed, it has been held that

[1] Lease *v.* Pennsylvania Co., 10 Ind. App. 47, s. c. 37 N. E. R. 423; Chicago, etc., R. Co. *v.* Bell, 44 Neb. 44, s. c. 62 N. W. R. 314, 11 Lewis' Am. R. & Corp. R. 682; Otis *v.* Pennsylvania Co., 71 Fed. R. 136.

[2] Ringle *v.* Pennsylvania R. Co., 164 Pa. St. 529, s. c. 30 Atl. R. 492; Graft *v.* Baltimore, etc., R. Co., (Pa. St.) 8 Atl. R. 206; Spitze *v.* Baltimore, etc., R. Co., 75 Md. 162, s. c. 23 Atl. R. 307, 48 Am. & Eng. R. Cas.

when an employe of a railroad company becomes a member of a relief association, and, although at the time a minor, as a condition of membership and in consideration of the contributions and guaranty of the company, signs a contract by which he releases the company from liability for any accident which may happen to him while in its employement, he can not recover against the company where both before and after bringing the action he receives money from the association on account of the injury and executes receipts releasing the company from all claims for damages on account of such injury.[1] In the last case the contract apparently attempted to take away all right of action against the company and did not give the employe the option of accepting the benefits from the relief association or suing the company. He was also a minor at the time he executed it. For these reasons it could probably not have been enforced, but he voluntarily accepted the benefits after the injury and executed a release in full, presumably after becoming of age, and this barred him from recovery against the company.

§ 1385. **Release of railroad company may be made a prerequisite to action against relief association.**—It has been said that "even if the release of the railroad is good it is doubtful whether the provision that no benefits shall be paid if the company is sued is valid. That contract seems to be wholly without consideration. The employe, in case he sues the com-

495; Lease *v.* Pennsylvania Co., 10 Ind. App. 47, s. c. 37 N. E. R. 423; State *v.* Baltimore, etc., R. Co., 36 Fed. R. 655; Clements *v.* London, etc., Co., L. R. (1894) 2 Q. B. 482, s. c. 70 L. T. (N. S.) 531; Otis *v.* Pennsylvania Co., 71 Fed. R. 136; Vickers *v.* Chicago, etc., R. Co., 71 Fed. R. 139; 2 Am. Law. Reg. (N. S., 1895) 231. *Contra* Miller *v.* Chicago, etc., R. Co., 65 Fed. R. 305. See, also, O'Neil *v.* Lake Superior Iron Co., 63 Mich. 690, s. c. 16 Am. & Eng. Corp. Cas. 107, which holds that although the employe signed an agreement releasing the company and received benefits from the relief fund if he was misled in so doing and supposed it to be a mere receipt he was not precluded from maintaining an action against the company and was not obliged to repay the benefit fund before bringing such action.

[1] Martin *v.* Baltimore, etc., R. Co., 41 Fed. R. 125. See Griffith *v.* Earl of Dudley, L. R. 9 Q. B. Div. 357.

pany, forfeits all contributions and the relief association receives the benefit of them without the slightest return.'"[1] But it has been held that a provision of the constitution of a railroad relief association that the railroad company shall be released before the association will pay the beneficiary any benefits on account of the accident, or, in other words, that he can not claim benefits out of the relief fund if he elects to sue the railroad company, is reasonable and valid.[2] It seems to us that such a provision or stipulation is founded upon a sufficient consideration and that one who voluntarily waives the benefits of the relief fund by electing to sue the railroad company has no reason to complain.

§ 1386. **Suit against company or compromise with it releases the relief association—Beneficiary barred.**—In the case last referred to in the preceding section it appeared that a provision of the constitution of the relief association required that the person who was entitled to recover damages for the death of the employe should release the railroad company before the beneficiary should be entitled to any benefits from the relief association; that his mother had been designated as beneficiary, but that his wife and child were the persons legally entitled to recover damages for his death, and that such wife and child did not release the railroad company but brought suit against it and received a large sum of money from it by way of compromise. The court held that the mother could not maintain an action against the association for benefits.[3] So, in another recent case it was held that the beneficiary took only what the contract of membership provided she should take, and that a suit by the administrator of a member who was killed and the compromise thereof precluded the beneficiary from recovering upon the certificate where the contract of membership

[1] 2 Am. Law Reg. & Rev., (N. S. 1895) 234.

[2] Fuller *v.* Baltimore, etc., Assn., 67 Md. 433, s. c. 10 Atl. R. 237.

[3] Fuller *v.* Baltimore, etc., Assn., 67 Md. 433, s. c. 10 Atl. R. 237. This has been criticised as "rank injustice." 1 Jaggard on Torts, 313, note 60, quoting from 2 Am. L. Reg. & Rev., (N. S. 1895) 234. The decision, however, while it may be close to the line, is not so clearly erroneous as such a criticism would indicate or imply.

provided that if suit should be brought by his legal representative against the company and proceed to judgment or be compromised all claims upon the relief fund for benefits upon account of the death should be precluded.[1]

§ 1387. **Acceptance of benefits by widow or child—When a bar to action against the company.**—In most of the states are found statutes, based upon Lord Campbell's Act, which provide that in the case of death by the wrongful act of another, the personal representative of the deceased may maintain an action for the benefit of the widow and children or next of kin. We suppose, that, in accordance with the principles already stated, the acceptance of benefits from a relief association under an agreement that the railroad company shall be released will prevent the recovery of damages for the benefit of the particular person who accepts such relief and executes a release of the railroad company after the injury. But the acceptance by the widow of benefits from the relief fund and the release by her of all her claims against the company will not necessarily prevent her from maintaining an action as administratrix against the company for the benefit of the children.[2]

§ 1388. **Hospitals and medical attendance.**—Some railroad companies, instead of maintaining a relief department from which benefits are paid, voluntarily and gratuitously furnish medical and surgical attendance or maintain or contribute to hospitals in which an injured employe may be treated without charge. It is a general rule that if there is no negligence in selecting the surgeon, physician or other attendants, those who furnish them or those who maintain and furnish the hospital accommodations out of charity and not for profit are not liable for the malpractice or negligence of the physician or attendant.[3]

[1] Donald *v.* Chicago, etc., R. Co., (Iowa) 61 N. W. R. 971.

[2] Chicago, etc., R. Co. *v.* Wymore, 40 Neb. 645, s. c. 58 N. W. R. 1120.

[3] Union Pac. R. Co. *v.* Artist, 60 Fed. R. 365, s. c. 23 L. R. A. 581; McDonald *v.* Massachusetts, etc., Hospital, 120 Mass. 432, s. c. 21 Am. R. 529; Fire Ins. Patrol *v.* Boyd, 120 Pa. St. 624, s. c. 1 L. R. A. 417; Secord *v.* St. Paul, etc., R. Co., 18 Fed. R. 221; Van Tassell *v.* Manhattan, etc., Hospital, 15 N. Y. Supp. 620, and note; Laubheim *v.* De Koninglyke, etc., 107

And even if a railroad company is obliged to furnish such attendance it is not liable on this ground if it does so and uses due care in the selection of a competent surgeon or physician.[1]

§ 1389. When company is liable for negligence of surgeon in its hospital.—Even a gratuitous bailee, however, must ex-

N. Y. 228; Glavin *v.* Rhode Island Hospital, 12 R. I. 411, s. c. 34 Am. R. 675; Hearns *v.* Waterbury Hospital, 66 Conn. 98, 33 Atl. R. 595; "The Liability of Charitable Corporations for the Torts of their Employes," 35 Cent. L. J. 125. See, also, 3 Am. L. Reg. & Rev., (N. S.) 185. Thus, in the case first cited it is said: "If one undertakes to treat such a patient for the purpose of making profit thereby, the law implies the contract to treat him carefully and skillfully, and holds him liable for the carelessness of the physicians and attendants he furnishes. But this doctrine of *respondeat superior* has no just application where one voluntarily aids in establishing or maintaining a hospital without expectation of pecuniary profit. If one, out of charity, with no purpose of making profit, sends a physician to a sick neighbor or to an injured servant, or furnishes him with hospital accommodations and medical attendance, he is not liable for the carelessness of the physicians or of the attendants. The doctrine of *respondeat superior* no longer applies, because, by fair implication, he simply undertakes to exercise ordinary care in the selection of physicians and attendants who are reasonably competent and skillful, and does not agree to become personally responsible for their negligence or mistakes. The same rule applies to corporations and to individuals, whether they are engaged in dispensing their own charities, or in dispensing the charitable gifts of others intrusted to them to administer. One reason why corporations and individuals conducting hospitals supported by charitable endowments and contributions, and operated to heal the sick and injured, but not for profit, are not liable for the negligence of their employes, is, that the moneys in their hands constitute a trust fund devoted to a charitable purpose, and the courts refuse to permit it to be diverted to the very different purpose of paying for the malpractice of their physicians or the negligence of their attendants. Moreover, the corporations or individuals that administer such trust must, after all, leave the treatment of the patients to the superior knowledge and skill of the physicians. They can not direct the latter, as the master may ordinarily direct the servant, what to do, and how to do it. * * * * And, finally, the patient is not required to accept the proffered accommodations and attendance. They are but freely offered to him. He may refuse to accept them, and seek other physicians and other accommodations."

[1] Atchison, etc., R. Co. *v.* Zeiler, 54 Kan. 340; Pittsburgh, etc., R. Co. *v.* Sullivan, 141 Ind. 83, s. c. 27 L. R. A. 840, 40 N. E. R. 138; South Florida R. Co. *v.* Price, 32 Fla. 46; Quinn *v.* Kansas City, etc., R. Co., 94 Tenn. 713, s. c. 28 L. R. A. 552. See, also, Allan *v.* State, etc., Co., 132 N. Y. 91, s. c. 15 L. R. A. 166; O'Brien *v.* Cunard, etc., Co., 154 Mass. 272, s. c. 13 L. R. A. 329; Pierce *v.* Union Pac. R. Co., 66 Fed. R. 44; Eighmy *v.* Union Pac. R. Co., (Iowa) 61 N. W. R. 1056.

ercise some care, and the failure to exercise such reasonable care as the nature of the thing bailed and the circumstances of the case require, may be such negligence as to render the bailee liable in damages.[1] If, therefore, a railroad company voluntarily undertakes to care for an injured employe who can not help himself, it may be held liable for negligence in its own treatment of him, or in knowingly or carelessly selecting an incompetent surgeon or physician to treat him. This is certainly true where it takes him to a hospital which it maintains with funds deducted out of the wages of the injured man and other employes, and he is there injured by the negligence of an incompetent physician in charge, whom the company has negligently selected to treat him.[2]

§ 1390. **When release of claim against company will not include claim for negligent treatment in hospital.**—As a railroad company can not, as a general rule, contract in advance that it shall not be held liable for its own negligence, it may be argued with some degree of plausibility that it can not thus escape liability for negligence in selecting an incompetent physician to take charge of its hospital or treat its injured employes. But, if no duty rests upon the company to take care of an injured employe in any particular case, it would seem that if the employe chooses to accept the voluntary assistance of the company and, in consideration of the company's furnishing him with surgical or medical attendance at its own cost, agrees that he will take all risks of the competency of the particular physician or surgeon so furnished, and will not hold the company liable for any negligence of such physician or surgeon, the contract is a valid one and will prevent any recovery by the employe against the company on account of the

[1] See Steamboat New World *v.* King, 16 How. (U. S.) 469, 470; Coggs *v.* Bernard, 2 Ld. Raym. 909; Philadelphia, etc., R. Co. *v.* Derby, 14 How. (U. S.) 468; Tracy *v.* Wood, 3 Mason (U. S. C. C.) 132; Milwaukee, etc., R. Co. *v.* Arms, 91 U. S. 489; Conner *v.* Winton, 8 Ind. 315, s. c. 65 Am. Dec. 761; Hutchinson on Carriers, (2d ed.) § 566; Story Bailm., 194.

[2] Richardson *v.* Carbon Hill Coal Co., 6 Wash. 52, s. c. 20 L. R. A. 338. See, also, Union Pac. R. Co. *v.* Winterbotham, 52 Kan. 433; Northern Cent. R. Co. *v.* State, 29 Md. 420, s. c. 96 Am. Dec. 545.

negligence of such attendant. A release of claims against a railroad company on account of specified personal injuries caused by the latter will not, however, include a claim for damages for other injuries caused by negligent treatment in the hospital maintained by the company, where the latter injuries were not known to either party at the time, although the release purported to cover all "claims and demands whatever" against the company "from the beginning of the world" to the date of its execution.[1]

[1] Union Pac. R. Co. *v.* Artist, 60 Fed. R. 365, s. c. 23 L. R. A. 581.

END OF VOLUME III.

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